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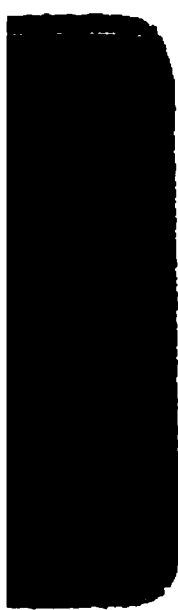
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A TREATISE
ON THE
LAW OF RAILROADS

**CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS
AND POWERS OF RAILROAD CORPORATIONS, AND OF THE
RIGHTS AND LIABILITIES INCIDENT TO THE LOCATION,
CONSTRUCTION AND OPERATION OF RAILROADS;
TOGETHER WITH THEIR DUTIES, RIGHTS AND
LIABILITIES AS CARRIERS**

INCLUDING BOTH
STREET AND INTERURBAN RAILWAYS

By BYRON K. ELLIOTT
AND
WILLIAM F. ELLIOTT

Authors of ROADS AND STREETS, GENERAL PRACTICE, EVIDENCE

Third Edition
VOLUME V

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CHAPTER LXXXVIII.

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ELLIOTT ON RAILROADS

CHAPTER LXXV.

RAILROADS AS CARRIERS OF PASSENGERS.

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§ 2380 (1573). **The general doctrine.**—Railroad companies are, as a general rule, public carriers of passengers. There may, of course, be railroad companies that are not public carriers of passengers, as for instance, a company operating a road exclusively for its own private purpose,¹ or for the exclusive transportation of freight, but these are exceptional instances for the rule that railroad companies are public carriers is almost universal. It is safe to say that a company incorporating under a general law, or accepting a special charter, granting the franchise of owning and operating a railroad becomes a public carrier of passengers insomuch as the consideration for the grant is the implied undertaking on its part to serve the community as a public carrier.² It is not, however, the duty of a railroad company to carry passengers on all of its trains for it may designate the trains on which passengers shall be carried and no one can justly demand to be transported as a passenger on any other trains than those provided and equipped for the

¹ *Wade v. Lutchter &c. Co.*, 74 Fed. 517, 33 L. R. A. 255. In the case of *Albion Lumber Co. v. De-Nobra*, 72 Fed. 739, it was held that a lumber company operating a railroad for the purpose of hauling logs was liable as a carrier of passengers to an employe who rode on one of the trains by direction of the company's superintendent, and the rule that the happening of an accident is prima facie evidence of negligence was also applied. It seems to us that in some respects the case goes too far. The cases of *Hoar v. Maine &c. R. Co.*, 70 Maine 65, 35 Am. Rep. 299; *Duff v. Allegheny &c. R. Co.*, 91 Pa. St. 458, 36 Am. Rep. 675; and *Morris v. Brown*, 111 N. Y. 318, 18 N. E. 722, 7 Am. St. 751, were distinguished, but the recent case of *Self v. Adel Lumber Co.*, 5 Ga. App. 846, 64 S. E. 112 also

seems to be in conflict with the case we questioned and still more difficult to distinguish. Company operating a scenic railway has been held a common carrier of passengers. *O'Callaghan v. Dellwood Park Co.*, 149 Ill. App. 34 affd. in 89 N. E. 1005. Compare also *Producers Transp. Co. v. Railroad Com. of Cal.*, 251 U. S. 228, 40 Sup. Ct. 131 (as to where petroleum pipe lines is common carrier).

² Ante, §§ 2096, 2097; *Beckman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679. See *Gibson v. Mason*, 5 Nev. 283; *Litchfield &c. R. Co. v. People*, 222 Ill. 242, 78 N. E. 589; *Slatten v. Des Moines &c. R. Co.*, 29 Iowa 148, 4 Am. Rep. 205; *Davis v. Mayor*, 14 N. Y. 506, 67 Am. Dec. 186 and note; *Pittsburgh &c. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751.

transportation of passengers or those on which passengers are customarily carried or on which the company invites them to travel. Where a railroad company holds out to the public that it will carry passengers on specified trains or cars it may be held bound to carry passengers on such cars or trains.³ But it does not follow that because a person runs trains over a railroad he is necessarily a public carrier of passengers.⁴ It has been held that where trains are run over a railroad the presumption is that they are managed and controlled by the company owning the road, and the burden is on such company to prove that it did not operate the road⁵ but, although the trains run over the same road, it may be shown that the particular train was not operated by the company owning the road.⁶ We

³ *International &c. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171, 19 Am. St. 795; *Eddy v. Reder*, 79 Tex. 53, 15 S. W. 113. See *Nashville &c. R. Co. v. Messino*, 1 Sneed (Tenn.) 220; *Citizens' &c. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55; *Kellow v. Central Iowa &c. R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858; *Ovatt v. Dakota &c. R. Co.*, 43 Minn. 300, 45 N. W. 436; *Dlabola v. Manhattan &c. R. Co.*, 29 N. Y. St. 149; *Galveston &c. R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32.

⁴ In *Shoemaker v. Kingsbury*, 12 Wall. (U. S.) 369, 20 L. ed. 432; the distinction between a private and public carrier was pointed out, and it was held that a contractor who ran construction trains over the road was not a public carrier of passengers. The court cited the case of *Sullivan v. Philadelphia &c. R. Co.*, 30 Pa. St. 234, 72 Am. Dec. 698. See also *Moore v. St. Louis &c. R. Co.*, 67 Ark. 389, 55

S. W. 164; *McCauley v. Tennessee &c. R. Co.*, 93 Ala. 356, 9 So. 611; *Berry v. Missouri Pac. R. Co.*, 124 Mo. 223, 25 S. W. 229; *Menough v. Bedford Belt R. Co.*, 157 Ind. 20, 60 N. E. 694. But one who runs trains for the carriage of passengers over a railroad owned by a railroad company may be a public carrier. *Davis v. Button*, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545. See generally *Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690 (railroad company using tracks of another company); *Caldwell v. Richmond &c. R. Co.*, 89 Ga. 550, 15 S. E. 678; *Truex v. Erie &c. R. Co.*, 4 Lans. (N. Y.) 198; *Gruber v. Washington &c. R. Co.*, 92 N. Car. 1, 21 Am. & Eng. R. Cas. 438.

⁵ *Ferguson v. Wisconsin &c. R. Co.*, 63 Wis. 145, 23 N. W. 123. See also *Brooks v. Missouri Pac. R. Co.*, 98 Mo. App. 166, 71 S. W. 1083.

⁶ *Anderson v. Des Moines &c. Co.*, 97 Iowa 739, 66 N. W. 64.

suppose that where different and independent carriers run trains over the same road, and a person takes passage on one of the trains under a contract with one of the companies, the company with which the contract is made is to be regarded as the carrier and answerable for injuries resulting from negligence in managing the particular train,⁷ although the company owning the road may be responsible for injuries caused by a negligent breach of duty in respect to the track, the road-bed or the like.⁸ It is probably true that a passenger would have a right of action against the lessee company for injuries received while traveling on one of its trains, because of the negligence of such company in running trains over an unsafe track.⁹ According to the prevailing view the passenger in such a case might maintain an action against both companies.¹⁰ We have heretofore considered the rule regarding the liability of lessor and lessee and expressed the opinion that where the lease is authorized and the lessor has no control over the trains it is not liable for injuries resulting from negligence in operating the trains.¹¹

⁷ *Chicago &c. R. Co. v. Groves*, 56 Kans. 601, 44 Pac. 628; *Byrne v. Kansas City &c. R. Co.*, 61 Fed. 605, 24 L. R. A. 693; *Smith v. St. Louis &c. R. Co.*, 85 Mo. 418, 55 Am. Rep. 380; *Webb v. Portland &c. R. Co.*, 57 Maine 117.

⁸ Ante, §§ 530-532; *Central &c. Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66.

⁹ *Chase v. Jamestown &c. R. Co.*, 38 N. Y. St. 954, 15 N. Y. S. 35. Compare also *Southern R. Co. v. Miller*, 129 Ky. 98, 110 S. W. 351.

¹⁰ See authorities cited in the following note.

¹¹ Ante, §§ 522, 529, 530, 531, 532. See also *Nugent v. Boston &c. R. Co.*, 80 Maine 62, 12 Atl. 797, 6 Am. St. 151; *Pennsylvania R. Co.*

v. St. Louis &c. R., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; *Macon &c. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678; *Killian v. Augusta &c. R. Co.*, 78 Ga. 749; *Chattanooga &c. R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. 853, 21 Am. St. 169; *St. Louis &c. R. Co. v. Curl*, 28 Kans. 622; *Mahoney v. Atlantic &c. R. Co.*, 63 Maine 68; *Ingersoll v. Stockbridge &c. R. Co.*, 8 Allen (Mass.) 438; *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; *Gulf &c. R. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156; *International &c. R. Co. v. Dunham*, 68 Tex. 231, 4 S. W. 472, 2 Am. St. 484; *Naglee v. Alexandria &c. R. Co.*, 83 Va. 707, 3 S. E. 369, 5 Am. St. 308.

§ 2381 (1574). **The duty to carry.**—There is a general duty on the part of railroad companies to receive and carry passengers. A railroad company does not occupy the same position as an individual carrier insomuch as it assumes the duty of serving the public as a consideration for the rights and privileges granted it by the sovereign.¹² It is, therefore, erroneous to accept the statement of some of the old books upon this subject. Under the modern decisions the rule is clear, for they affirm that a railroad company is under an obligation to carry persons who properly present themselves and request transportation.¹³ It is to be understood, of course, that there are cases in which a railroad company may rightfully refuse to accept persons as passengers. It is not every person that the carrier is bound to accept as a passenger, nor is it bound under all circumstances to receive passengers, for, as we shall hereafter show, the carrier may in many cases be excused for refusing to accept persons as passengers.¹⁴ But the general rule is that it is bound to receive and carry all persons fit to be carried who properly present themselves for that purpose.

§ 2382 (1575.) **Refusal to carry—Extraordinary press of business.**—The principle which is asserted in the cases holding that a common carrier of things may be excused where its failure to carry is caused by an unusual press of business applies to passenger carriers. It seems quite clear that if the carrier is disabled by an unusual and unforeseen press of business from accepting all who offer themselves as passengers it can not be

¹² Ante, §§ 2096, 2097.

¹³ *Jencks v. Coleman*, 2 Sumn. (U. S.) 221; *Pearson v. Duane*, 4 Wall. (U. S.) 605, 18 L. ed. 447; *Hannibal &c. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 20 L. ed. 423; *Galena &c. R. Co. v. Yarwood*, 15 Ill. 468; *Indianapolis &c. R. Co. v. Rainard*, 46 Ind. 293; *Lake Erie &c. R. Co. v. Acres*, 108 Ind. 548, 9 N. E. 453, 28 Am. & Eng. R. Cas. 112; *Baltimore &c. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052; *Bennett*

v. Dutton, 10 N. H. 481; *Mershon v. Hobensack*, 22 N. J. L. 372; *Story v. Railroad Co.*, 133 N. Car. 59, 45 S. E. 349. See also *Woodward v. Southern R. Co.*, 99 S. Car. 251, 83 S. E. 591, L. R. A. 1915C, 477n. As to liability for breach of contract to furnish special train, see *Burrus v. Nevada &c. Ry. Co.*, 38 Nev. 156, 145 Pac. 926, L. R. A. 1917D, 750.

¹⁴ Post, § 2384.

held guilty of a breach of duty.¹⁵ We suppose that it is the duty of a railroad company to exercise due care and diligence to meet demands that it has reason to expect will be made upon it.¹⁶ But we think it is going too far to say, as some of the authorities do, that it is bound to do all that human foresight and care can do to enable it to meet the extraordinary demand. One court has expressed this view in these words: "We think it unreasonable to hold a railway company bound under all circumstances to furnish a sufficient number of cars so that all who may apply for transportation may be furnished with seats. Unforeseen emergencies may often arise where the performance of such duty would involve impossibilities. Crowds of people of whom the company has had no notice, or crowds whose numbers exceed all reasonable anticipation, may unexpectedly present themselves; and the duty of being prepared on all such occasions to furnish cars and equipments sufficient to suitably and conveniently accommodate all who may wish to ride, would necessarily involve such a constant accumu-

¹⁵ *Chicago &c. R. Co. v. Carroll*, 5 Ill. App. 201; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322; *Chicago &c. R. Co. v. Fisher*, 31 Ill. App. 36. It is held, however, that although a carrier is not bound to receive "an unusual and unexpected number of passengers," yet, if it does receive them it is liable for failure to exercise that degree of care which the law requires. *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322. But see *Chicago &c. R. Co. v. Dumser*, 161 Ill. 190, 43 N. E. 698. The case just cited may, perhaps, be discriminated from the other decisions in that the railroad company having specially invited an unusual number of persons was bound to make provision for them.

¹⁶ *Chicago &c. R. Co. v. Fisher*, 31 Ill. App. 36. See *Purcell v. Richmond &c. R. Co.*, 108 N. Car. 414, 12 S. E. 954, 12 L. R. A. 113, 47 Am. & Eng. R. Cas. 457; *Branch v. Wilmington &c. R. Co.*, 77 N. Car. 347; *Hansley v. Jamesville &c. R. Co.*, 115 N. Car. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. 474, 117 N. Car. 565, 23 S. E. 443, 32 L. R. A. 515, 53 Am. St. 600. And is ordinarily under a duty to furnish passengers with seats even where there is an unusual crowd if the carrier has reason to anticipate it. *Chesapeake &c. R. Co. v. Austin*, 137 Ky. 611, 126 S. W. 144, 136 Am. St. 307; *Cave v. Seaboard &c. R. Co.*, 94 S. Car. 282, 77 S. E. 1017, L. R. A. 1915B, 915n, Ann. Cas. 1915A, 1065n; *Texas &c. R. Co. v. Rea* (Tex.), 74 S. W. 939.

lation of the means of transportation at every point where any extraordinary number of people may, on any special occasion, present themselves as passengers, as would in all probability make the business of carrying passengers by railroad too expensive to be profitable. It is undoubtedly the duty of these companies to furnish suitable sitting accommodations for its ordinary number of passengers or even for an extraordinary number on reasonable notice. But where passengers apply for transportation in extraordinary and unexpected numbers, they should be held only to the exercise of such reasonable diligence in providing cars as may be consistent with the particular circumstances of each case."¹⁷

§ 2383 (1576). Excuses for refusal to carry—Disregard of rules and regulations.—Railroad companies have a general power to make reasonable rules and regulations for the government of their business¹³ and to require persons who seek to become

¹⁷ *Chicago &c. R. Co. v. Carroll*, 5 Ill. App. 201. See also *St. Louis Southwestern R. Co. v. Tittle* (Tex. Civ. App.), 115 S. W. 640 (citing text).

¹⁸ *Morrill v. Minneapolis St. Ry. Co.*, 103 Minn. 362, 115 N. W. 395, 123 Am. St. 341, 344 (citing text); *Crawford v. Cincinnati &c. R. Co.*, 26 Ohio St. 580; *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352, 20 Atl. 994, 21 Am. St. 883; *Southern Ry. Co. v. McNabb*, 130 Tenn. 197, 169 S. W. 757, L. R. A. 1915B, 761; ante, §§ 228, 229, 233. See also *Hurst v. Great Western R. Co.*, 19 C. B. (N. S.) 310; *Gray v. Cincinnati &c. R. Co.*, 11 Fed. 683; *Florida &c. R. Co. v. Hirst*, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631 and note, 32 Am. St. 17 and note; *Chicago &c. R. Co. v. McLallen*, 84 Ill. 109; *Chicago &c. R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am.

St. 256; *State v. Chovin*. 7 Iowa 204; *Northern &c. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 75 Am. St. 422; *Van Dusen v. Grand Trunk R. Co.*, 97 Mich. 439, 56 N. W. 848, 37 Am. St. 354; *Johnson v. Concord &c. R. Co.*, 46 N. H. 213, 88 Am. Dec. 199; *Gordon v. Manchester &c. R. Co.*, 52 N. H. 596, 13 Am. Rep. 97; *Rogers v. Atlantic &c. R. Co.*, 57 N. J. L. 703, 34 Atl. 11; *McRea v. Wilmington &c. R. Co.*, 88 N. Car. 526, 43 Am. Rep. 745; *Britton v. Atlanta &c. R. Co.*, 88 N. Car. 536, 43 Am. Rep. 749; *Decker v. Atchison &c. R. Co.*, 3 Okla. 553, 41 Pac. 610; *Boston v. Chesapeake &c. R. Co.*, 36 W. Va. 318, 15 S. E. 158, 52 Am. & Eng. R. Cas. 357; *Campbell v. Milwaukee Elec. R. Co.*, 169 Wis. 171, 170 N. W. 937, 6 A. L. R. 628; *Denton v. Great Northern R. Co.*, 5 El. & Bl. 860.

passengers, to conform to such rules and regulations. A person who refuses to comply with such rules and regulations can not maintain an action against a railroad company for refusing to accept him as a passenger. The authorities warrant the conclusion that passengers must know that rules and regulations are necessary to the proper conduct and management of the business affairs of a railroad company and must take notice of general rules and regulations.¹⁹ It is always essential, we may add, that such rules should be reasonable, should not violate the law and should not assume to relieve the carrier from the performance of duties which the law does not permit it to evade or refuse to perform.²⁰ Where the company establishes reasonable rules and regulations a passenger has in general no right

¹⁹ *Gulf &c. R. Co. v. Moody* (Tex. Civ. App.), 30 S. W. 574; *Southern &c. R. Co. v. Hinsdale*, 38 Kans. 507, 16 Pac. 937. See also *Texas &c. R. Co. v. Bell*, 39 Tex. Civ. App. 412, 87 S. W. 730; *Terry v. Flushing &c. R. Co.*, 13 Hun (N. Y.) 359; *Northern R. Co. v. Page*, 22 Barb. (N. Y.) 130; *Drew v. Central Pac. R. Co.*, 51 Cal. 425; *Wright v. California Cent. R. Co.*, 78 Cal. 260, 20 Pac. 740. Telegraph companies are governed by substantially the same rules as railroad carriers, and it is held that they may make reasonable rules and regulations of which persons dealing with them must take notice. *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131; *Birney v. New York Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *United States &c. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Western Union Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. 847. See generally *Given v. Western Union Tel. Co.*, 24 Fed. 119; *Western Union &c. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Stevenson v. Mon-*

treal Tel. Co., 16 U. C. Q. B. 530. As to the duty of passengers to ascertain when and where rules require trains to stop, see *Atchison &c. R. Co. v. Gants*, 38 Kans. 608, 17 Pac. 54, 5 Am. St. 780; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711. But see *Lake Shore &c. R. Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. 545, 26 Am. & Eng. R. Cas. 145; *Hufford v. Grand Rapids &c. R. Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. 859; *New York &c. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. ed. 71. It is held that a passenger is not bound to take notice of secret rules, but may rely on the statements of the conductor. *Georgia R. &c. Co. v. Murden*, 86 Ga. 434, 12 S. E. 630. And this is generally true as to rules intended merely for employes. *Virginia Ry. &c. Co. v. Godsey*, 117 Va. 167, 83 S. E. 1072.

²⁰ *Brown v. Memphis &c. R. Co.*, 4 Fed. 37; *Central R. &c. Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352; *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62; *Eddy v. Rider*, 79 Tex.

to require a conductor to deviate from them.²¹ Courts will not control the exercise of a discretionary power conferred upon a railroad company, and hence will not annul or disregard reasonable rules regarding the trains on which passengers shall be carried, the places and times where trains shall stop, the division of passengers into first and second class, the time and mode of purchasing tickets and of entering trains and the like, but courts will interfere in cases where there is a clear abuse of discretion or an illegal attempt to evade the performance of duties enjoined by law, or to deprive the public of rights which the law awards them.²²

53, 15 S. W. 113; *Norfolk &c. R. Co. v. Wysor*, 82 Va. 250, 26 Am. & Eng. R. Cas. 234; *Boster v. Chesapeake &c. R. Co.*, 36 W. Va. 318, 15 S. E. 158. See generally *Mahoney v. Detroit &c. R. Co.*, 93 Mich. 612, 53 N. W. 793, 18 L. R. A. 335, 32 Am. St. 528; *Stewart v. Brooklyn &c. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185; *South &c. R. Co. v. Rhodes*, 25 Fla. 40, 5 So. 633, 3 L. R. A. 733, 23 Am. St. 506; *Chilton v. St. Louis &c. R. Co.*, 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; *Louisville &c. R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347. As to what are and are not reasonable rules and when the question is for the court, see *Ohege v. Northern Pac. R. Co.*, 200 Fed. 128; *Southern Ry. Co. v. McNabb*, 130 Tenn. 197, 169 S. W. 757, L. R. A. 1915B, 761 and note.

²¹ *Lake Shore &c. R. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157, 3 Am. & Eng. R. Cas. 340. See also *Coombs v. Southern Wisconsin R. Co.*, 162 Wis. 111, 155 N. W. 922, Ann. Cas. 1918C, 532 and note. But see *McGee v. Missouri Pac. R. Co.*,

92 Mo. 208, 4 S. W. 739, 1 Am. St. 706.

²² *Texas &c. R. Co. v. Ludlam*, 57 Fed. 481; *Watkins v. Pennsylvania R. Co.*, 21 D. C. 1, 52 Am. & Eng. R. Cas. 159; *Macon &c. R. Co. v. Johnson*, 38 Ga. 409; *Chicago &c. R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60; *Connell v. Mobile &c. R. Co. (Miss.)*, 7 So. 344; *Sira v. Wabash &c. R. Co.*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. 386; *Browne v. Raleigh &c. R. Co.*, 108 N. Car. 34, 12 S. E. 958, 47 Am. & Eng. R. Cas. 544; *Cleveland &c. R. Co. v. Bartram*, 11 Ohio St. 457; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333; *West Chester &c. R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744; *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21, 37 Am. Rep. 651; *Houston &c. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; *International &c. R. Co. v. Goldstein*, 2 Tex. App. (Civil Cases) 206; *Catherham R. Co. v. London &c. R. Co.*, 1 C. B. (N. S.) 410. For example of an unreasonable rule, see *Pittsburgh &c. R. Co. v. Lyon*, 123 Pa. St. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. 517.

§ 2384 (1577). **Excuses for refusal to carry—Improper or unfit persons.**—A railroad carrier may excuse its refusal to accept a person as a passenger by showing that because of his character, conduct, or condition he is not a fit person to enter its train with other persons,²³ but it is held that *prima facie* every citizen is entitled to be carried as a passenger.²⁴ And the mere fact that a person has had a bad reputation or has been guilty of misconduct on previous occasions may not justify his rejection unless it is such as affords probable or reasonable ground for apprehending misconduct injurious to the carrier or annoying to passengers on the occasion in question.²⁵ A carrier can not rightfully refuse to carry a person who is ill,²⁶ unless the disease

²³ See *Pullman Co. v. Krauss*, 45 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 130n, 8 Ann. Cas. 218; *Price v. St. Louis &c. R. Co.*, 75 Ark. 479, 88 S. W. 575, 578, 112 Am. St. 79 (citing text); *Gregory v. Chicago &c. R. Co.*, 100 Iowa 345, 69 N. W. 532; *Renaud v. New York &c. R. Co.*, 210 Mass. 553, 97 N. E. 98, 38 L. R. A. (N. S.) 689; *Runyan v. Railroad Co.*, 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744, 65 N. J. L. 228, 47 Atl. 422; *Daniel v. New Jersey St. R. Co.*, 64 N. J. L. 603, 46 Atl. 625; *Stevenson v. West Seattle &c. Co.*, 22 Wash. 84, 60 Pac. 51; *Walsh v. Chicago &c. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; and authorities cited in other notes to this section.

²⁴ *Norfolk &c. R. Co. v. Gallier*, 89 Va. 639, 16 S. E. 935; *Chicago &c. R. Co. v. Pillsbury (Ill.)*, 8 N. E. 803. But see *Chicago &c. R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 5 Am. St. 483; *Winnegar v. Central &c. R. Co.*, 85 Ky. 547, 4 S. W. 237. See generally *Gillingham v. Ohio &c. R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798

29 Am. St. 827; *Thurston v. Union &c. R. Co.*, 4 Dill. (U. S.) 321; *Saltonstall v. Stockton*, 1 Taney (U. S.) 11; *Colorado &c. R. Co. v. Union &c. R. Co.*, 41 Fed. 293; *Contra Costa &c. R. Co. v. Moss*, 23 Cal. 323; *Waldron v. Chicago &c. R. Co.*, 1 Dak. 351, 46 N. W. 456; *Camden &c. R. Co. v. Belknap*, 21 Wend. (N. Y.) 354.

²⁵ *Brown v. Memphis &c. R. Co.*, 7 Fed. 51; *Reasor v. Paducah &c. Co.*, 152 Ky. 220, 153 S. W. 222, 43 L. R. A. (N. S.) 820n; *Meisner v. Detroit &c. Co.*, 154 Mich. 545, 118 N. W. 14, 19 L. R. A. (N. S.) 872, 129 Am. St. 493; *State ex rel. Atwater v. Delaware &c. R. Co.*, 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543; *Story v. Norfolk &c. R. Co.*, 133 N. Car. 59, 45 S. E. 349.

²⁶ *Pullman &c. Co. v. Barker*, 4 Colo. 344, 34 Am. R. 89; *Denver &c. R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 27 L. R. A. (N. S.) 761; *Mathew v. Wabash R. Co.*, 115 Mo. App. 468, 78 S. W. 271, *affd.* in 199 U. S. 605, 26 Sup. Ct. 752, 50 L. ed. 327.

from which he is suffering is contagious or so loathsome as to render him unfit to enter a car with other travelers,²⁷ or unless he is violently or dangerously ill or comes unattended when special attendance is necessary, or the like. A carrier, it has been held, is excused from transporting a person who goes upon its train for the purpose of committing a crime or one who is fleeing from justice.²⁸ It is also held that a carrier is not bound to accept as a passenger one who desires to travel for the purpose of depriving it of business.²⁹ We think that the carrier can not rightfully refuse to carry a person from point to point on its line simply because he may be going to such points to solicit business for a competing carrier, but it may, as we believe, refuse to carry him if he undertakes to deprive it of business while on its trains. Neither can it refuse transportation on the ground that the person had formerly scalped the carrier's tickets³⁰ or at another time had conducted himself in a

See also *Louisville &c. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443; *Zachery v. Mobile &c. R. Co.*, 75 Miss. 746, 23 So. 434, 41 L. R. A. 385, 65 Am. St. 617; *Sevier v. Vicksburg &c. R. Co.*, 61 Miss. 48; *Hogan v. Nashville &c. R. Co.*, 131 Tenn. 244, 174 S. W. 1118, L. R. A. 1915E, 788n, Ann. Cas. 1916C, 1162; note in 26 L. R. A. (N. S.) 171.

²⁷ *Walsh v. Chicago &c. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376. See also *Pullman Co. v. Krauss*, 145 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 103; *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57, 5 So. 259, 6 So. 526, 3 L. R. A. 133, 17 Am. St. 389; *Paddock v. Atchison &c. R. Co.*, 37 Fed. 841, 4 L. R. A. 231.

²⁸ *Thurston v. Union &c. R. Co.*, 4 Dill. (U. S.) 321. It has been held, however, that a carrier can

not sit in judgment upon the morals of persons who apply for transportation as passengers, but must receive them if they properly conduct themselves. *Brown v. Memphis &c. R. Co.*, 5 Fed. 499, 7 Fed. 51, 1 Am. & Eng. R. Cas. 247. See *Bass v. Chicago &c. R. Co.*, 36 Wis. 450, 17 Am. Rep. 495; *Pearson v. Duane*, 4 Wall. (U. S.) 605, 18 L. ed. 447; *Pullman Co. v. Bales*, 80 Tex. 211, 15 S. W. 785; *Eads v. Metropolitan St. R.*, 43 Mo. App. 536; *Rosenberg v. Brooklyn &c. R. Co.*, 91 App. Div. 580, 86 N. Y. S. 871.

²⁹ *Barney v. Oyster &c. Co.*, 67 N. Y. 301, 23 Am. Rep. 115; *Jencks v. Coleman*, 2 Sumn. (U. S.) 221. But see *Ford v. Railroad Co.*, 110 La. Ann. 414, 34 So. 585.

³⁰ *Ford v. East Louisiana R. Co.*, 110 La. 414, 34 So. 585.

way offensive to other passengers.³¹ The adjudged cases affirm that a carrier is not bound, as a matter of law, to accept as a passenger an insane person whose condition is such that his presence in the train will probably put other passengers in fear or otherwise substantially annoy them.³² We are inclined to think the doctrine of the cases referred to is not to be extended but is to be limited and carefully guarded. Intoxicated persons may rightfully be denied entrance to trains where their condition is such as to make their presence disgusting to other travelers or such as to substantially interfere with the comfort of other passengers,³³ but it has been held that where a person who is slightly intoxicated and not in such a condition as to render it probable that he will be disorderly or annoy others he

³¹ *Story v. Norfolk &c. R. Co.*, 133 N. Car. 59, 45 S. E. 349. See also *Reasor v. Paducah &c. Ferry Co.*, 152 Ky. 220, 153 S. W. 222, 43 L. R. A. (N. S.) 820n.

³² *Meyer v. St. Louis &c. R. Co.*, 54 Fed. 116; *Owens v. Macon &c. R. Co.*, 119 Ga. 230, 46 S. E. 87. Nor a blind person, without attendance, who is unable to travel alone. *Illinois Cent. R. Co. v. Allen*, 28 Ky. L. 108, 89 S. W. 150; *Zachery v. Mobile &c. R. Co.*, 75 Miss. 746, 23 So. 434, 41 L. R. A. 385, 65 Am. St. 617; *Illinois Cent. R. Co. v. Smith*, 85 Miss. 349, 37 So. 643, 70 L. R. A. 642, 107 Am. St. 293. But, as shown in the Georgia and Mississippi cases above cited, this depends largely on circumstances, and if the person in either case is known by the carrier to be competent to travel alone, or proper provision is made and due notice given, the carrier may be required to accept them. *Putnam v. Broadway &c. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190. See also *Louisville &c. R.*

Co. v. Brewer, 147 Ky. 166, 143 S. W. 1014, 39 L. R. A. (N. S.) 647, Ann. Cas. 1913D, 151n. See *Pearson v. Duane*, 4 Wall. (U. S.) 605, 18 L. ed. 447.

³³ *Pittsburg &c. R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68; *Louisville &c. R. Co. v. Logan*, 88 Ky. 232, 10 S. W. 655, 3 L. R. A. 80, 21 Am. St. 332; *Paris &c. R. Co. v. Robinson*, 53 Tex. Civ. App. 12, 114 S. W. 658; *Atchinson &c. R. Co. v. Weber*, 33 Kans. 543, 6 Pac. 877, 52 Am. Rep. 543; *King v. Ohio &c. R. Co.*, 22 Fed. 413. See also *Lemont v. Washington &c. R. Co.*, 1 Mackey (12 D. C.) 180, 47 Am. Rep. 238; *Bogard v. Illinois Cent. R. Co.*, 144 Ky. 649, 139 S. W. 855, 36 L. R. A. (N. S.) 337n; *Chesapeake &c. R. Co. v. Selsor*, 142 Ky. 163, 134 S. W. 143, 33 L. R. A. (N. S.) 165; *Murphy v. Union R. Co.*, 118 Mass. 228; *Thayer v. Old Colony St. R. Co.*, 214 Mass. 234, 101 N. E. 368, 44 L. R. A. (N. S.) 1125n, Ann. Cas. 1914B, 865.

can not rightfully be refused carriage as a passenger.³⁴ A carrier may justly decline to accept as a passenger a person whose presence on its trains will probably lead to mob violence and result in injury to its property.³⁵ Although a carrier is not bound to receive a person who, because of his mental or physical condition, is unable to care for himself and is not accompanied by an attendant, if it does receive him, knowing his condition, it is bound to bestow upon him such reasonable and necessary care as his condition requires.³⁶

§ 2385 (1577a). Refusal to carry on account of color or race—Putting passenger in wrong car.—A railroad company which is a common carrier of passengers can not, in this country, refuse to carry a person merely because of his color or race.³⁷ But, in some of the states, separate cars or accommodations are provided for colored persons and such persons are confined to them. Statutes providing for such separate accommodations, equal to

³⁴ *Milliman v. New York &c. R. Co.*, 66 N. Y. 642; *Pittsburgh &c. R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68. See also *Price v. St. Louis &c. R. Co.*, 75 Ark. 479, 88 S. W. 575, 578, 112 Am. St. 79 (citing text); *Parks v. Delaware &c. R. Co.*, 85 N. J. L. 577, 89 Atl. 983, *affd.* in 86 N. J. L. 696, 92 Atl. 1087. As to ejection of sick or intoxicated persons, see note in L. R. A. 1915C, 134.

³⁵ *Chicago &c. R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 5 Am. Rep. 483. See *Pounder v. North &c. R.* (1892) 1 Q. B. 385.

³⁶ *Weirling v. St. Louis &c. Ry. Co.* (Ark.), 171 S. W. 901, 904 (citing text); *Price v. St. Louis &c. Ry. Co.*, 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79; *Croom v. Chicago &c. R. Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. 557. See also *Louisville &c. R.*

Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443; *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57, 5 So. 256, 3 L. R. A. 133, 17 Am. St. 389; *Adams v. St. Louis &c. R. Co.* (Tex. Civ. App.), 137 S. W. 437; *Illinois Cent. R. Co. v. Allen*, 28 Ky. L. 108, 89 S. W. 150. And see as to duty as to travelers who are ill or infirm and effect of knowledge or lack of knowledge of the carrier. *Clayton v. Philadelphia &c. R. Co.* (Del. Super. Ct.), 106 Atl. 577; *Ingerman v. Grand Trunk Ry.* (N. H.) 106 Atl. 488 (intoxicated passengers). *Louisville &c. R. Co. v. Brewer*, 147 Ky. 166, 143 S. W. 1014, 39 L. R. A. (N. S.) 647n, Ann. Cas. 1913D, 151, and cases cited in opinion

³⁷ *Brown v. Memphis &c. R. Co.*, 5 Fed. 499; *Chicago &c. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641.

those furnished to white persons, have often been held constitutional and valid.³⁸ And a carrier has been held liable in damages to a white passenger for compelling him to ride in a coach which is set apart for colored persons and in which negroes are riding.³⁹

§ 2386 (1577b.) **Carriage of dead bodies.**—The matter of the transportation of corpses is peculiarly a subject for legislative regulation in the interest of public health, and, while the subject may not come strictly within the scope of this chapter, this seems to be a convenient place to consider it. A regulation of a State Board of Health providing that every dead body must be accompanied by a person in charge, who must present a transit permit from the proper health authorities, giving permission for the removal, and showing the name and age of the deceased, the place and cause of death, the point to which it is to be shipped and the names of the medical attendants and undertaker, has been upheld as a reasonable regulation.⁴⁰ Under such a regulation it has been held that the omission of the name of the medical attendant from the transit permit was a material one and sufficient to justify a carrier in refusing to receive the

³⁸ *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. ed. 256; *Chesapeake &c. R. Co. v. Commonwealth*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. ed. 244, 21 Ky. L. 228, 51 S. W. 160; *Anderson v. Louisville &c. R. Co.*, 62 Fed. 46; *Crooms v. Schad*, 51 Fla. 168, 40 So. 497; *Chiles v. Chesapeake &c. R. Co.*, 125 Ky. 299, 101 S. W. 386; *Chesapeake &c. R. Co. v. Wells*, 85 Tenn. 613, 4 S. W. 5; *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432; *Segal v. Railway Co.*, 35 Tex. Civ. App. 517, 80 S. W. 233. See also notes in 11 L. R. A. (N. S.) 268, 41 L. R. A. (N. S.) 958, L. R. A. 1916E, 280, L. R. A. 1918D, 709.

³⁹ *Louisville &c. R. Co. v. Ritchel*, 148 Ky. 701, 147 S. W. 416, 41 L. R. A. (N. S.) 958n, Ann. Cas. 1913E, 517n, (punitive damages as well as nominal compensatory damages were recovered). But see where the white passenger voluntarily rode in the car for colored passengers. *Chesapeake &c. R. Co. v. Austin*, 137 Ky. 611, 126 S. W. 144, 136 Am. St. 307; *Norfolk &c. R. Co. v. Stone*, 111 Va. 730, 69 S. E. 927 (holding passenger must request to be put in car for white passengers). Compare, however, with the last case, *Missouri &c. R. Co. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327.

⁴⁰ *Lake Erie &c. R. Co. v. James*, 10 Ind. App. 550, 35 N. E. 395.

body and that this defect was not cured by pasting the certificate of the medical attendant upon the box containing the body unless it was shown that the carrier had knowledge of that fact.⁴¹ There is a direct conflict in the authorities on the question whether damages are recoverable for mental anguish caused by the mutilation of a corpse during transportation through the negligence of the carrier's employes, or for delay in transportation. The weight of authority especially where there is such mutilation, seems to favor the recovery of such damages.⁴² Courts favoring this doctrine proceed on the theory that the right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife, or next of kin and not the personal representative, and that for the protection of this right the surviving spouse or next of kin may maintain an action for any infraction of the right, such as an unlawful mutilation of the remains. In such an action it is held that a recovery may be had for injury to the feeling and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damages is alleged or proved.⁴³ Courts taking the opposite view as to damages

⁴¹ *Lake Erie &c. R. Co. v. James*, 10 Ind. App. 550, 35 N. E. 395. So it has been held that a carrier is not required to transport a corpse on the mileage book of the deceased. *Minnish v. Southern R. Co.*, 135 N. Car. 342, 47 S. E. 432. But see as to damages for requiring excessive fare. *Osteen v. Southern R. Co.*, 101 S. Car. 532, 86 S. E. 30, L. R. A. 1916A, 565, Ann. Cas. 1917C, 505.

⁴² *Louisville &c. R. Co. v. Hull*, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 771; *Lindh v. Great Northern R. Co.*, 99 Minn. 408, 109 N. W. 823, 7 L. R. A. (N. S.) 1018; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. 370;

Foley v. Phelps, 1 App. Div. 551, 37 N. Y. S. 471; *Missouri &c. R. Co. v. Linton* (Tex. Civ. App.), 109 S. W. 942; *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956, and note in 19 L. R. A. (N. S.) 564. But compare *Beaulieu v. Great Northern R. Co.*, 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564n, 14 Ann. Cas. 462.

⁴³ *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. 370; *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. 850; *Express Co. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. 824.

for mutilation do so on the theory that there is no right of property in a corpse.⁴⁴ But these latter courts allow the recovery of actual damages where the corpse is mutilated in such a way as to render necessary the expenditure of extra money and labor in caring for it, or where injury is done to the coffin or clothes.⁴⁵ In a case where a contract to transport a corpse from the place of death to her home was entered into between the railway company and a stranger in no way related to the family, and the fact of the existence of the parents of the dead person was not disclosed to the company, it was held that the mental anguish and suffering of the mother on account of being deprived of a sight of the corpse, owing to the railway company's delay in transporting it, could not have been reasonably in the contemplation of the company, at the time of receiving the corpse, as a probable consequence of the breach of the contract, and hence she could not recover therefor.⁴⁶

§ 2387 (1578). Who are passengers.—We think it is safe to say that the general rule is that every one on the passenger train of a railroad company and there for the purpose of carriage with the consent, express or implied, of the company, is presumptively a passenger.⁴⁷ In a recent case, evidence

⁴⁴ Long v. Chicago &c. R. Co., 15 Okla. 512, 86 Pac. 289, 6 Ann. Cas. 1005. See also Hockenhammer v. Lexington &c. R. Co., 24 Ky. L. 383, 74 S. W. 222.

⁴⁵ Long v. Chicago &c. R. Co., 15 Okla. 512, 86 Pac. 289, 6 L. R. A. (N. S.) 883, and note. See also note to Floyd v. Atlantic &c. R. Co., L. R. A. 1915B, 519.

⁴⁶ Nichols v. Eddy (Tex.), 24 S. W. 316. See also Adams Exp. Co. v. Hibbard, 145 Ky. 818, 141 S. W. 397, 38 L. R. A. (N. S.) 439n.

⁴⁷ Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Clark v. North Pac. &c. R. Co., 74

Ore. 470, 144 Pac. 472; Pennsylvania &c. R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229; Creed v. Pennsylvania &c. R. Co., 86 Pa. St. 139, 27 Am. Rep. 693; Pennsylvania &c. R. Co. v. Price, 96 Pa. St. 256; Bricker v. Pennsylvania &c. R. Co., 132 Pa. St. 1, 18 Atl. 983, 19 Am. St. 585. See also Sanderson v. Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368, 369, 55 L. R. A. 908, 88 Am. St. 841 (citing text); Fitzgibbon v. Railway Co., 108 Iowa 614, 79 N. W. 477. See article in 54 Cent. Law Jour. 86. The text is cited with approval in Illinois Cent. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R.

of the custom of the company to carry small children riding with their parents, without fare, was held admissible, and such a child so carried was held to be a passenger.⁴⁸ There must, however, as we believe, be in some form an acceptance by the company of the person as a passenger.⁴⁹ Yet this acceptance need not, by any means, be direct or express, but may be, and generally is, implied from circumstances. The presumption to which we have referred may, of course, be rebutted, and it will not, it is evident, ordinarily arise where the person occupies a position on the train which passengers have no right to occupy,⁵⁰ or goes upon a train on which passengers are not

A. 148, 61 Am. St. 68; and *Moore v. St. Louis &c. R. Co.*, 67 Ark. 389, 55 S. W. 161; and in *St. Louis &c. R. Co. v. Fitts*, 40 Okla. 685, 140 Pac. 144, 145. But see *Bullock v. Houston &c. R. Co. (Tex.)*, 55 S. W. 184.

⁴⁸ *Ball v. Mobile &c. Co.*, 146 Ala. 309, 39 So. 584, 119 Am. St. 32, 9 Ann. Cas. 962. See also *Rawlings v. Railroad Co.*, 97 Mo. App. 511, 71 S. W. 535; *Littlejohn v. Railroad Co.*, 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; *Austin v. Great Western R. Co.*, L. R. 2. Q. B. 442. In *Southern R. Co. v. Lee*, 30 Ky. L. 1360, 101 S. W. 307, 10 L. R. A. (N. S.) 837, it is held that the fact that no fare was paid for a child by the person in charge of him upon a train did not prevent him from being a passenger where he was riding with the knowledge and consent of the conductor. And it is so held also in *St. Louis &c. R. Co. v. Fitts*, 40 Okla. 685, 140 Pac. 144.

⁴⁹ *McLaren v. Atlanta &c. R. Co.*, 85 Ga. 504, 11 S. E. 840; *Coleman v. Georgia R. &c. Co.*, 84 Ga. 1, 10 S. E. 498; *Chicago &c. R. Co.*

v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; *Robertson v. Boston &c. R. Co.*, 190 Mass. 108, 76 N. E. 513, 3 L. R. A. (N. S.) 588, 112 Am. St. 314; *Schaefer v. St. Louis &c. R. Co.*, 128 Mo. 64, 30 S. W. 331; *Banks v. Kanas City Ry. Co.* 280 Mo. 227, 217 S. W. 488. See also *Brown v. Scargoro*, 97 Ala. 316, 12 So. 289 (mere failure to order from wrong train does not amount to acceptance),

⁵⁰ The conclusion stated in the text is well illustrated by the cases where tramps attempt to travel on trains, or do travel, and take unusual places thereon. *Hendryx v. Kansas City &c. R. Co.*, 45 Kans. 377, 25 Pac. 893. See also *Devine v. Chicago &c. R. Co.*, 162 Ill. App. 243; *Barlow v. Jersey City &c. R. Co.*, 67 N. J. L. 364, 51 Atl. 463; *Radley v. Columbia &c. R. Co.*, 44 Ore. 332, 75 Pac. 212, 1 Ann. Cas. 447; *Bullock v. Houston &c. R. Co. (Tex. Civ. App.)*, 55 S. W. 184. But compare *Bergan v. Central Vermont R. Co.*, 82 Conn. 574, 74 Atl. 937; *Southern R. Co. v. Cullen*, 221 Ill. 392, 77 N. E. 470; *International &c. R. Co. v. Hanna (Tex. Civ.*

carried. The presumption that a person on a train is a passenger does not prevail in cases where the train is one on which passengers are not ordinarily carried, as for instance, a construction train, an oil train or the like. It has been held, and in our opinion justly so held, that a person in the caboose of a freight train can not be presumed to be a passenger,⁵¹ but it may, of course, be shown that passengers were carried on such trains.⁵²

§ 2388 (1578a). Who are passengers—Illustrative cases.— The courts have held the relation of carrier and passenger to exist in cases of mail agents or postal clerks⁵³ and a similar rule is

App.), 58 S. W. 548. See generally as to who are not passengers, *Chicago &c. R. Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, 19 Am. St. 17; *Higley v. Gilmer*, 3 Mont. 90, 36 Am. Rep. 450; *Brown v. Missouri &c. R. Co.*, 64 Mo. 536; *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 57 L. R. A. 700.

⁵¹ *Atchison &c. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822; *Eaton v. Delaware &c. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513. See also *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875, 878 (citing text); *Eaton v. Delaware &c. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513. And compare to much the same effect, *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 57 L. R. A. 700; *McCauley v. Tennessee &c. R. Co.*, 93 Ala. 357, 9 So. 611; *Southwestern R. Co. v. Singleton*, 66 Ga. 252; *San Antonio &c. R. Co. v. Lynch* (Tex. Civ. App.), 55 S. W. 517.

⁵² *Kruse v. St. Louis &c. R. Co.*, 97 Ark. 137, 133 S. W. 841; *Prince v. International &c. R. Co.*, 64 Tex. 144; *Dysart v. Missouri &c. R. Co.*, 122 Fed. 228.

⁵³ *Arrowsmith v. Nashville &c. R. Co.*, 57 Fed. 165; *Southern Ry. Co. v. Harrington*, 166 Ala. 630, 52 So. 57, 139 Am. St. 59; *Wood v. Philad. &c. R. Co.*, 1 Boyce (Del.) 336, 76 Atl. 613; *Cleveland &c. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. 550; *Magoffin v. Missouri &c. R. Co.*, 102 Mo. 540, 15 S. W. 76, 22 Am. St. 798; *Mellor v. Missouri &c. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988; *Seybolt v. New York &c. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75 and note; *Grant v. Raleigh &c. R. Co.*, 108 N. Car. 462, 13 S. E. 209; *Gulf &c. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345; *Schuyler v. Southern Pac. Co.*, 37 Utah 581, 109 Pac. 458. See generally *Nolton v. Western &c. R. Co.*, 15 N. Y. 444, 69 Am. Dec. 623; *Gleason v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458; *Baltimore &c. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; *Chesapeake &c. R. Co. v. Patton*, 23 App. D. C.

declared in the absence of some special contract changing the rule or status, as to express messengers.⁵⁴ Persons who pay a consideration for passage no matter in what form are generally

113; *Yeomans v. Contra Costa &c. Co.*, 44 Cal. 71; *Barker v. Chicago &c. R. Co.*, 243 Ill. 482, 90 N. E. 1057, 26 L. R. A. (N. S.) 1058n, 134 Am. St. 382; *Ohio &c. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774; *Baltimore &c. R. Co. v. State*, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. 454; *Blair v. Erie &c. R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Hammond v. Northeastern &c. R. Co.*, 6 S. Car. 130, 24 Am. Rep. 467; *Illinois Cent. R. Co. v. Porter*, 117 Tenn. 13, 94 S. W. 666, 10 Ann. Cas. 789; *Gulf &c. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345; *Carter v. Washington &c. Ry. Co.*, 122 Va. 458, 95 S. E. 464; *Norfolk &c. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811. A soldier riding under a contract between the carrier and the government is held to be a passenger. *Galveston &c. R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64. For decisions upon the statute of Pennsylvania in relation to mail agents, see *Pennsylvania &c. R. Co. v. Price*, 96 Pa. St. 256; *Bricker v. Pennsylvania*, 132 Pa. St. 1, 18 Atl. 983, 19 Am. St. 585; *Foreman v. Pennsylvania R.*, 195 Pa. St. 499, 46 Atl. 109. It seems to us that the validity of that statute may well be questioned, but in *Price v. Pennsylvania R. Co.*, 113 U. S. 218, 5 Sup. Ct. 427, 28 L. ed. 980, and in *Martin v. Pittsburgh &c. R. Co.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. ed.

184, its constitutionality is recognized. In *Yarrington v. Delaware &c. R. Co.*, 143 Fed. 565, many cases are cited showing that the Pennsylvania rule is contrary to the overwhelming weight of authority, and the court criticises the Pennsylvania cases, and, while holding that it was bound by the construction given by those courts, it held that the statute did not apply where the mail clerk was not engaged in any way in railroad work.

⁵⁴ *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597; *Yeomans v. Navigation Co.*, 44 Cal. 71; *Railroad Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. 550; *Railroad Co. v. Thomas*, 79 Ky. 169, 42 Am. Rep. 208; *Davis v. Chesapeake &c. R. Co.*, 122 Ky. 528, 29 Ky. L. 53, 92 S. W. 339, 340, 5 L. R. A. (N. S.) 458n, 121 Am. St. 481, 19 Ann. Cas. 723 (citing text); *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. 514; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Brewer v. New York &c. R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. 647; *Kennedy v. Railroad Co.*, 125 N. Y. 422, 26 N. E. 626; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Railroad Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345; *Missouri &c. R. Co. v. Blalack*, 105 Tex. 206, 147 S. W. 559; *Chamberlain v. Railroad Co.*, 11 Wis. 238;

regarded as passengers,⁵⁵ and so, as will be hereafter shown, are persons who ride on passes. It is held in very many cases that a person may become a passenger before the payment of fare, and that where a person enters a train he is to be regarded as a passenger unless he has entered without right, although he may not have paid his fare, but this rule does not oppose the doctrine that a carrier may require the payment of fare before admitting persons to the train. As to whether an employe riding on a train is a passenger there is some conflict, but the rule seems to be that if he is being carried to and from his working place he is not a passenger, but if he is carried for his own convenience or business, or such transportation is part of the compensation under his contract of employment, he is a passenger.⁵⁶

Jenkins v. Grand Trunk R., 15 Ont. App. 477; post, § 2431. As to whether this may be changed where there is a special contract either in the case of an express messenger or a postal clerk is another question elsewhere considered, but it is also considered in many of the cases cited in this and the last preceding note. Especially *Baltimore &c. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; holding that the contract created a different relation from that of carrier and passenger. See also note in *Ann. Cas.* 1913C, 836; and *McKay v. Louisville &c. R. Co.*, 133 Tenn. 590, 182 S. W. 874. In *Pittsburg &c. Ry. Co. v. Arnott* (Ind.), 126 N. E. 13, the court cites some apparently conflicting authorities on both sides as to whether a mail clerk or an express messenger is a passenger, but holds that in any event the duty of the company to him is to exercise the care which a person of ordinary prudence would exer-

cise under like conditions and circumstances.

⁵⁵ *Union &c. R. Co. v. Nichols*, 8 Kans. 505, 12 Am. Rep. 475; *Bartlett v. New York &c. R. Co.*, 25 Jones & S. (N. Y.) 348; *Commonwealth v. Vermont &c. R. Co.*, 108 Mass. 7, 11 Am. Rep. 301; *Enos v. Rhode Island &c. Ry. Co.*, 28 R. I. 291, 67 Atl. 5, 12 L. R. A. (N. S.) 244, 245 (quoting text). See also *McNeill v. Durham &c. R. Co.*, 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227, 243 (citing text); *Lake Shore &c. R. Co. v. Tettters*, 166 Ind. 335, 74 N. E. 1014, 77 N. E. 599, 5 L. R. A. (N. S.) 425n; *Pittsburg &c. R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; *Holt v. Hannibal &c. R. Co.*, 87 Mo. App. 203.

⁵⁶ *O'Connell v. Baltimore &c. R. Co.*, 20 Md. 212; *Gillshannon v. Stony Brook &c. R. Co.*, 10 Cush. (Mass.) 228; *Seaver v. Boston &c. R. Co.*, 14 Gray (Mass.) 466; *Gilman v. Eastern R. Co.*, 92 Mass 233. 87 Am. Dec. 635; *O'Brien v. Bos-*

In one recent case an employe was held not to be a passenger where he got on an engine, as was the custom of employes, to go home after his services were ended;⁵⁷ and in another it was held an employe going on a train to make a better run, but having no duty to perform with reference to such train, was not strictly a passenger but was entitled to the same degree of care, and the company was held liable to him for injury caused by derailment of the train.⁵⁸ The employe of a sleeping car company is held not to be a passenger although he is entitled to require reasonable care on the part of the railroad company.⁵⁹

ton &c. R. Co., 138 Mass. 387, 52 Am. Rep. 279, and note; Doyle v. Fitchburg &c. R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. 335; Manville v. Cleveland R. Co., 11 Ohio St. 417. See generally Chicago &c. R. Co. v. Bryant, 65 Fed. 969; International &c. R. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219; Kansas City &c. R. Co. v. Phillips, 98 Ala. 159, 13 So. 65; Denver &c. R. Co. v. Dwyer, 3 Colo. App. 408, 33 Pac. 815. See also Sander-son v. Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 910, 88 Am. St. 841 (citing text); Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 1025, 72 N. E. 145; Indianapolis &c. R. Co. v. Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. 185; Louisville &c. R. Co. v. Stuber, 108 Fed. 934, 54 L. R. A. 696; Arkadelphia Lum-ber Co. v. Smith, 78 Ark. 505, 95 S. W. 800; ante, § 1870. But compare St. Louis &c. R. Co. v. Kitchen, 98 Ark. 507, 136 S. W. 970, 50 L. R. A. (N. S.) 828. Held a question for the jury in Wilkes v. Buffalo &c. R. Co., 216 Pa. 355, 65 Atl. 787, 9 Ann. Cas. 42; Compare Indianap-olis &c. R. Co. v. Isgrig, 181 Ind.

211, 104 N. E. 60. Held a passen-ger in Enos v. Rhode Island &c. Ry. Co., 28 R. I. 291, 67 Atl. 5, 125 Am. St. 738, 12 L. R. A. (N. S.) 244, where he traveled to and from his home on tickets furnished as part of his compensation for his services. See also Indiana Union Trac. Co. v. Langley, 178 Ind. 135, 98 N. E. 728; Harris v. City &c. R. Co., 69 W. Va. 65, 70 S. E. 859, 50 L. R. A. (N. S.) 706n, Ann. Cas. 1912D, 59n.

⁵⁷ Dodge v. Chicago &c. R. Co., 164 Iowa 627, 146 N. W. 14. See also Glover v. Chicago &c. Ry. Co., 54 Mont. 446, 171 Pac. 278.

⁵⁸ Chicago &c. R. Co. v. Smith, 115 Ark. 473, 172 S. W. 829.

⁵⁹ Hughson v. Richmond &c. R. Co., 2 D. C. App. 98, 22 Wash. L. 55; Denver &c. R. Co. v. Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432. But see Jones v. St. Louis &c. R. Co., 125 Mo. 666, 28 S. W. 883, 28 L. R. A. 718, 46 Am. St. 514; Coleman v. Pennsylvania R. Co., 242 Pa. 304, 89 Atl. 87, 50 L. R. A. (N. S.) 432n, Ann. Cas. 1915B, 529n. Nor on the other hand, is he an employe of the rail-road company so as to come within

So, it has been held in Pennsylvania, that a news agent who is permitted to ride upon the train to sell papers and fruit, under an agreement between the railroad company and the news company, is not a passenger.⁶⁰ It is quite well settled that one who gets on a train by mistake is usually entitled to be treated as a passenger.⁶¹ In one of the cases this doctrine was extended to one, who, having a ticket, got on a freight train,⁶² but this case, as it seems to us, carries the doctrine too far, for persons are chargeable with knowledge that freight trains do not ordinarily carry passengers. It may be true that the plaintiff in the case referred to was not a trespasser, but he was not entitled to exact of the carrier that extraordinary degree of care which the law imposes on public carriers. One does not cease to be a

the provision of the Federal Employers' Liability Act invalidating contracts by carriers attempting to exempt themselves from liability under that act. *Robinson v. Baltimore &c. R. Co.*, 40 App. (D. C.) 169, L. R. A. 1915D, 510, *affd.* in 237 U. S. A. 84, 35 Sup. Ct. 491, 59 L. ed 849.

⁶⁰ *Smallwood v. Baltimore &c. R. Co.*, 215 Pa. 540, 64 Atl. 732, 7 Ann. Cas. 525. But compare *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282. See *ante*, §§ 1785-1789; also *Fleming v. Brooklyn City R. Co.*, 74 N. Y. 618; *Indianapolis St. Ry. Co. v. Hockett*, 161 Ind. 196, 67 N. E. 106. Newsboys jumping on and off street cars to sell papers are not passengers. *Rosenkovitz v. United R. &c. Co.*, 108 Md. 306, 70 Atl. 108; *Padgitt v. Moll*, 159 Mo. 143, 60 S. W. 121, 81 Am. St. 347; *Raming v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268.

⁶¹ *Columbus &c. R. Co. v. Powell*, 40 Ind. 37, 3 Am. Neg. Cas. 100; *Cincinnati &c. R. Co. v.*

Carper, 112 Ind. 26, 13 N. E. 122, 2 Am. St. 144, 3 Am. Neg. Cas. 186; *Lewis v. Delaware &c. R. Co.*, 145 N. Y. 508, 40 N. E. 248; *Lake Shore &c. R. Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. 545; *Arnold v. Pennsylvania R. Co.*, 115 Pa. St. 135, 8 Atl. 13, 2 Am. St. 542, 28 Am. & Eng. R. Cas. 189; *International &c. R. Co. v. Gilbert*, 64 Tex. 536, 22 Am. & Eng. R. Cas. 405. See also *Baltimore &c. R. Co. v. Norris*, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. 166; *Patry v. Railway Co.*, 77 Wis. 218, 46 N. W. 56; *Gary v. Railway Co.*, 17 Tex. Civ. App. 129, 42 S. W. 576.

⁶² 25 Am. & Eng. Ency. of Law 1083; *Boggess v. Chesapeake &c. R. Co.*, 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777. See also *Fitzgibbon v. Railway Co.*, 119 Iowa 261, 93 N. W. 276. But compare *Robertson v. Boston &c. St. R. Co.*, 190 Mass. 108, 76 N. E. 513, 3 L. R. A. (N. S.) 588, 112 Am. St. 314, and see note upon the general subject.

passenger simply because he leaves the train, as for instance, when required to change cars,⁶³ but if he leaves it solely for his own convenience or to transact business of his own he can not be regarded as a passenger while so engaged and not on the train.⁶⁴ There is some diversity of opinion as to whether one who enters a train for the purpose of assisting a passenger is to be regarded as a passenger and there are cases which seem to hold that such a person is a passenger.⁶⁵ We are unable to assent to this doctrine as broadly held by some of the cases for it seems to us that the extraordinary duty of a carrier to a passenger, is not, as a general rule, owing to such a person,⁶⁶

⁶³ *Baltimore &c. R. Co. v. State*, 60 Md. 449, 3 Am. Negl. Cas. 632; *Dwinelle v. New York &c. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 44 Am. & Eng. R. Cas. 384; *Texas &c. R. Co. v. Ellison*, 39 Tex. Civ. App. 172, 87 S. W. 213; *Railway Co. v. Young*, 90 Fed. 709. See also notes in 48 L. R. A. (N. S.) 683, and 51 L. R. A. (N. S.) 900.

⁶⁴ *Johnson v. Boston &c. R. Co.*, 125 Mass. 75, 3 Am. Neg. Cas. 791; *Webster v. Fitchburg &c. R. Co.*, 161 Mass. 298, 37 N. E. 165; *Buckley v. Old Colony &c. R. Co.*, 161 Mass. 26, 36 N. E. 583; *DeKay v. Chicago &c. R. Co.*, 41 Minn. 178, 43 N. W. 182, 4 L. R. A. 632, 16 Am. St. 687. See generally *Keokuk &c. Co. v. True*, 88 Ill. 608; *Blackburn v. Williamson &c. R. Co.*, 180 Ky. 254, 202 S. W. 500; *State v. Grand Trunk &c. R. Co.*, 58 Maine 176, 4 Am. Rep. 258; *Wandell v. Corbin*, 17 N. Y. St. 718, 1 N. Y. S. 795; *Zeccarde v. Yonkers R. Co.*, 190 N. Y. 389, 83 N. E. 31, 17 L. R. A. (N. S.) 770; *Dice v. Willamette &c. R. Co.*, 8 Ore. 60, 34 Am. Rep. 575; *Palmer v. Willamette &c. Ry. Co.*, 88 Ore. 322, 171 Pac. 1169, L.

R. A. 1918D, 1114; post, § 2411. But compare *Atchison &c. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; *Gannon v. Chicago &c. R. Co.*, 141 Iowa 37, 117 N. W. 966, 23 L. R. A. (N. S.) 1061; *Parsons v. Railroad Co.*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. 450; *Galveston &c. R. Co. v. Mathes* (Tex. Civ. App.), 73 S. W. 411; *Railway Co. v. Coggins*, 88 Fed. 455.

⁶⁵ *Evansville &c. Co. v. Athon*, 6 Ind. App. 295, 33 N. E. 469, 51 Am. St. 303, 3 Am. Negl. Cas. 15; *Louisville &c. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443, 3 Am. Neg. Cas. 229; *Galloway v. Chicago &c. R. Co.*, 87 Iowa 458, 54 N. W. 447, 3 Am. Negl. Cas. 395. See *Cherokee &c. R. Co. v. Hilson*, 95 Tenn. 1, 31 S. W. 737; *Texas &c. R. Co. v. McGilvary* (Tex. Civ. App.), 29 S. W. 67.

⁶⁶ See *New York &c. R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954; *Central R. &c. Co. v. Letcher*, 69 Ala. 106, 44 Am. Rep. 505; *Coleman v. Georgia &c. R. Co.*, 84 Ga. 1, 10 S. E. 498; *Berry v. Railroad Co.*, 22 Ky. L. 1410, 60

although we have no doubt that the railroad company owes to him the duty of exercising ordinary or reasonable care under the circumstances.⁶⁷ There may possibly be cases where a person assists a passenger on a train, as, for instance, where the passenger is ill, feeble, too young to care for himself or the like, where it is proper to hold that the person rendering the assistance is a passenger, but where there is no reason for rendering

S. W. 699; *Tobin v. Portland &c. R. Co.*, 59 Maine 183, 8 Am. Rep. 415; *Lucas v. New Bedford &c. R. Co.*, 72 Mass. 64, 66 Am. Dec. 406, 3 Am. Neg. Cas. 735 (citing *Lygo v. Newbold*, 9 Exch. 302); *Grand Rapids &c. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173; *McKone v. Michigan &c. R. Co.*, 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596; *Doss v. Missouri &c. R. Co.*, 59 Mo. 27, 21 Am. Rep. 371; *Dunne v. New York &c. R. Co.*, 99 App. Div. (N. Y.) 571, 91 N. Y. S. 145; *Railway Co. v. Phillio*, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. 868; *Dillingham v. Pierce* (Tex.), 31 S. W. 203; *Missouri &c. R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Bullock v. Houston &c. R. Co.* (Tex. Civ. App.), 55 S. W. 184; *Griswold v. Chicago &c. R. Co.*, 64 Wis. 652, 26 N. W. 101; *York v. Canada &c. S. Co.*, 22 Can. Sup. Ct. 167; *Holmes v. Northeastern &c. R. So.*, L. R. 4 Exch. 254, L. R. 6 Exch. 123; note in 3 L. R. A. (N. S.) 432. One who boards a train to assist in caring for baggage has been held to be a trespasser, where the passenger proposed to fraudulently take the baggage as his own. *Andrews v. Fort Worth &c. R. Co.* (Tex.), 25 S. W. 1040. And one going merely to meet and greet friends and not to

render assistance is held a mere licensee and not even an invitee. *Arkansas &c. R. Co. v. Sain*, 90 Ark. 278, 119 S. W. 659, 22 L. R. A. (N. S.) 910. See also *Whaley v. Louisville &c. R. Co.*, 186 Ala. 72, 65 So. 140, 52 L. R. A. (N. S.) 179n. Even though not a passenger, the company may well be held liable in many cases to one injured by its negligence while thus rendering needed assistance. See authorities cited in last preceding note; also *Railway Co. v. Lawton*, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. 48; *Railway Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347; *Railway Co. v. Owens*, 123 Ga. 393, 51 S. E. 404; *McKone v. Railroad Co.*, 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596; *Izlar v. Railroad Co.*, 57 S. Car. 332, 35 S. E. 583; *Morrow v. Railway Co.*, 134 N. Car. 92, 46 S. E. 12.

⁶⁷ See note to *Hill v. Louisville &c. R. Co.*, 124 Ga. 243, 52 S. E. 651, in 3 L. R. A. (N. S.) 432n; *Fortune v. Southern R. Co.*, 150 N. Car. 695, 64 S. E. 759, 134 Am. St. 955; *St. Louis &c. R. Co. v. Lee*, 37 Okla. 545, 132 Pac. 1072, 46 L. R. A. (N. S.) 367 and note. In cases cited in the notes above referred to it is also shown that the carrier is usually liable to the person so assisting where it has notice there-

assistance the person giving it can not, as we believe, be regarded as a passenger.⁶⁸

§ 2389 (1578b). Who are passengers—Burden of proof—Offer and acceptance.—Where one sues for damages for injuries received as a passenger, as, for instance, where he alleges that he was injured by the negligence of the defendant when he was boarding one of the defendant's cars as a passenger, while the car was standing at a regular stopping place for the reception of passengers, the burden is on him to prove he was a passenger; and an instruction defining a passenger as "one who is boarding a car, or who is attempting to board a car, or at the station of a company operating a car, for the purpose of being carried on the cars from one point to another," is erroneous, as is also a statement therein that "he becomes a passenger when, with the intention of boarding a train, he attempts to board for the purpose of riding." "A passenger," said the court in the case under consideration, "may be defined to be one who undertakes, with the consent of the carrier, to travel in a conveyance furnished by the latter, otherwise than in the service of the carrier as such."⁶⁹ The relation of carrier and passenger is dependent upon the existence of a contract of carriage, express or implied, between the carrier and passenger, made by themselves or their respective agents; and this relation begins when a person puts himself in the care of the carrier or directly within its control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier. There is, however, seldom any formal act of delivery of the passenger's person into the care of

of and suddenly starts the train and injures him without warning or opportunity to get off but is not liable where it has no notice of anyone on the train merely for such purpose or wanting to get off. See also on this phase of the question. *Southern R. Co. v. Parham*, 10 Ga. App. 531, 73 S. E. 763; *St. Louis &c. R. Co. v. Lee*, 37 Okla. 545, 132 Pac. 1072, 46 L. R. A. (N.

S.) 357, and numerous cases cited in opinion; *Chesapeake &c. R. Co. v. Fortune*, 107 Va. 412, 59 S. E. 1095; *Chesapeake &c. R. Co. v. Paris*, 107 Va. 408, 59 S. E. 398.

⁶⁸ See *Southern R. Co. v. Patterson*, 148 Ala. 77, 41 So. 964, 121 Am. St. 30, 31 (citing and quoting text).

⁶⁹ *Alabama City &c. R. Co. v. Bates*, 149 Ala. 487, 43 So. 98.

the carrier, or of acceptance by the carrier of one who presents himself for transportation; hence, the existence of the relation is generally to be implied from the attendant circumstances. But it is undoubtedly the rule that these circumstances must be such as will warrant the implication that one has offered himself to be carried and the offer has been accepted by the carrier. And this, of course, necessarily involves the existence of the fact that the person must signify his intention to take passage either by words or conduct, and those in charge of the car must assent by words or conduct to his becoming a passenger."⁷⁰

§ 2390 (1579). The relation of passenger and carrier—When it begins.—It is broadly stated in one of the cases that the fact that a person had purchased a ticket "created the relation of carrier and passenger, and the law imposed duties arising out of that relation both on the carrier and the passenger,"⁷¹ but

⁷⁰ Citing *North Birmingham R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18; *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202, 76 S. W. 680; *Farley v. Cincinnati &c. R. Co.*, 108 Fed. 14; *Webster v. Railway Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Illinois Cent. R. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. 68; ante, § 2387; 5 Am. & Eng. Ency Law, pp. 486-489, and cases cited in note. See also *Georgia &c. R. Co. v. Tapley*, 144 Ga. 453, 87 S. E. 473, L. R. A. 1916C, 1020; *Murray v. Cumberland &c. Co.*, 117 Maine 165, 103 Atl. 66; *Moguer v. Boston Ry. Co.*, 198 Mass. 260, 84 N. E. 464, 15 L. R. A. (N. S.) 960, and note; *Doherty v. New York &c. R. Co.*, 229 Mass. 135, 118 N. E. 281; *Palmer v. Williamette Valley &c. R. Co.*, 88 Ore. 322, 171 Pac. 1168, L. R. A. 1918D, 1114. But compare *Birmingham R. &c. Co. v. Wise*, 149 Ala.

492, 42 So. 821; *Pittsburgh &c. Ry. Co. v. Friend* (Ind. App.), 118 N. E. 598; *Snipes v. Norfolk &c. R. Co.* (N. Car.), 56 S. E. 477. As how this may be done in case of street car see *Rice v. Michigan Ry. Co.* 208 Mich. 123, 175 N. W. 454.

⁷¹ *Wabash &c. R. Co. v. Rector*, 104 Ill. 296, 2 Am. Negl. Cas. 648. It is proper to say that we do not assert that the able court by which the case referred to was decided did not reach a correct conclusion in the particular instance, but we do respectfully say that it stated the rule too broadly. *Webster v. Fitchburg &c. R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521, asserts what we believe to be the sound doctrine. And this is approved in *Baril v. New York &c. R. Co.* 90 Conn. 74, 96 Atl. 164, 166 (citing text) *Fremont &c. R. Co. v. Hagblad*, 72 Nebr. 773, 101 N. W.

this, we venture to say, carries the rule too far. We do not believe that the mere fact that the intending passenger purchases a ticket creates the relation of carrier and passenger in such a sense as to exact of the carrier that high degree of care which the law prescribes. That duty, as we conceive, does not arise until the person holding the ticket has come under the charge of the carrier in some way as by entering a train or the like.⁷² A holder of a ticket is not always a passenger,⁷³ nor does the relation of carrier and passenger always begin with the acquisition of a ticket.^{73a} A person may become a passenger before he has entered the train or vehicle of the carrier.⁷⁴ We think it safe to say that a person becomes a passenger when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting room or the like, at a time when such a place is open for the reception of persons intending to take passage on the trains of the company.⁷⁵

⁷² *Radley v. Columbia Southern Ry. Co.*, 44 Ore. 332, 75 Pac. 212, 214 (citing text).

⁷³ *Johnson v. Boston &c. R. Co.*, 125 Mass. 75, 3 Am. Negl. Cas. 791; *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Kidwell v. Chesapeake &c. R. Co.*, 71 W. Va. 664, 77 S. E. 285, 43 L. R. A. (N. S.) 999, 102 (citing text). But purchase of a ticket may be important in fixing the time the relation begins. *Johns v. Charlotte &c. R. Co.*, 39 S. Car. 162, 17 S. E. 698, 39 Am. St. 709, 20 L. R. A. 520n.

^{73a} *Baril v. New York &c. R. Co.* 90 Conn. 74, 96 Atl. 164, 166 (citing text).

⁷⁴ *Railroad Co. v. Voils*, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; *Rogers v. Kennebec Steamboat Co.*, 86 Maine 261, 29 Atl. 1069, 25 L. R. A. 491, 3 Am. Neg. Cas. 590; *Bartle v. Railroad Co.*, 142 Mo.

535, 44 S. W. 778; *Bledsoe v. West*, 186 Mo. App. 460, 171 S. W. 622; *Chicago &c R. Co. v. Walker*, 217 Ill. 605, 75 N. E. 520; *Brien v. Bennett*, 8 C. & P. 724. See as to street railways, *Citizens' &c. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 935; *Hall v. Terre Haute &c. Co.*, 38 Ind. App. 43, 76 N. E. 334, 336, and cases there cited.

⁷⁵ *Hannibal &c. R. Co. v. Martin*, 111 Ill. 219, 2 Am. Negl. Cas. 661; *Louisville &c. R. Co. v. Treadway*, 142 Ind. 475, 40 N. E. 807; *Allender v. Chicago &c. R. Co.*, 37 Iowa 264, 3 Am. Negl. Cas. 323; *Shannon v. Boston &c. R. Co.*, 78 Maine 52, 2 Atl. 678; *Rogers v. Kennebec Steamboat Co.*, 86 Maine 261, 26 Atl. 1069, 25 L. R. A. 491, 3 Am. Negl. Cas. 590; *Warren v. Fitchburg &c. R. Co.*, 90 Mass. 227, 85 Am. Dec. 700; *Caswell v. Boston &c. R. Co.*, 98 Mass. 194, 93 Am Dec. 151; *Smith*

Where, however, by reasonable rules or regulations a railroad company designates the times at which places will be ready for the reception of passengers, a person can not become a passenger by entering such a place in violation of the rules or at an unreasonable time.⁷⁶ It is held that one who enters a car of a train made up for its customary run, where the cars are prepared to receive passengers, although not standing at the station,

v. St. Paul &c. R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Haselton v. Portsmouth &c. R.*, 71 N. H. 589, 53 Atl. 1016, 1017 (cited text); *Poucher v. New York &c. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Abbott v. Oregon R. Co.*, 46 Ore. 549, 80 Pac. 1012, 114 Am. St. 885. See generally *Grimes v. Pennsylvania Co.*, 36 Fed. 72; *Denver &c. R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 27 L. R. A. (N. S.) 761, 764 (citing text); *MacFeat v. Railroad Co.*, 5 Penn. (Del.) 52, 62 Atl. 898; *Central R. &c. Co. v. Perry*, 58 Ga. 461; *Chicago &c. R. Co. v. Walker*, 217 Ill. 605, 75 N. E. 520; *Vandalia R. Co. v. Darby*, 60 Ind. App. 294, 298, 108 N. E. 778 (citing text); *MacFeat v. Railroad Co.*, Co., 139 Mass. 542, 2 N. E. 97; *Albin v. Chicago &c. Ry. Co.*, 103 Mo. App. 308, 316, 77 S. W. 153; *Fremount &c. R. Co. v. Hagblad*, 72 Nebr. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254n, 9 Ann. Cas. 1096; *Exton v. Railroad Co.*, 62 N. J. L. 7, 42 Atl. 486, 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508. The text is cited in *Barnett v. Minneapolis &c. R. Co.*, 123 Minn. 153, 143 N. W. 263, 48 L. R. A. (N. S.) 262, but the plaintiff was held not to be a passenger, nor entitled to recov-

er for failing to heat the depot, because he was there an unreasonable time before train time. See also *Hunt v. New York &c. R. Co.*, 212 Mass. 102, 98 N. E. 787, 40 L. R. A. (N. S.) 778n, to the effect that one who purchases a ticket at a terminal depot station, owned and operated by a separate and independent company does not become a passenger of the carrier whose train he expects to take until about to enter such carrier's car.

⁷⁶ See *Philips v. Southern R. Co.*, 124 N. Car. 123, 32 S. E. 388, 389, 45 L. R. A. 163 (citing text); *Illinois Cent. Co. v. Laloge*, 24 Ky. L. 693, 69 S. W. 795, 62 L. R. A. 405; *Fremont &c. R. Co. v. Hagbald*, 72 Nebr. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254n, 9 Ann. Cas. 1096; *Hicks v. Union Pac. R. Co.*, 76 Nebr. 496, 107 N. W. 798; *June v. Railroad Co.*, 153 Mass. 79, 26 N. E. 238; *Railroad Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827, for cases in which the traveler had not yet become a passenger. So one coming to a station at an unreasonable time has often been held not to be a passenger. *Brown v. Georgia &c. R. Co.*, 119 Ga. 88, 46 S. E. 71; *Illinois Cent. R. Co. v. Laloge*,

becomes a passenger,⁷⁷ but it seems to us that the decision referred to is of doubtful soundness, for a person has no right to enter a train and impose a duty upon a railroad company unless he enters at a place where the rules or custom of the company provide for receiving passengers.⁷⁸

§ 2391 (1580). **The relation of passenger and carrier—Authority of subordinate employes to create.**—The railroad company by its rules and regulations or by its custom, may provide trains and places in which persons may be transported as passengers. The principle, which we have elsewhere discussed, that subordinate employes, such as conductors, brakemen, engineers, firemen and the like, can not change or abrogate the rules of the company requires the conclusion that such employes can not impose upon their employer the obligation of a public carrier of passengers by receiving persons on trains not provided for the carriage of passengers, or, as a general rule, by inviting them to ride in dangerous places not provided by their employer for passengers to occupy.⁷⁹ The adjudged cases are quite har-

113 Ky. 896, 69 S. W. 795, 62 L. R. A. 405; *Barnett v. Minneapolis &c. R. Co.*, 123 Minn. 153, 143 N. W. 263, 48 L. R. A. (N. S.) 262; *Phillips v. Southern R. Co.*, 124 N. Car. 123, 32 S. E. 388, 45 L. R. A. 163; *Kidwell v. Chesapeake &c. Ry. Co.*, 71 W. Va. 664, 77 S. E. 285, 43 L. R. A. (N. S.) 999n.

⁷⁷ *Missouri &c. R. Co. v. Simmons*, 12 Tex. Civ. App. 500, 33 S. W. 1096, citing *Huston &c. R. Co. v. Washington* (Tex. Civ. App.), 30 S. W. 719; *Missouri &c. R. Co. v. Huff* (Tex. Civ. App.), 32 S. W. 551. See also *Hannibal &c. R. Co. v. Martin*, 111 Ill. 219.

⁷⁸ But see where a blind passenger was taken from a train to a sleeping car standing in a yard at a junction point, and injured getting on, and the carrier was held li-

able. *Denver &c. R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 27 L. R. A. (N. S.) 761. And see where one entering a street car after it had started was held a passenger after his presence was noted and he was so received, though not before; *Mishler v. Chicago &c. Ry. Co.* (Ind. App.), 111 N. E. 460. The court distinguished this from other cases where the entry was not at or near a regular stopping case. See note in 104 Am. St. 580. As we shall hereafter see the duty of a railroad company respecting its depots or station buildings is not usually so rigorous as that respecting its roadbed, tracks, cars and equipments.

⁷⁹ *Morris v. Georgia R. &c. Co.*, 131 Ga. 475, 62 S. E. 579, 580 (citing text); *Woolsey v. Chicago &c. R.*

monious in support of the general doctrine we have stated,⁸⁰ but we are not to be understood as saying that persons who have become passengers may not in many instances be justified in obeying the directions of employes. It is clear that there is a marked difference between a case of one to whom the railroad company owes a duty as a public carrier and a case where the duty has not arisen. In the one case it may well be held that, within limits, passengers may be excused for obeying the direc-

Co., 39 Nebr. 798, 58 N. W. 444, 25 L. R. A. 79. The doctrine of the text is well illustrated by the case in which it was held that a superintendent of construction could not impose upon a railroad company the duty of a carrier in favor of a person invited to ride on a construction train. *Evansville &c. R. Co. v. Barnes*, 137 Ind. 306, 36 N. E. 1092.

⁸⁰ *Ohio &c. R. Co. v. Hatton*, 60 Ind. 12; *Pittsburg &c. R. Co. v. Nuzum*, 60 Ind. 533; *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875, 878 (citing text); *Stone v. Chicago &c. R. Co.*, 47 Iowa 82, 29 Am. Rep. 458; *Mason v. Missouri &c. R. Co.*, 27 Kans. 83, 41 Am. Rep. 405; *Candiff v. Louisville &c. R. Co.*, 42 La. Ann. 477, 7 So. 601; *Files v. Boston &c. R. Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. 411; *Powers v. Boston &c. R. Co.*, 153 Mass. 188, 26 N. E. 446; *Frederick v. Marquette &c. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *McNamara v. Great Northern &c. R. Co.*, 61 Minn. 296, 63 N. W. 726; *Lillis v. St. Louis &c. R. Co.*, 64 Mo. 464, 27 Am. Rep. 255; *Hibbard v. New York &c. R. Co.*, 15 N. Y. 455; *Grimshaw v. Lake Shore &c. R. Co.*, 205 N. Y. 371, 98 N. E.

762, 40 L. R. A. (N. S.) 563, Ann. Cas. 1913E, 571n; *Atchison &c. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641; *Haase v. Oregon &c. R. Co.*, 19 Ore. 354, 24 Pac. 238; *Radley v. Columbia Ry. Co.*, 44 Ore. 332, 75 Pac. 212, 1 Ann. Cas. 447; *Louisville &c. R. Co. v. Wilson*, 88 Tenn. 316, 12 S. W. 720, cited in *Illinois &c. R. Co. v. Meacham*, 91 Tenn. 428, 19 S. W. 232; *Louisville etc. R. Co. v. Hailey*, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549; *International &c. R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635, 2 Am. St. 521; *Gulf &c. R. Co. v. Campell*, 76 Tex. 174, 13 S. W. 19, 41 Am. & Eng. R. Cas. 100; *Texas &c. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *Texas &c. R. Co. v. Hayden*, 6 Texas Civ. App. 745, 26 S. W. 331; *St. Louis &c. R. Co. v. White (Tex.)*, 34 S. W. 1042; *Canadian R. Co. v. Johnson*, *Montreal L. R.* 6 Q. B. 213; *Graham v. Toronto &c. R. Co.*, 23 Up. Can. C. P. 514. See also *White v. Illinois Cent. R. Co.*, 99 Miss. 651, 55 So. 593; *Vassor v. Atlantic Coast Line R. Co.*, 142 N. Car. 68, 54 S. E. 849; *Missouri &c. R. Co. v. Huff*, 98 Tex. 110, 81 S. W. 525; *Waterbury v. New York &c. R. Co.*, 17 Fed. 671.

tions of employes, but in the other case the question is whether the person who assumes to be a passenger has actually entered into that relation, and whether he has or not generally depends upon the authority of the employe to accept him as a passenger.⁸¹ We do not believe, as we have indicated, that a conductor or any other subordinate agent or employe can impose upon a railroad company the duty of a carrier by receiving persons as passengers on trains not intended or used for the transportation of passengers.⁸² We know that there is some conflict of authority upon this question.⁸³ But with great respect for the eminent author to whom we refer, we believe the sound rule is that it is for the officers or superior agents of a railroad company and not for subordinate employes to determine on what trains passengers shall be carried. Rules and regulations can not be made by such employes nor can they annul them. To permit such employes to transform freight, coal oil, construction trains or the like into trains for the conveyance of passengers would be to allow them to impose extraordinary duties and liabilities upon the employer in cases where it is apparent that no such duties or liabilities were assumed or intended to be assumed by the employer.

⁸¹ *Huston &c. R. Co. v. Bolling*, 59 Ark. 395, 27 S. W. 492, 27 L. R. A. 190, 43 Am. St. 38; citing *Storey v. Ashton*, L. R. 4 Q. B. 476. See generally as to authority of employes. *Illinois &c. R. Co. v. Latham*, 72 Miss. 33, 16 So. 757; *San Antonio &c. R. Co. v. Lynch*, 8 Tex. Civ. App. 513, 28 S. W. 252; *Copper v. Lake Erie &c. R. Co.* 136 Ind. 366, 36 N. E. 272. But see *Chicago &c. R. Co. v. Frazer*, 55 Kans. 582, 40 Pac. 923; *McDonald v. Central R. Co.*, 72 N. J. L. 280, 62 Atl. 405, 111 Am. St. 672.

⁸² *Powers v. Boston &c. R. Co.*,

153 Mass. 188, 26 N. E. 446; *Gulf &c. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Murch v. Concord R. Co.*, 29 N. H. 9, 61 Am. Dec. 631; *Missouri &c. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. 785; *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875, 878 (citing text); *Graham v. Toronto &c. Ry. Co.*, 23 Up. Can C. P. 541.

⁸³ 3 *Thomp. Neg.* (2nd ed.) § 7666, et seq. See also *Chicago &c. R. Co. v. Benedict*, 154 Ky. 675, 159 S. W. 526; *Chesapeake &c. Ry. Co. v. Smith*, 162 Ky. 747, 172 S. W. 1088.

§ 2392 (1581). **Trespassers and intruders.**—It is obvious that a mere intruder or trespasser can not create the relation of carrier and passenger by his own act.⁸⁴ The relation can not exist unless the person claiming to be a passenger has been impliedly or expressly received as such by the carrier.⁸⁵ There may be a right of action for a wrongful refusal to carry but it does not follow that an action may be maintained in the character of a passenger by one whom the carrier has not accepted as a passenger. A railroad company is, indeed, not bound in its capacity of a carrier to one who has not been received as a passenger by an employe having authority to receive passengers, and hence it is quite clear that it is not liable in the capacity of a carrier to one who enters its trains without right, and as a mere trespasser or intruder. Upon this point there is no substantial diversity of opinion,⁸⁶ nor could there well be, since one does

⁸⁴ *Berry v. Missouri &c. R. Co.*, 124 Mo. 223, 25 S. W. 229; *Austin v. Great Western &c. R. Co.*, L. R. 2 Q. B. 442; *Toledo &c. R. Co. v. Brooks*, 81 Ill. 245, 292; *Illinois &c. R. Co. v. Meacham*, 91 Tenn. 428, 19 S. W. 232; *Grimshaw v. Lake Shore &c. R. Co.*, 205 N. Y. 371, 98 N. E. 762, 40 L. R. A. (N. S.) 563, Ann. Cas. 1913E, 571n. *Radley v. Columbia Southern R. Co.*, 44 Ore. 332, 75 Pac. 212, 213 (citing text).

⁸⁵ *Illinois Cent. R. Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, 295, 39 L. R. A. 148, 61 Am. St. 68 and note (citing text); *Radley v. Columbia Southern R. Co.*, 44 Ore. 332, 75 Pac. 212, 213 (citing text). Thus in *Ramonas v. Grand Rapids Ry. Co.*, 194 Mich. 69, 160 N. W. 382 383 (citing text), it is said: "It is true that the rule of law is that the acceptance of a passenger by a carrier need not be direct or express, but it must be some-

thing which can fairly be implied."

⁸⁶ *Chicago &c. R. Co. v. Field*, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. 444; *Pittsburg &c. R. Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243; *Satterlee v. Groat*, 1 Wend. (N. Y.) 272; *O'Brien v. Boston &c. R. Co.*, 81 Mass. 20, 77 Am. Dec. 347. See also *St. Louis &c. Ry. v. Jones*, 96 Ark. 558, 132 S. W. 636, 37 L. R. A. (N. S.) 418n; *Youngerman v. New York &c. R. Co.*, 223 Mass. 29, 111 N. E. 607. One who gets upon a train not intending to pay fare is a trespasser. *Condran v. Chicago &c. R. Co.*, 67 Fed. 522, 28 L. R. A. 749. And see as to one who procures passage by fraudulent representations. *Fitzmaurice v. New York &c. R. Co.*, 192 Mass. 159, 78 N. E. 418, 6 L. R. A. (N. S.) 1146n, 116 Am. St. 236. 7 Ann. Cas. 586, and cases cited; also post § 2437.

not become a passenger until he puts himself in charge of the carrier.⁸⁷ Persons who enter the trains of a railroad company through a fraudulent or collusive arrangement with the brakeman or other subordinate employes are not passengers.⁸⁸ A person who rides upon an engine in violation of the rules of the company, although he does so upon the invitation of the engineer, is not a passenger.⁸⁹ We believe that the rule goes

⁸⁷ *Schepers v. Union &c. Co.*, 126 Mo. 665, 29 S. W. 712; *Donovan v. Hartford &c. R. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Illinois Cent. R. Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, 295, 39 L. R. A. 148, 61 Am. St. 68 (citing text).

⁸⁸ *Brevig v. Chicago &c. R. Co.*, 64 Minn. 168, 66 N. W. 401; *Janny v. Great Northern &c. R. Co.*, 63 Minn. 380, 65 N. W. 450; *Gulf &c. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Grahan v. International &c. Ry. Co.*, 100 Tex. 27, 93 S. W. 104, 5 L. R. A. (N. S.) 1025n, 123 Am. St. 767. See also *Railroad Co. v. Best*, 169 Ill. 301, 48 N. E. 684; *Smith v. Georgia R. &c. Co.*, 113 Ga. 9, 38 S. E. 330; *Greenfield v. Railway Co.*, 133 Mich. 557, 95 N. W. 546; *Southern Ry. Co. v. McNabb*, 130 Tenn. 197, 169 S. W. 757, L. R. A. 1915 B, 761n (so holding as to one riding in violation of rule, with permission of conductor given under mistake); *Purple v. Railway Co.*, 114 Fed. 123, 57 L. R. A. 700; and note to *St. Louis &c. Ry. Co. v. Jones*, 96 Ark. 558, 132 S. W. 636, in 37 L. R. A. (N. S.) 418. Men beating their way, though they paid trainmen a small sum for permission to ride were held mere trespassers in *Williams*

v. Chicago &c. Ry. Co., 139 Ark. 562, 215 S. W. 605.

⁸⁹ *Wilcox v. San Antonio &c. R. Co.*, 11 Tex. Civ. App. 487, 33 S. W. 379, citing *Texas &c. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *International &c. R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517; *Cook v. Houston &c. Navigation Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. 52; *Files v. Railroad Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. 411; *Woolsey v. Railroad Co.*, 39 Nebr. 798, 58 N. W. 444, 25 L. R. A. 79. See also *Chicago &c. R. Co. v. Casey*, 9 Bradw. (Ill. App.) 632; *Chicago &c. R. Co. v. Carroll*, 5 Bradw. (Ill. App.) 201, 210; *Chicago &c. R. Co. v. Michie*, 83 Ill. 427; *Kentucky &c. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Snyder v. Hannibal &c. R. Co.*, 60 Mo. 413; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251; *Duff v. Allegheny &c. R. Co.*, 91 Pa. St. 458, 36 Am. Rep. 675, 2 Am. & Eng. R. Cas. 1; *Pennsylvania &c. R. Co. v. Langdon*, 92 Pa. St. 21, 37 Am. Rep. 651; *Huston &c. R. Co. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 799. Compare also *Hannant v. Southern Ry. Co.*, 113 S. Car. 19, 100 S. E. 709 (riding on engine forbidden by state law and by federal law of interstate). As will be shown

further than asserted in the case cited, for all persons are bound to know that, except, perhaps, in extraordinary and peculiar cases, no one can rightfully take passage on a locomotive. The general doctrine is that a person can take passage on such trains only, and only in such places as the rules of the company provide that passengers shall be carried,⁹⁰ and one who does not conform to such rules is ordinarily to be regarded as an intruder or trespasser, and an intruder or trespasser can not impose upon a railroad company the high duty which a carrier owes to its passengers.⁹¹ There may be special and peculiar cases in which persons may ride on trains or in places not provided for passengers generally,⁹² but the general rule is that persons must

hereafter, it is generally held that one who voluntarily places himself in a dangerous position is guilty of such contributory negligence as will defeat a recovery, but we think that where a person voluntarily, and without excuse, goes into a place not provided for passengers, he cannot hold a railroad company liable in its capacity of a public carrier of passengers, because he is not a passenger. In *Southern R. Co. v. Cullen*, 221 Ill. 392, 77 N. E. 470, a railroad company had contracted to transport cars of cattle, and to carry an agent of the shipper upon the "freight train," and the cars, after being loaded by the shipper, were met by a switching crew with a locomotive, which was to take the cars to yards, where they were to be put into a train being made up, but there was no caboose attached to the cars during the run to the yards, and it was held that a servant of the shipper, who had been instructed to accompany the cars,

and who rode upon the locomotive, was a passenger.

⁹⁰ *Pennsylvania &c. R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Texas &c. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *Robertson v. New York &c. R. Co.*, 22 Barb. (N. Y.) 91; *Houston &c. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; *Waterbury v. New York &c. R. Co.*, 17 Fed. 671. See generally *Eaton v. Delaware &c. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513. But see *Dunn v. Grand Trunk &c. R. Co.*, 58 Maine 187, 4 Am. Rep. 267.

⁹¹ See *Southern Ry. Co. v. McNabb*, 130 Tenn. 197, 169 S. W. 757, L. R. A. 1915B, 761n.

⁹² *Ohio &c. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Ryan v. Cumberland &c. R. Co.*, 23 Pa. St. 384; *Gillshannon v. Stony Brook &c. R. Co.*, 10 Cush. (Mass.) 228. See also *Dysart v. Missouri &c. R. Co.*, 122 Fed. 228. Thus, in *Vandalia Ry. Co. v. Darby*, 60 Ind. App. 294, 298, 108 N. E. 778 (citing text), it is held that where a

ride on the trains and in the places provided for the carriage of passengers. There is, however, some diversity of opinion as to the rights of a person who has no notice of the rules of the company and is riding by permission of the employes in charge of the train, some of the cases holding that he is not a passenger, others, that he is a passenger.⁹³ We think it clear, however, that the high duty of a public carrier of passengers does not exist, at least under ordinary circumstances, unless the employe has authority to accept the person as a passenger, although the acts of the employe may relieve the person suffered to ride from the imputation of being a trespasser or intruder and impose upon the company the duty of exercising ordinary care. We do not say that such acts of an employe may not impose some duty on the company, but we do give it as our opinion that they do not impose upon the company the duty of using the highest degree of practicable care.⁹⁴

woman at the request of the conductor of a freight train entered the caboose to accompany and care for a person injured by the carrier, who was being transported to a hospital, she became, under the emergency, a passenger to whom the carrier owed the highest practical care and diligence in the operation of the train.

⁹³ *Houston &c. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; *Hanson v. Mansfield &c. R. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *Alabama &c. R. Co. v. Yarbrough*, 83 Ala. 238, 3 So. 447, 3 Am. St. 715. See also *Missouri &c. R. Co. v. Avis*, 41 Tex. Civ. App. 72, 91 S. W. 877.

⁹⁴ See *Eaton v. Railroad Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Stalcup v. Louisville &c. R. Co.*, 16 Ind. App. 584, 45 N. E. 802; *St.*

Joseph &c. R. Co. v. Wheeler, 35 Kans. 185, 10 Pac. 461; *Kansas City &c. R. Co. v. Berry*, 53 Kans. 112, 36 Pac. 53, 42 Am. St. 278; *Whitehead v. St. Louis &c. R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *Railway Co. v. Cox*, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. 583. See generally *Ohio &c. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336, and notes; *Railroad Co. v. Davenport*, 177 Ill. 110, 52 N. E. 266; *Indiana &c. Ry. Co. v. Ditto*, 158 Ind. 669, 64 N. E. 222. The text is cited in *Grimshaw v. Lake Shore &c. R. Co.*, 205 N. Y. 371, 98 N. E. 762, 40 L. R. A. (N. S.) 562, 563, Ann. Cas. 1913E, 571n, where it is held that the duty is not that owing to a passenger but is that of ordinary care owing to a licensee.

§ 2393 (1581a). **Trespassers and intruders—Illustrations.**—The term “trespasser” has been used to include persons stealing rides on trains,⁹⁵ persons seeking transportation on freight trains without the permit required by the rules of the carrier,⁹⁶ and in some instances, employes riding on trains when off duty.⁹⁷ It will not include a passenger rightfully on the train though mistakenly in the wrong coach,⁹⁸ nor, according to recent decisions, an employe of an independent contractor going to and from work on the carrier’s vehicle with permission of the operatives and acquiescence of the carrier’s general manager,⁹⁹ or a passenger on the train after his destination has been reached though a reasonable opportunity to alight had been given.¹ But it has been held that a person injured while riding on a train contrary to the carrier’s regulation is none the less a trespasser by reason of the existence of a custom of the carrier’s employes to allow such persons to ride, and evidence of the custom and the habitual disregard of the rule is not admissible in the absence of proof that the carrier had knowledge of this disregard of its rules and acquiesced therein.² Where, however, according to a general custom known to the carrier, newsboys are allowed to sell papers on street railway

⁹⁵ *Pledger v. Chicago &c. R. Co.*, 69 Nebr. 456, 95 N. W. 1057; *Gulf &c. R. Co. v. Hall*, 34 Tex. Civ. App. 535, 80 S. W. 133; *St. Louis &c. R. Co. v. Mayfield*, 35 Tex. Civ. App. 82, 79 S. W. 365. See also *Wickenberg v. Minneapolis &c. R. Co.*, 94 Minn. 276, 102 N. W. 713.

⁹⁶ *Dyche v. Vicksburg &c. R. Co.*, 79 Miss. 361, 30 So. 711. See also *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 57 L. R. A. 700; *White v. Illinois Cent. R. Co.*, 99 Miss. 651, 55 So. 593.

⁹⁷ *Lemasters v. Southern Pac. Co.*, 131 Cal. 105, 63 Pac. 128. But in some of these instances “licensee” would seem to be the correct term.

⁹⁸ *Gulf &c. R. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653, 70 S. W. 359. See also *Cincinnati &c. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. 144.

⁹⁹ *Gulf &c. R. Co. v. Lovett* (Tex. Civ. App.), 74 S. W. 570.

¹ *Fanning v. St. Louis &c. R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354. But the relation of passenger and carrier, at least, ceases after reasonable time to alight and depart.

² *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875; *Feedback v. Missouri Pac. R. Co.*, 167 Mo. 206, 66 S. W. 965; *Sands v. Southern R. Co.*, 108 Tenn. 1, 64 S. W. 478.

cars, it has been held that they should not be regarded as trespassers while thus employed unless their right to remain on the car has been terminated by a reasonable notice,³ and a command given by a conductor to a newsboy to get off of the car, which he did not hear, would not have this effect.⁴

§ 2394 (1582). **Taking passage on freight trains, hand-cars and the like.**—As we have elsewhere shown, a person can not, as a general rule, establish the relation of carrier and passenger by entering trains not intended or used for the carriage of passengers. The general rule is that persons can not rightfully take passage on freight, construction, coal trains or the like, nor on hand-cars,⁵ but some of the cases hold that permission by the subordinate agents although without authority will constitute the person a passenger,⁶ but this ruling we regard as erroneous.

³ *Indianapolis St. R. Co. v. Hockett*, 161 Ind. 196, 67 N. E. 106. Compare ante, § 2388, n 60.

⁴ *Indianapolis St. R. Co. v. Hockett*, 161 Ind. 196, 67 N. E. 106.

⁵ *Atchison &c. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822; *Smith v. Louisville &c. R. Co.*, 124 Ind. 394, 24 N. E. 753; *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875; *Planz v. Boston &c. R. Co.*, 157 Mass. 377, 32 N. E. 356; *Whitehead v. St. Louis &c. R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409, 39 Am. & Eng. R. Cas. 410; *Cleveland &c. R. Co. v. Bartram*, 11 Ohio St. 457; *Haase v. Oregon &c. R. Co.*, 19 Ore. 354, 24 Pac. 238, 44 Am. & Eng. R. Cas. 360; *Railroad Co. v. Hailey*, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549; *International &c. R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635, 2 Am. St. 521; *Gulf &c. R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982; *Railway Co. v. Black*, 87 Tex. 160, 27 S. W. 118. See In-

dianapolis &c. R. Co. v. Kennedy, 77 Ind. 507; *Connell v. Mobile &c. R. Co.* (Miss.), 7 So. 344; *Burlington &c. R. Co. v. Rose*, 11 Nebr. 177, 8 N. W. 433; *Thomas v. Chicago &c. R. Co.*, 72 Mich. 355, 40 N. W. 463.

⁶ *Everett v. Oregon &c. R. Co.*, 9 Utah 340, 34 Pac. 289; *Alabama &c. R. Co. v. Yarbrough*, 83 Ala. 238, 3 So. 447, 3 Am. St. 715. See *Whitehead v. Railroad Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *Railroad Co. v. Frazer*, 55 Kans. 582, 40 Pac. 923; *Lucas v. Milwaukee &c. R. Co.*, 33 Wis. 41, 14 Am. Rep. 735; *Lake Shore &c. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. 510. As we have elsewhere suggested the question is not whether the consent of the employe relieves the person who rides on a freight train from the imputation of being a trespasser and imposes on the company no higher duty than that of refraining from inflicting a wanton injury

A railroad company may, of course, carry passengers on its freight trains, and when it does, it assumes, to a somewhat limited extent at least, the liability of a carrier of passengers,⁷ but all persons take the risk incident to the mode of travel they adopt, not, however, risks from negligence, and one who travels on a freight train assumes the risks incident to that mode of travel, as for example risks of injury from jerks or jolts incident to the movement of freight trains.⁸

upon him, but the question is as to whether the consent of the employe can impose on the employer the extraordinary duty of a public carrier. It may be true that the consent of the employe is sufficient to require the exercise of ordinary care by the employer and yet not true that it is sufficient to require the highest practicable degree of care such as a carrier owes to one who is a passenger in all that the term implies, although there may possibly be exceptional cases. See *McGee v. Missouri Pac. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. 706; *Prince v. International &c. R. Co.*, 64 Tex. 144; *Lucas v. Milwaukee &c. R. Co.*, 33 Wis. 41, 14 Am. R. 735.

⁷ *Chicago &c. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313, 2 Am. Negl. Cas. 694; *New York &c. R. Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 1 L. R. A. 157, 7 Am. St. 451, 3 Am. Neg. Cas. 223; *Burke v. Missouri &c. R. Co.*, 51 Mo. App. 491; *Hobbs v. Texas &c. R. Co.*, 49 Ark. 357, 5 S. W. 586; *Western &c. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842. See also *Simmons v. Railroad Co.*, 41 Ore. 151, 69 Pac. 440, 1022; *Fitzgibbon v. Railway Co.*, 108 Iowa 614, 79 N. W. 477; *Greenfield v.*

Railway Co., 133 Mich. 557, 95 N. W. 546. See also where one is accepted as passenger on a freight train or special train, *Indianapolis &c. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111; *Fitzgibbon v. Chicago R. Co.*, 119 Iowa 261, 93 N. W. 276; *Texas &c. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

⁸ *Reber v. Bond*, 38 Fed. 822; *Lusby v. Atchison &c. R. Co.*, 41 Fed. 181; *Rodgers v. Choctaw &c. R. Co.*, 76 Ark. 520, 89 S. W. 468, 1 L. R. A. (N. S.) 1145n, 113 Am. St. 102; *Crine v. East Tennessee &c. R. Co.*, 84 Ga. 651, 11 S. E. 555; *Woolery v. Louisville &c. R. Co.*, 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; *Louisville &c. R. Co. v. Bisch*, 120 Ind. 549, 22 N. E. 662, 3 Am. Negl. Cas. 257; *Harris v. Hannibal &c. R. Co.*, 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111; *Young v. Missouri Pac. R. Co.* (Mo. App.), 84 S. W. 175 (citing text); *Wallace v. Western &c. R. Co.*, 98 N. Car. 494, 4 S. E. 503, 2 Am. St. 346. See also *Chicago &c. R. Co. v. Troyer*, 70 Nebr. 293, 103 N. W. 680, affirming 97 N. W. 308; *Southern R. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979; *St. Louis &c. R. Co. v. Gosnel*, 23

§ 2395 (1583). Nature of the liability as a carrier of passengers.

—There is a well-marked and wide difference between the liability of a railroad company as a common carrier of goods and as a public carrier of passengers. It is not in any sense an insurer of the safety of the persons it undertakes to carry as passengers.⁹ The reasons for the distinction have often been given and they are so obvious that it would be unnecessary to dwell upon them even if they had not been so often and so clearly presented.¹⁰

Okla. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892, 895 (citing text); and post, § 2476.

⁹ Ladd v. Foster, 31 Fed. 827; Maury v. Talmadge, 2 McLean (C. C.) 157; Little Rock &c. Co. v. Kimbro, 75 Ark. 211, 87 S. W. 121, 644; Kansas &c. R. Co. v. Miller, 2 Colo. 442; Kebbe v. Connecticut Co., 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167; Coyle v. Peoples R. Co., 7 Penn. (Del.) 454, 80 Atl. 638; Florida R. Co. v. Dorsey, 59 Fla. 260, 52 So. 963; Toledo &c. R. Co. v. Apperson, 49 Ill. 480; Chicago &c. R. Co. v. Stumps, 69 Ill. 409; Gulf &c. R. Co. v. Warlick, 1 Ind. Ter. 10, 35 S. W. 235; Jeffersonville &c. R. Co. v. Hendricks, 26 Ind. 228; Louisville &c. Tract. Co. v. Korbe, 175 Ind. 450, 93 N. E. 5, 94 N. E. 768; Fitch v. Traction Co., 124 Iowa 665, 100 N. W. 618; Chesapeake &c. R. Co. v. Burke, 147 Ky. 694, 145 S. W. 370, Ann. Cas. 1913D, 208n; Ingalls v. Bills, 9 Metc. (Mass.) 1; Glennen v. Boston &c. R. Co., 207 Mass. 497, 93 N. E. 700, 32 L. R. A. (N. S.) 470n; Sawyer v. Hannibal &c. R. Co., 37 Mo. 240, 90 Am. Dec. 382; Gilson v. Jackson &c. R. Co., 76 Mo. 282, 12 Am. & Eng. R. Cas. 132; Dougherty v. Missouri &c. R. Co., 81 Mo. 325, 51 Am. Rep. 239, 21

Am. & Eng. R. Cas. 497; Omaha St. R. Co. v. Boesen, 68 Nebr. 437, 94 N. W. 619; Bennett v. Dutton, 10 N. H. 481; Boucher v. Boston &c. R. Co., 76 N. H. 91, 79 Atl. 993, 34 L. R. A. (N. S.) 728, Ann. Cas. 1912B, 847n; Gonzales v. New York &c. R. Co., 39 How. Pr. (N. Y.) 407; Palmer v. Delaware &c. R. Co., 46 Hun. (N. Y.) 486; Camden &c. R. Co. v. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; Alden v. New York &c. R. Co., 44 N. Y. 478, 4 Am. Rep. 705; McPadden v. New York &c. R. Co., 44 N. Y. 478, 4 Am. Rep. 705; Caldwell v. New Jersey &c. Co., 47 N. Y. 282; Meir v. Pennsylvania Co., 64 Pa. St. 225, 3 Am. Rep. 581; Palmer v. Warren St. R. Co., 206 Pa. 574, 56 Atl. 49, 63 L. R. A. 507; Renneker v. South Carolina R. Co., 20 S. Car. 219, 18 Am. & Eng. R. Cas. 149; Railroad Co. v. Mitchell, 11 Heisk. (Tenn.) 400; Derring v. Virginia Ry. &c. Co., 122 Va. 517, 95 S. E. 405; Christie v. Griggs, 2 Camp. 79; Readhead v. Midland &c. R. Co., L. R. 2 Q. B. 412.

¹⁰ Crofts v. Waterhouse, 11 Moore 133, 3 Bing. 319; Christie v. Griggs, 2 Camp. 79; Johnson v. Winona &c. R. Co., 11 Minn. 296, 88 Am. Dec. 83. See generally

As a railroad carrier of passengers is not an insurer of the safety of passengers it logically follows that where there is no negligence on its part there is no liability. But as we shall hereafter see, evidence of the happening of an accident is in many cases sufficient to make a *prima facie* case in favor of an injured passenger, so that, while it is essential to a recovery that there should be negligence on the part of the carrier, it is by no means always necessary that there should be affirmative evidence of negligence, other than the happening of the accident.

§ 2396 (1584). **Accidents.**—The term “accident” is often used as meaning an occurrence “to which human fault does not contribute” and the general rule is that there is no liability for injuries resulting from such an occurrence.¹¹ But the term “accident” is also frequently used as signifying an occurrence to which human fault does contribute.¹² If we take the term

Maverick v. Eighth Ave. &c. R. Co., 36 N. Y. 378; *Hall v. Connecticut &c. R. Co.*, 13 Conn. 319; *Fuller v. Naugatuck &c. R. Co.*, 21 Conn. 557; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, 10 L. ed. 115; *Marable v. Southern R. Co.*, 142 N. Car. 557, 55 S. E. 355. But see under statute *Chicago &c. R. Co. v. Zerneck*, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. ed. 339; *Chicago &c. R. Co. v. Eaton*, 183 U. S. 589, 22 Sup. Ct. 228, 46 L. ed. 341.

¹¹ *Wabash &c. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. 193; *Terre Haute &c. R. Co. v. Clem*, 123 Ind. 15, 19, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. 303; *Lewis v. Flint &c. R. Co.*, 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790; *Deyo v. New York &c. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Loftus v. Union &c. R. Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Hoag v. Lake Shore &c. R.*, 85 Pa. St. 293, 27

Am. Rep. 653; *Crafter v. Metropolitan &c. Co.*, L. R. 1 C. P. 300; *Aston v. Heaven*, 2 Esp. 533; *Elliott Roads and Streets* (3d ed.), 788n, 1139. See also *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145; *Hayes v. Michigan &c. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410; *McKinney v. Neil*, 1 McLean (U. S. C. C.) 540; *Grote v. Chester &c. Co.*, 2 Exch. 251; *Metropolitan &c. R. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Sharp v. Powell*, L. R. 7 C. P. 253; *Blyth v. Birmingham &c. Co.*, 11 Exch. 781. We are not here speaking of the burden of proof in actions against carriers, but of liability, where it is shown that there was a pure accident.

¹² *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; 1 *Thomp. Neg.* (2d ed.) § 14. See also *Huelsenkamp v. Citizens' &c. R. Co.*, 37 Mo. 537, 90 Am. Dec. 399; *Parrott v. Wells*,

"accident" as signifying an occurrence to "which human fault does not contribute," we may safely affirm that where the defendant is not an insurer there is no liability for injuries resulting from an accident, but if we take the term "accident" as signifying an occurrence to "which human fault contributes" the conclusion stated can not be always justly affirmed. It results from the principles we have stated that as carriers of passengers are not insurers they are not liable for injuries to passengers resulting from an accident in cases where their negligence does not produce or concur in producing the accident, but they are liable if their negligence is the proximate cause of the injuries.¹³ In other words, if there is no negligence on the part of the railroad carrier there may be said to be such an accident as will exonerate it from liability,¹⁴ but if there is

15 Wall. (U. S.) 524, 21 L. ed. 206; *Ohio &c. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Laing v. Colder*, 8 Pa. St. 479; *Vaughan v. Taff &c. R. Co.*, 5 Hurst. & N. 679.

¹³ *Davis v. Chicago &c. R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. 935. Upon the question of proximate cause the court cited, *Atkinson v. Goodrich Transportation Co.*, 60 Wis. 141, 18 N. W. 764; *Block v. Milwaukee &c. R. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. 849; *Barton v. Pepin Co. &c. Society*, 83 Wis. 19, 52 N. W. 1129; *Huber v. LaCrosse &c. R. Co.*, 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583, 53 Am. St. 940; *Craven v. Smith*, 89 Wis. 119, 61 N. W. 317; *Guinard v. Knapp &c. Co.*, 90 Wis. 123, 62 N. W. 625, 48 Am. St. 901. For a good example of the application of the doctrine of proximate cause, see *Chicago &c. R. Co.*

v. Bell, 1 Kans. App. 71, 41 Pac. 209. See also *Sickles v. Missouri &c. R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493. And see for cases where it was held that it was not the proximate cause or that it could not have been foreseen, *Transportation Co. v. Harper*, 118 Ga. 672, 45 S. E. 458; *Cleveland v. Steamboat Co.*, 68 N. Y. 306, 89 N. Y. 627, 125 N. Y. 299; *Hershey v. New York &c. Ry. Co.*, 179 N. Y. S. 396; *McKinney v. New York &c. Ry. Co.*, 179 N. Y. S. 535.

¹⁴ *Perry v. Malarin*, 107 Cal. 363, 40 Pac. 489; *Kansas &c. R. Co. v. Miller*, 2 Colo. 442; *Eaton v. Wilmington City R. Co.*, 1 Boyce (24 Del.) 435, 75 Atl. 369; *Clayton v. Philadelphia &c. R. Co.* (Del. Sup. St.), 106 Atl. 577; *Ham v. Georgia R. &c. Co.*, 97 Ga. 411, 24 S. E. 152; *Chicago &c. R. Co. v. Stumps*, 69 Ill. 409; *Knight v. Portland &c. Co.*, 56 Maine 234, 96 Am. Dec. 449; *Stewart v. Boston &c. R. Co.*, 146 Mass. 605, 16 N. E. 466; *Hamil-*

negligence it will not be excused solely upon the ground that the injury was the result of an accident. It is obvious that where an injury to a passenger is caused by extraordinary floods, tempests, storms or the like, there is no liability on the part of the carrier.¹⁵ But while it is unquestionably true that a railroad carrier of passengers is not liable for injuries caused by extraordinary floods or storms it is also true that where it has knowledge of the effect of such floods or storms, as for instance, where it has knowledge that a bridge has been weakened by a freshet, it is bound to exercise care proportionate to the increased danger.¹⁶ If the accident is due to the negligence of the company in constructing or maintaining its road-bed or

ton v. West &c. R. Co., 163 Mass. 199, 39 N. E. 1010; Carroll v. Staten Island &c. Co., 58 N. Y. 126, 17 Am. Rep. 221; Alden v. New York &c. R. Co., 26 N. Y. 102, 82 Am. Dec. 401 and note; Cleveland v. New Jersey Steamboat Co., 125 N. Y. 299, 26 N. E. 327; Ayers v. Rochester R. Co., 156 N. Y. 104, 50 N. E. 960; Cleveland &c. R. Co. v. Curran, 19 Ohio St. 1; Cleveland &c. R. Co. v. Osborn, 66 Ohio St. 45, 63 N. E. 604; Texas &c. R. Co. v. Overall, 82 Tex. 247, 18 S. W. 142; Choate v. San Antonio &c. R. Co., 90 Tex. 82, 36 S. W. 247; Galveston &c. R. Co. v. Long, 13 Tex. Civ. App. 664, 36 S. W. 485; Gulf &c. R. Co. v. Stricklin (Tex.), 27 S. W. 1093.

¹⁵ Norfolk &c. R. Co. v. Marshall, 90 Va. 836, 20 S. E. 823 (citing Curtis v. Rochester &c. R. Co., 18 N. Y. 534, 75 Am. Dec. 258 and note; Railroad Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. ed. 909; Transportation Co. v. Downer, 11 Wall. (U. S.) 130, 20 L. ed. 160; Ingalls v. Bills, 50 Mass. 1, 43 Am. Dec. 346; Gillespie v. St. Louis &c.

R. Co., 6 Mo. App. 554; Long v. Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. 732); Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Ellet v. St. Louis &c. R. Co., 76 Mo. 518; International &c. R. Co. v. Halloren, 53 Tex. 46, 37 Am. Rep. 744. See generally Brehm v. Great Western &c. R. Co., 34 Barb. (N. Y.) 256; Withers v. North &c. R. Co., 27 L. J. Exch. 417; Livezey v. Philadelphia, 64 Pa. St. 106, 3 Am. Rep. 578; Palmer v. Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95, 10 S. W. 325; Galveston &c. R. Co. v. Crier, 45 Tex. Civ. App. 434, 100 S. W. 1177; American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25, 28, 6 L. R. A. (N. S.) 252, 256 (citing text).

¹⁶ Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 451, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120 (citing Hardy v. North Carolina &c. R. Co., 74 N. Car. 734); Great Western &c. R. Co. v. Braid, 1

track it may be liable, although a flood concurred in causing the accident.¹⁷ It is the duty of railroad carriers to use proper precautions and due care to provide against danger from such floods and storms as may be expected and the failure to perform this duty may constitute actionable negligence.¹⁸

§ 2397 (1585). Degree of care required of railroad passenger carriers—General rule.—It is agreed very generally that a high degree of care in regard to road-bed, tracks, cars, equipments and appliances, is required of railroad carriers and that slight negligence is such a breach of duty as will confer upon a passenger who is free from contributory negligence a cause of action.¹⁹ While the adjudged cases nearly all concur in holding

Moore P. C. (N. S.) 101. See also *Alabama &c. R. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 794; *Chesapeake &c. R. Co. v. Burke*, 147 Ky. 694, 145 S. W. 370, Ann. Cas. 1913D, 208.

¹⁷ *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458; *Bonner v. Wingate*, 78 Tex. 333, 14 S. W. 790; *Texas &c. R. Co. v. Barron*, 78 Tex. 421, 14 S. W. 698; *Sandy v. Lake St. &c. R. Co.*, 235 Ill. 194, 85 N. E. 300; *St. Louis &c. R. Co. v. Bryant*, 46 Tex. Civ. App. 601, 103 S. W. 237. See also *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202, 203 (citing text).

¹⁸ Authorities cited in preceding note. *Grote v. Chester &c. R. Co.*, 2 Exch. 251; *Philadelphia &c. R. Co. v. Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787. See generally *People v. Utica &c. Co.*, 22 Ill. App. 159; *Strouss v. Wabash &c. R. Co.*, 17 Fed. 209; *Coosa River &c. Co. v. Barclay*, 30 Ala. 120; *Norris v. Savannah &c. R. Co.*, 23 Fla. 182, 1 So. 475, 11 Am. St. 355; *Dorman*

v. Ames, 12 Minn. 451; *Miller v. Steam &c. Co.*, 10 N. Y. 431; *Black v. Charleston &c. R. Co.*, 87 S. Car. 241, 69 S. E. 230, 31 L. R. A. (N. S.) 1184n; *International &c. R. Co. v. Halloren*, 53 Tex. 46, 37 Am. Rep. 744; *Richardson v. Great Eastern &c. R. Co.*, L. R. 10 C. P. 486; *Withers v. North &c. R. Co.*, 27 L. J. N. S. Exch. 417.

¹⁹ The decisions upon these questions are very numerous, and we do not undertake to cite all of them. *Lehr v. Steinway*, 118 N. Y. 556, 23 N. E. 889; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, 10 L. ed. 115; *Indianapolis &c. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Lad v. Foster*, 31 Fed. 827; *George v. St. Louis &c. R. Co.*, 34 Ark. 613, 1 Am. & Eng. R. Cas. 294; *St. Louis &c. R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *Little Rock &c. R. Co. v. Kimbro*, 75 Ark. 211, 87 S. W. 644; *Franklin v. Southern &c. R. Co.*, 85 Cal. 63, 24 Pac. 723; *Denver &c. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954; *Central &c. R. Co. v. Perry*, 58 Ga. 461; *East Ten-*

that a very high degree of care is required of railroad carriers, and that they are responsible for injuries proximately resulting from slight negligence on their part, there is, nevertheless, much difference in the statements of the rule in the opinions of the courts.²⁰ It seems to us that the expressions in some of the

nessee &c. R. Co. v. Miller, 95 Ga. 738, 22 S. E. 660; Grand Rapids &c. R. Co. v. Boyd, 65 Ind. 526; Louisville &c. R. Co. v. Pedigo, 108 Ind. 481, 8 N. E. 627; Lake Erie &c. R. Co. v. Huffman, 177 Ind. 126, 97 N. E. 434, Ann. Cas. 1914C, 1272n; Gulf &c. R. Co. v. Warlick, 1 Ind. Ter. 10, 35 S. W. 235; Moore v. Des Moines &c. R. Co., 69 Iowa 491, 30 N. W. 51, 27 Am. & Eng. R. Cas. 315; Hanson v. Mansfield &c. R. Co., 38 La. Ann. 111, 58 Am. Rep. 160; Libby v. Maine &c. R. Co., 85 Maine 34, 26 Atl. 943, 20 L. R. A. 812; Maxfield v. Maine Cent. R. Co., 100 Maine 79, 60 Atl. 710; Baltimore &c. R. Co. v. State, 60 Md. 449; White v. Fitchburg R. Co., 136 Mass. 321, 18 Am. & Eng. R. Cas. 140; Clark v. Chicago &c. R. Co., 127 Mo. 197, 29 S. W. 1013; Bryan v. Missouri &c. R. Co., 32 Mo. App. 228; Hamilton v. Great Falls &c. R. Co., 17 Mont. 334, 42 Pac. 860; Taylor v. Grand Trunk &c. R. Co., 48 N. H. 304, 2 Am. Rep. 229; Klein v. Jewett, 26 N. J. Eq. 474; Jewett v. Klein, 27 N. J. Eq. 550; McClenaghan v. Brock, 5 Rich. L. (S. Car.) 17; Fort Worth &c. R. Co. v. Kennedy (Tex.), 35 S. W. 335; St. Louis &c. Ry. Co. v. Tittle (Tex. Civ. App.), 115 S. W. 640, 641 (citing text); Trow v. Vermont &c. R. Co., 24 Vt. 487, 58 Am. Dec. 191; Williams v. Spokane &c. Co., 39 Wash. 77, 80 Pac.

1100; Carrico v. West Va. &c. R. Co., 35 W. Va. 389, 14 S. E. 12, 52 Am. & Eng. R. Cas. 393; Kennedy v. Chesapeake &c. R. Co., 68 W. Va. 589, 70 S. E. 359; Bartley v. Western Md. Ry. Co., 81 W. Va. 795, 95 S. E. 443; Chamberlain v. Milwaukee &c. R. Co., 7 Wis. 425. But see as to slight negligence or omission, St. Louis &c. R. Co. v. Purifoy, 99 Ark. 366, 138 S. W. 631.

²⁰ We cannot comment in detail upon the different forms in which the rule has been expressed, and content ourselves with a reference to the authorities. Palmer v. Delaware &c. Co., 120 N. Y. 170, 24 N. E. 302, 17 Am. St. 629; Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 468, 486, 14 L. ed. 502; Mackoy v. Missouri &c. R. Co., 5 McCray (U. S.) 538; Maury v. Talmadge, 2 McLean (U. S.) 157; Indianapolis &c. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Cavin v. Southern Pac. Co., 136 Fed. 592, 144 Fed. 348; St. Louis &c. R. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; Fuller v. Naugatuck &c. R. Co., 21 Conn. 557; Toledo &c. R. Co. v. Conroy, 68 Ill. 560; Chicago &c. R. Co. v. Hazzard, 26 Ill. 373; Crauf v. Chicago City R. Co., 235 Ill. 262, 85 N. E. 235; Indiana Union Trac. Co. v. Keiter, 175 Ind. 268, 92 N. E. 982; Kellow v. Central &c. R. Co., 68

cases are too strong since they convey the meaning that the carrier is liable absolutely and at all events. We do not doubt that the carrier is bound to exercise the highest practicable degree of care, or, in other words, the utmost or highest care consistent with the practical operation of the business, and that the failure to exercise such care constitutes actionable negligence,²¹ when injury proximately results therefrom but we do

Iowa 470, 27 N. W. 466; Louisville &c. R. Co. v. Park, 96 Ky. 580, 29 S. W. 455; Railway Co. v. Vivion, 19 Ky. L. 580, 41 S. W. 580; Keith v. Pinkham, 43 Maine 501, 69 Am. Dec. 80; Gardner v. Boston &c. R. Co., 204 Mass. 213, 90 N. E. 534; Pitcher v. Old Colony &c. R. Co., 196 Mass. 69, 81 N. E. 876, 13 L. R. A. (N. S.) 481n, 124 Am. Rep. 513, 12 Ann. Cas. 886; Sawyer v. Hannibal &c. R. Co., 37 Mo. 240, 90 Am. Dec. 382; Gilson v. Railway Co., 76 Mo. 282; Holland v. Railway Co., 105 Mo. App. 117, 79 S. W. 508; McClary v. Sioux City &c. R. Co., 3 Nebr. 44, 19 Am. Rep. 631; Boss v. Providence &c. R. Co., 15 R. I. 149, 1 Atl. 9; Bosworth v. Railroad, 25 R. I. 202, 55 Atl. 490; Dillingham v. Wood, 8 Tex. Civ. App. 71, 27 S. W. 1074; Gulf &c. R. Co. v. Stricklin (Tex.), 27 S. W. 1093; Texas &c. R. Co. v. Orr (Tex.), 31 S. W. 696; Nashville &c. R. Co. v. Elliott, 41 Tenn. 611, 78 Am. Dec. 506; Virginia &c. R. Co. v. Sanger, 15 Grat. (Va.) 230; Searle v. Railway Co., 32 W. Va. 370, 9 S. E. 248; Perkins v. Monongahela Val. Trac. Co., 81 W. Va. 781, 95 S. E. 797; Ford v. London &c. R. Co., 2 Fost. & F. 730; Burns v. Cork &c. R. Co., 13 Irish C. L. R. 543; Bridge v. Grand Junction &c. R. Co., 3 Mees & W. 244; 3

Thomp. Neg. (2d ed.), § 2722, et seq. Many of the authorities are reviewed, and various statements of the rule referred to in Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202, where the statement that "the utmost degree of care and prudence" is required, is preferred. Various statements of the rule are also quoted in the note to Omaha St. R. Co. v. Boesen, 74 Nebr. 764, 105 N. W. 303, 4 L. R. A. (N. S.) 122n, and cases approving certain instructions are therein cited.

²¹ Dunlap v. Steamboat Reliance, 2 Fed. 249; Mackoy v. Missouri Pac. R. Co., 18 Fed. 236; Van de Venter v. Chicago &c. R. Co., 26 Fed. 32; Central of Georgia R. Co. v. Robertson, 203 Ala. 358, 83 So. 102; Pittsburgh &c. R. Co. v. Thompson, 56 Ill. 138; Chicago &c. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204; North Chicago &c. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958; Bedford &c. R. Co. v. Rainbolt, 99 Ind. 551, 559; Cloud v. Kansas &c. Trac. Co., 103 Kans. 249, 173 Pac. 338; Dunn v. Grand Trunk &c. R. Co., 58 Maine 187, 4 Am. Rep. 267; Oviatt v. Dakota &c. R. Co., 43 Minn. 300, 45 N. W. 436; Gilson v. Jackson County &c. R. Co., 76 Mo. 282; Furnish v. Missouri &c. R. Co., 102 Mo. 438, 13

not believe that a carrier is bound to anticipate and provide against all occurrences which may be conceived by the mind of man. If the highest practicable degree of care is exercised there is not negligence, although there may be an occurrence resulting in an injury to a passenger.²² Every person who travels, no matter by what mode of conveyance, assumes some risk,²³ and if the negligence of the carrier does not add to that risk there is no liability for injuries received by the traveler. The expressions in some of the opinions break down the distinction between common carriers of things and public carriers of passengers, relieve the passenger from all risk and put the entire risk upon the carrier, and this we regard as erroneous. The rule is that where the injury is attributable to a pure accident

S. W. 1044, 22 Am. St. 781; Delaware &c. R. Co. v. Dailey, 37 N. J. L. 526. The text is cited in Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202, 207. Every possible precaution against danger and accident is not necessarily required. Libby v. Railroad, 85 Maine 34, 26 Atl. 943, 20 L. R. A. 812. See also Craighead v. Railroad, 123 N. Y. 391, 25 N. E. 387. And, perhaps it would be better to leave the word "degree" out in stating the rule, but it is used in nearly all the cases.

²² An instruction not limiting the care required to such as is practicable, or consistent with the practical operation, has been held erroneous. Tri-city R. Co. v. Gould, 217 Ill. 317, 75 N. E. 493; North Chicago &c. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793. See also St. Louis &c. R. Co. v. Sweet, 57 Ark. 287, 21 S. W. 587; Colorado &c. R. Co. v. McGeorge, 46 Colo. 15, 102 Pac. 747, 133 Am. St. Rep. 43, 17 Ann. Cas. 880; Libby v. Railroad, 85 Maine 34, 26 Atl. 943, 20

L. R. A. 812; Glennen v. Boston &c. R. Co., 207 Mass. 497, 93 N. E. 700, 32 L. R. A. (N. S.) 410n; Wanzer v. Chippewa &c. R. Co., 108 Wis. 319, 84 N. W. 423. Compare Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049.

²³ McKinney v. Neil, 1 McLean (U. S.) 540. It has been held that where a person with full knowledge becomes a passenger in trains running over a new and unfinished road, he assumes the risks incident to travel over such a road. San Antonio &c. R. Co. v. Robinson, 79 Tex. 608, 15 S. W. 584. But compare Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747. See generally Railroad Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; Stody v. Railway Co., 124 Mich. 420, 83 N. W. 26; Railroad Co. v. Bell, 100 Ky. 203, 38 S. W. 3; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; Railway Co. v. Dawson, 98 Va. 577, 36 S. E. 996; Sprague v. Southern R. Co., 92 Fed. 59.

the carrier is not liable and this is an assertion that there are cases of accidental injuries not due to the act of God, for an injury caused by the act of God will not even constitute a cause of action against an insurer such as common carriers of goods always are where there is no protecting contract. The Supreme Court of Indiana, in recent cases, has disapproved the rule as formerly stated by it, and still followed by nearly all of the courts, to the effect that a high degree of care is required, and now holds that it should be stated as ordinary and reasonable care under the circumstances and in view of the dangers to be apprehended.^{23a}

§ 2398 (1586). Duty as to road-bed and tracks.—It is unnecessary to dwell at length upon the duty of a railroad carrier respecting its road-bed and tracks, for the general rule requiring a carrier to exercise the highest practicable degree of care obviously extends to and embraces the road-bed and track. Slight negligence in constructing or maintaining the road-bed and tracks will render the company liable to a passenger without fault who sustains an injury proximately caused by such negligence. It is firmly settled that if the carrier omits to exercise the highest degree of practicable care in making its road-bed, tracks, bridges and the like safe for travel, or omits to exercise that degree of care in keeping them safe for use it is guilty of negligence.²⁴

^{23a} *Indiana Union Trac. Co. v. Berry*, 188 Ind. 514, 121 N. E. 655; *Pittsburgh &c. Ry. Co. v. Arnott* (Ind.), 126 N. E. 13.

²⁴ *Arkansas Cent. R. Co. v. Janson*, 90 Ark. 494, 119 S. W. 648; *Kansas &c. R. Co. v. Miller*, 2 Colo. 442; *Kansas &c. R. Co. v. Lundin*, 3 Colo. 94; *Florida &c. R. Co. v. Webster*, 25 Fla. 394, 5 So. 714; *Peoria &c. R. Co. v. Reynolds*, 88 Ill. 418; *Chicago &c. R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960; *Louisville &c. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. 60 (bridge); *Union &c. R. Co. v. Hand*, 7 Kans.

380; *Southern &c. R. Co. v. Walsh*, 45 Kans. 653, 26 Pac. 45; *McFee v. Vicksburg &c. R. Co.*, 42 La. Ann. 790, 7 So. 720; *Jackson v. Natchez &c. R. Co.*, 114 La. Ann. 981, 38 So. 701, 108 Am. St. 366 (bridge); *Libby v. Maine &c. R. Co.*, 85 Maine 34, 26 Atl. 943, 20 L. R. A. 812; *McElroy v. Nashua &c. R. Co.*, 58 Mass. 400, 50 Am. Dec. 794; *Taylor v. Grand Trunk &c. R. Co.*, 48 N. H. 304; *Gonzales v. New York &c. R. Co.*, 39 How. Pr. (N. Y.) 407; *Stodder v. New York &c. R. Co.*, 50 Hun. 221, 121 N. Y. 655; *Birmingham v. Rochester &c. R. Co.*, 59 Hun. 583, 14 N. Y. S. 13; *East*

But such negligence, to be actionable and justify a recovery, must, of course, be a proximate cause of the injury complained of.²⁵ Many illustrative cases and instances of the application of the general rule to road-bed, tracks and the like, will be found in the chapter on injuries to passengers.

§ 2399 (1587). Duty as to engines, cars, equipments and appliances.—It is not necessary to do more than say that the rule as to the degree of care and diligence required of railroad carriers imposes upon them the duty of exercising the highest degree of practicable care to provide and keep safe for use engines, cars, equipments and appliances, and to refer to a few of the great number of cases which assert and enforce the general rule.²⁶ But while there is no substantial diversity of opinion

Tennessee &c. R. Co. v. Gurley, 12 Lea (Tenn.) 46, 17 Am. & Eng. R. Cas. 568; St. Louis &c. R. Co. v. Boyer, 44 Tex. Civ. App. 311, 97 S. W. 1070 (bound to highest degree of care in keeping its tracks in condition for the operation of its trains); Pennsylvania &c. R. Co. v. MacKinney, 124 Pa. St. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. 601, 37 Am. & Eng. R. Cas. 153; Baltimore &c. R. Co. v. Noell, 32 Grat. (Va.) 394. See also and compare Le Dean v. Northern Pac. R. Co., 19 Idaho 711, 115 Pac. 502, 34 L. R. A. (N. S.) 725, Ann. Cas. 1912C, 438n. As to the duty to fence, see Blair v. Milwaukee &c. R. Co., 20 Wis. 254; Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527; Louisville &c. R. Co. v. Hendricks, 128 Ind. 462, 28 N. E. 58; Terre Haute &c. R. Co. v. Sheeks, 155 Ind. 74, 94, 56 N. E. 434 (citing text).

²⁵ For cases in which negligence of the company as to roadbed or tracks was held a proximate cause,

see Clyde v. Richmond &c. R. Co., 59 Fed. 394; Scott v. Metropolitan St. R. Co., 138 Mo. App. 196, 120 S. W. 151; Bonner v. Wingate, 78 Tex. 333, 14 S. W. 790.

²⁶ Mackey v. Baltimore &c. R. Co., 8 Mackey (D. C.) 282; Peck v. Neil, 3 McLean (U. S.), 22; Taylor v. Pennsylvania Co., 50 Fed. 755; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Irwin v. Louisville &c. R. Co., 161 Ala. 489, 50 So. 62, 135 Am. St. 153, 18 Ann. Cas. 772; Arkansas &c. R. Co. v. Jamson, 90 Ark. 494, 119 S. W. 648; Arkansas &c. R. Co. v. Canman, 52 Ark. 517, 13 S. W. 280; Hall v. Connecticut &c. R. Co., 13 Conn. 319; Galena &c. R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Pershing v. Chicago &c. R. Co., 71 Iowa 561, 32 N. W. 488, 34 Am. & Eng. R. Cas. 405; Dorn v. Chicago &c. R. Co., 154 Iowa 140, 134 N. W. 855; Topeka &c. R. Co. v. Higgs, 38 Kans. 375, 16 Pac. 667, 5 Am. Rep. 754; Hanson v. Mansfield &c. R. Co., 38 La. Ann. 111, 58 Am. Rep. 162; Ed-

as to the general rule there is conflict of opinion upon one phase of the question, namely, as to what constitutes the highest degree of practicable care. Some of the decisions affirm that the carrier is liable, although the defect is a latent one and undiscoverable, and even though the carrier has used the highest care in making inspections and searching for defects.²⁷ But reason and authority are opposed to the doctrine of the cases to which we have referred. The true rule is that if the defects are latent and such as can not be discovered by the exercise of the highest degree of care, skill and diligence the carrier is not liable.²⁸ It is clear that the rule just stated is the sound one,

wards v. Lord, 49 Maine 279; Western Md. R. Co. v. State, 95 Md. 637, 53 Atl. 969; Jacobus v. St. Paul &c. R. Co., 20 Minn. 125, 18 Am. Rep. 360; Schultz v. Pacific &c. R. Co., 36 Mo. 13; Nashville &c. R. Co. v. Jones, 9 Heisk. (Tenn.) 27; East Line &c. R. Co. v. Smith, 65 Tex. 167; Frish v. Reigle, 11 Grat (Va.) 697, 62 Am. Dec. 666; Sharp v. Grey, 9 Bing. 457; Germain v. Montreal &c. R. Co., 6 Low. Can. 172; Thatcher v. Great Western &c. R. Co., 4 U. C. C. P. 543. See also as to what is included under this rule, Bunes v. Penna. R. Co., 233 Pa. St. 304, 82 Atl. 246, Ann. Cas. 1913B 811n; Adams v. Portland Ry. &c. Co., 87 Ore. 602, 171 Pac. 219. L. R. A. 1918D, 526; Louisville &c. R. Co. v. McKenna, 7 Lea. (Tenn.) 313; San Antonio Trac. Co. v. Flory, 45 Tex. Civ. App. 233, 100 S. W. 200, aff'd in 102 Tex. 529; Texas &c. R. Co. v. Leakey, 39 Tex. Civ. App. 584, 87 S. W. 1168; Cogswell v. West &c. R. Co., 5 Wash. 46, 31 Pac. 411.

²⁷ Alden v. New York &c. R. Co., 26 N. Y. 102, 82 Am. Dec. 401; Hegeman v. Western &c. R. Co.,

13 N. Y. 9, 64 Am. Dec. 517; Brehm v. Great Western &c. R. Co., 34 Barb. (N. Y.) 256. See also, Siemsen v. Oakland &c. Elec. Ry., 134 Cal. 494, 66 Pac. 672; Morgan v. Southern Pac. R. Co. (Cal. App.), 187 Pac. 74; Dibbert v. Metropolitan Invest. Co., 158 Wis. 69, 147 N. W. 3, 148 N. W. 1097, L. R. A. 1915D, 305n., Ann. Cas. 1916E, 924 and note to Morgan v. Chesapeake &c. R. Co., in 15 L. R. A. (N. S.) 790. But compare McPadden v. New York &c. R. Co., 44 N. Y. 478, 4 Am. Rep. 705; Carroll v. Staten Island &c. R. Co., 58 N. Y. 126, 17 Am. Rep. 221.

²⁸ Anthony v. Louisville &c. R. Co., 27 Fed. 724; Carter v. Kansas City &c. R. Co., 42 Fed. 37; Central of Georgia Ry. Co. v. Robertson, 203 Ala. 358, 83 So. 102; Derwort v. Loomer, 21 Conn. 245; Galena &c. R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Frink v. Potter, 17 Ill. 406; Toledo &c. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Frink v. Coe, 4 G. Greene (Iowa) 555, 61 Am. Dec. 141; Edwards v. Lord, 49 Maine 279; Stockton v. Frey, 4 Gil. (Md.) 406, 45 Am. Dec.

for a different rule would make a carrier of passengers an insurer to the same extent as a common carrier of goods, and as all the well-considered cases affirm that a carrier of passengers is not an insurer, it can not be true that a carrier of passengers is liable for injuries caused by defects undiscoverable by human care, diligence and skill. The carrier must make proper inspection and apply appropriate tests. A carrier who omits to make proper inspections and use the necessary tests is guilty of negligence and can not successfully defend upon the ground that the cars, equipments, appliances or the like were purchased of reputable manufacturers.²⁹

138; *Ingalls v. Bills*, 42 Mass. 1, 35 Am. Dec. 339; *Buckland v. New York &c. R. Co.*, 181 Mass. 3, 62 N. E. 955; *Sawyer v. Hannibal &c. R. Co.*, 37 Mo. 240, 90 Am. Dec. 382; *McPadden v. New York &c. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705; *Caldwell v. New Jersey &c. R. Co.*, 47 N. Y. 282; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581; *Neslie v. Second &c. R. Co.*, 113 Pa. St. 300, 6 Atl. 72; *Fredericks v. Northern &c. R. Co.*, 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306 and note; *Nashville &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *Texas &c. R. Co. v. Buckalew* (Tex.), 34 S. W. 165; *Missouri &c. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325; *Roanoke &c. R. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 19 L. R. A. (N. S.) 316, 128 Am. St. 971; *Croghan v. New York &c.*, 18 Alb. L. J. 70; *Gilbert v. North London &c. R. Co.*, 1 *Cab-babe & E.* 31; *Dube v. Queen, The*, 3 Can. Exch. 147, 30 Can L. Times (Notes) 30; *Readhead v. Midland*

&c. R. Co., L. R. A. 2 Q. B. 412, L. R. 4 Q. B. 379; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Blamires v. Lancashire &c. R. Co.*, 42 L. J. Ex. 182, L. R. 8 Exch. 283. See also generally as to inspection and to same effect as above. *St. Louis &c. R. Co. v. Leflar*, 104 Ark. 528, 149 S. W. 530; *Indiana Un. Trac. Co. v. Scribner*, 47 Ind. App. 621, 93 N. E. 1014; *Chesapeake &c. R. Co. v. Morgan*, 129 Ky. 731, 112 S. W. 859; *Proud v. Phila &c. R. Co.*, 64n. J. L. 702, 46 Atl. 710, 50 L. R. A. 468; note in *Ann. Cas.* 1916E, 932, et. seq.

²⁹ *Robinson v. New York &c. R. Co.*, 20 Blatch. (U. S.) 338; *Pendleton v. Kinsley*, 3 Cliff. (U. S.) 416; *McGuire v. Steamship Golden Gate*, 1 McAllister (U. S.) 104; *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234; *Gillenwater v. Madison &c. R. Co.*, 5 Ind. 340, 61 Am. Dec. 101; *Cleveland &c. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Louisville &c. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. 60; *Birmingham v. Rochester &c. R. Co.* 59 Hun 583, 14 N. Y. S.

§ 2400 (1588). Duty to provide and equip trains with modern and improved appliances.—A railroad carrier is bound to exercise a high degree of care to secure and use the most improved machinery and appliances. It can not, perhaps, be said that there is an absolute duty to adopt the latest improvements, but a very high degree of care in that regard is required.⁸⁰ It is not, however, negligence on the part of a railroad company not to adopt new and untried inventions.⁸¹ Failure to equip the dressing-

13; *Nashville &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *Texas &c. R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406; *Grote v. Chester &c. R. Co.*, 2 Exch. 25; *Pym. v. Great Northern &c. R. Co.*, 2 Fost. & F. 619; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Gaiser v. Niagara &c. R. Co.*, 19 Ont. L. R. 31. See also *Siemens v. Oakland &c. Ry.*, 134 Cal. 494, 66 Pac. 672; *Terre Haute &c. R. Co. v. Sheeks*, 155 Ind. 74, 94, 56 N. E. 434 (citing text); *Chesapeake &c. R. Co. v. Morgan*, 129 Ky. 731, 112 S. W. 859; *Jackson v. Natchez &c. R. Co.*, 114 La. Ann. 982, 38 So. 701, 70 L. R. A. 294, 108 Am. St. 366; *Kingman v. Lynn &c. R. Co.*, 181 Mass. 387, 64 N. E. 79; *Gerlach v. Detroit United Ry.*, 171 Mich. 474, 137 N. W. 256; *Palmer v. Delaware &c. Co.*, 120 N. Y. 170, 24 N. E. 302, 17 Am. St. 629; *Texas &c. R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406. But see contra, *Grand Rapids &c. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

⁸⁰ *Wallace v. Wilmington &c. R. Co.*, 8 Hous. (Del.) 529, 18 Atl. 818; *Louisville &c. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902, 34 Am. & Eng. R. Cas. 417; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 489, 13 Am. St. 175; *Val-*

ente v. Sierra R. Co., 151 Cal. 534, 91 Pac. 481. See also *Central of Georgia Ry. Co. v. Robertson*, 203 Ala. 358, 83 So. 103; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581; *Railway Co. v. Young*, 9 Fed. 709; *Ozanne v. Illinois Cent. R. Co.*, 151 Fed. 900; *Steinweg v. Erie R. Co.*, 43 N. Y. 123, 3 Am. Rep. 673; *Texas &c. R. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. 797; *Johnson v. Gulf &c. R. Co.*, 2 Tex. Civ. App. 139, 21 S. W. 274; *Huston &c. R. Co. v. Swancey* (Tex. Civ. App.), 128 S. W. 677. Compare *Railway Co. v. Orton*, 67 Kans. 848, 73 Pac. 63; *Wynn v. Central Park &c. R. Co.*, 133 N. Y. 575, 30 N. E. 721; *Central Vt. R. Co. v. Bateman*, 75 Fed. 1021.

⁸¹ *Georgia &c. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764; *Valente v. Sierra R. Co.*, 151 Cal. 534, 91 Pac. 481; *Warren v. Fitchburg R. Co.*, 90 Mass. 227, 85 Am. Dec. 700; *Le Barron v. East Boston &c. Co.*, 93 Mass. 312, 87 Am. Dec. 717; *Oviatt v. Dakota &c. R. Co.*, 43 Minn. 300, 45 N. W. 436; *Steinweg v. Erie &c. R. Co.*, 43 N. Y. 123, 3 Am. Rep. 673. See also *Louisville &c. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902; *Pershing v. Chicago &c. R. Co.*, 71 Iowa 561, 32 N. W. 488;

room of a sleeping car with seats and handholds has been held not to constitute negligence per se.⁸²

Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Trap-hagen v. Erie R. Co., 73 N. J. L. 759; Mid. R. Co. v. Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797; International &c. R. Co. v. Welch, 86 Tex. 203, 24 S. W. 390, 40 Am. St. 829.

⁸² Ozanne v. Illinois Cent. R. Co., 151 Fed. 900. In this case the court said: "We think the rule is that while a carrier of passengers must use the utmost diligence and care in providing reasonably safe cars, etc., for the persons it carries, such carrier is not an insurer of the safety of its passengers in the absolute sense. It has discharged its duty to its passengers in respect to its cars and trains when it has supplied the best instrumentalities that a highly prudent person would have supplied in the same business in the then known condition of the art and business of doing so. But whilst the carrier must rigidly perform all of these duties, the natural laws of motion superadd risks which the carrier cannot always guard against, even by the use of the utmost care, and such risks as those the passenger must be supposed to assume. The railroad track cannot always be straight. The transit of its trains must be rapid, and the swing of a car is inevitable when the train passes over a curve. This is unavoidable, and the consequences of it is one of the risks we have referred to. To say the least, the testimony in this case is over-

whelming, if indeed it is not entirely uncontradicted, that the defendant in respect to its cars, its trains, and the management thereof, came up to the standard of duty just indicated. In any event, the testimony is clear that no sort of negligence can fairly be imputed to the defendant, although, as we have seen, it is essential to entitle a plaintiff to recover to show, by substantive proof, that there was some negligence. It may not be inappropriate to remark that whilst the carrier can never, as between itself and the passenger, transfer nor shift its duty to the sleeping-car company, yet the carrier's duties relate to safe transportation. It is not commonly supposed, nor has it ever been ruled, that the carrier is under any duty to provide dressing rooms for its passengers. The public know that the sleeping-car company does that, and is paid for that convenience. Hence, if the instrumentalities of transportation are all inherently safe, and no negligence is shown, the carrier has performed its duty, and it may well be questioned in some future litigation whether the carrier can be held bound to see that the sleeping car company affords the highest type of convenient dressing rooms for any class of passengers who, in respect to this matter, are exclusively its patrons." But see Creason v. St. Louis &c. R. Co., 149 Mo. App. 223, 130 S. W. 445.

§ 2401 (1588a). **Duty to make provisions for feeding passengers en route.**—It is also said that another duty of carriers of passengers is to stop at the usual places and to allow the usual intervals for refreshment of passengers or make other provisions therefor, and they can not at their mere caprice vary or annul these accommodations, for every passenger is understood to contract for the usual reasonable accommodations.³³ Where a stop is made for this purpose it is the duty of the carrier to give timely warning of an intention to start the train.³⁴ The obligation in this particular is usually discharged when the carrier exercises care to furnish an opportunity to those in ordinary physical condition to procure food for themselves. It is not ordinarily the duty of the carrier to convey food to infirm passengers.³⁵

§ 2402 (1589). **Care required in operation of trains.**—It is the duty of a railroad carrier to provide its trains with a sufficient number of competent persons to properly operate and manage them, but the carrier is not, of course, excused from liability to passengers injured by the negligence of its employes, although it may have exercised due care in selecting them. The rule in such cases is that for the negligent or tortious acts of its employes a railroad company is liable to a passenger injured by

³³ See *Dodge v. Boston &c. Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. 541; *Peniston v. Railroad Co.*, 34 La. Ann. 777, 44 Am. Rep. 444; *Jeffersonville &c. R. Co. v. Riley*, 39 Ind. 568. But we do not think it can be said that there is any absolute duty to stop at regular meal hours, three times a day, for instance, or the like, or on a short journey, less, for instance, than half a day, at least when the company has not held itself out as so doing.

³⁴ *State v. Grand Trunk R. Co.*, 58 Maine 176, 4 Am. Rep. 258;

Mitchell v. Railroad Co., 30 Ga. 22; *Pitcher v. Railroad Co.*, 55 Hun 604, 8 N. Y. S. 389. See also *Atchison &c. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729.

³⁵ *Texas &c. R. Co. v. Harrington*, 44 Tex. Civ. App. 386, 98 S. W. 653. See as to whether carrier is under duty in regard to safe way to eating house. *Alabama &c. R. Co. v. Godfrey*, 156 Ala. 202, 47 So. 185, 130 Am. St. Rep. 76; *Watson v. Oxanna Land Co.*, 92 Ala. 320, 8 So. 770; *East Tenn. &c. R. Co. v. Watson*, 94 Ala. 634, 10 So. 228; *Chicago &c. R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901,

such wrongful acts.³⁶ It is not necessary to do much more than suggest that the rule is that a railroad carrier is under an obligation to exercise due care in all matters relating to the management of the trains on which passengers are carried. Thus, proper signals must be given at places and under circumstances where signals are required for the protection of passengers.³⁷

Atchinson &c. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; *Dillingham v. Teeling* (Tex.), 24 S. W. 1094; *Texas &c. R. Co. v. Mangum*, 68 Tex. 342, 4 S. W. 607.

³⁶ See *Injuries to Passengers*, post Chapter LXXVIII. *Holladay v. Kennard*, 12 Wall. (U. S.) 254, 20 L. ed. 390; *New Jersey &c. R. Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. ed. 1049; *New Orleans &c. R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109, 33 L. ed. 919; *Eddy v. Wallace*, 49 Fed. 801; *Kansas &c. R. Co. v. Sanders*, 98 Ala. 293, 13 So. 57, 58 Am. & Eng. R. Cas. 140; *Murray v. Railroad*, 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539; *Gasway v. Atlanta &c. R. Co.*, 58 Ga. 216; *Johnson v. Chicago &c. R. Co.*, 58 Iowa 348, 12 N. W. 329, 8 Am. & Eng. R. Cas. 206; *Way v. Chicago &c. R. Co.*, 73 Iowa 463, 35 N. W. 525; *Louisville &c. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530, 7 Am. St. 600; *Goddard v. Grand Trunk &c. R. Co.*, 57 Maine 202, 2 Am. Rep. 39; *Western &c. R. Co. v. Stanley*, 61 Md. 266, 48 Am. Rep. 9; *Ramsden v. Boston &c. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543, 8 Am. St. 648; *Stewart v. Brooklyn &c. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185; *Carpenter v. Boston &c. R. Co.*, 97 N. Y. 494,

49 Am. Rep. 540; *Smith v. Manhattan &c. R. Co.*, 45 N. Y. St. 865, 18 N. Y. S. 759; *Railroad Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323; *Dinwiddie v. Louisville &c. R. Co.*, 9 Lea (Tenn.) 309, 15 Am. & Eng. R. Cas. 483; *Springer &c. Co. v. Smith*, 16 Lea (Tenn.) 498, 1 S. W. 280; *Billingham v. Ohio &c. R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. 827, 51 Am. & Eng. R. Cas. 222; *Craker v. Chicago &c. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Crofts v. Waterhouse*, 3 Bing. 319.

³⁷ *Alabama &c. R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403, 18 Am. & Eng. R. Cas. 194, (but failure to give signals must be a proximate cause of the injury complained of); *Railroad Co. v. Sanders*, 98 Ala. 293, 13 So. 57; *Sonier v. Boston &c. R. Co.*, 141 Mass. 10, 6 N. E. 84; *Clark v. Railroad*, 127 Mo. 197, 29 S. W. 1013; *Malcolm v. Richmond &c. R. Co.*, 106 N. Car. 63, 11 S. E. 187, 44 Am. & Eng. R. Cas. 379; *Thirteenth St. &c. R. Co. v. Boudrou*, 92 Pa. St. 475, 37 Am. Rep. 707, 2 Am. & Eng. R. Cas. 30; *Gulf &c. R. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614. See also *Grand Trunk Railway Co. v. Walker*, 154 U. S. 653, 14 Sup. Ct. 1189, 25 L. ed. 977. Passengers cannot, however, found an action upon the failure to give a

Improperly coupling cars,³⁸ improperly leaving or permitting switches to be left open,³⁹ failure to stop when necessary to avoid danger of collision with animals or with trains, vehicles or other objects⁴⁰ are instances wherein carriers have been held

signal unless, under the circumstances of the particular case, signals are necessary for their protecting, for as a general rule, the law does not require signals to be given for the protection or safety of passengers. Nor can a passenger maintain an action upon the ground that there was a failure to give a signal unless such failure was the proximate cause of his injury. *Chicago &c. R. Co. v. Bell*, 1 Kans. App. 71, 41 Pac. 209. See generally *Central &c. R. Co. v. Perry*, 58 Ga. 461; *South &c. R. Co. v. Thompson*, 62 Ala. 494; *Central &c. R. Co. v. Letcher*, 69 Ala. 106, 44 Am. Rep. 505, 12 Am. & Eng. R. Cas. 115; *Memphis &c. R. Co. v. Copeland*, 61 Ala. 376.

³⁸ *Lent v. New York &c. R. Co.*, 120 N. Y. 467, 31 N. Y. S. 538; *Chicago &c. R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W. 853; *Hannibal &c. R. Co. v. Martin*, 111 Ill. 219; *Cotchett v. Savannah &c. R. Co.*, 84 Ga. 687, 11 S. E. 553; *Douglas &c. R. Co. v. Swindle*, 2 Ga. App. 550, 59 S. E. 600. See also *Stoody v. Detroit &c. R. Co.*, 124 Mich. 420, 83 N. W. 26; *Cos-tikyan v. Rome &c. R. Co.*, 35 N. Y. St. 163, 12 N. Y. S. 683; *Lane v. Spokane &c. R. Co.*, 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. 821; *Harden v. Chicago &c. R. Co.*, 102 Wis. 213, 78 N. W. 424.

³⁹ *Louisville &c. R. Co. v. Kingman*, 18 Ky. L. 82, 35 S. W. 264;

Hamilton v. Great Falls &c. R. Co., 17 Mont. 334, 42 Pac. 860. See *Redfield v. Oakland &c. R. Co.*, 110 Cal. 277, 42 Pac. 822; *Fogel v. San Francisco &c. R. Co.*, 110 Cal. xvii, 42 Pac. 565; *Washington v. Spokane &c. R. Co.*, 13 Wash. 9, 42 Pac. 628; *Union Pac. R. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. ed. 1003. In *Koetter v. Manhattan &c. R. Co.*, 36 N. Y. St. 611, 13 N. Y. S. 458, the carrier was held liable where a switch was changed by a stranger, but the act was done in the presence of a brakeman.

⁴⁰ *East Tennessee &c. R. Co. v. Bayliss*, 75 Ala. 466, 77 Ala. 429, 54 Am. Rep. 49; *East Tennessee &c. R. Co. v. Deaver*, 79 Ala. 216; *Fordyce v. Jackson*, 56 Ark. 584, 20 S. W. 528, 597; *Chicago &c. R. Co. v. McAra*, 52 Ill. 296; *Card v. New York &c. R. Co.*, 50 Barb. (N. Y.) 39; *Brown v. New York &c. R. Co.*, 34 N. Y. 404; *Bullock v. Wilmington &c. R. Co.*, 105 N. Car. 180, 10 S. E. 988; *Sullivan v. Philadelphia &c. R. Co.*, 30 Pa. St. 234, 72 Am. Dec. 698; *Nashville &c. R. Co. v. Troxlee*, 1 Lea (Tenn.) 520; *Mexican &c. R. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. 103; *Pachell v. Irish &c. R. Co.*, 6 Irish R. C. L. 117. See generally for cases of collision, *Farlow v. Kelly*, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. ed. 726; *Railroad Co. v. Richmond*, 23 Ky. L. 2394, 67 S. W. 25 (running trains

guilty of a breach of duty, and illustrate the general rule. The cases which hold the carrier liable for injuries resulting from improperly stopping or starting trains may also be referred to as illustrations,⁴¹ but risks of injury from jolts and jerks ordin-

too close together); *Railway Co. v. Lauricella* (Tex. Civ. App.), 26 S. W. 301, 87 Tex. 277, 28 S. W. 277, 47 Am. St. 103 (wounded animal left near track); *Chicago &c. R. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. 640 (whether position of locomotive in rear, where collision with horse, is negligence, for jury); *Columbia &c. R. Co. v. Means*, 136 Fed. 83. See also as to duty to run and manage train with reference to such dangers where they should be anticipated. *Baldwin v. People's R. Co.*, 7 Penn. (Del.) 81, 76 Atl. 1088; *Andrews v. Chicago &c. R. Co.*, 86 Iowa 677, 53 N. W. 399; *Sawyer v. Hannibal &c. R. Co.*, 37 Mo. 240, 90 Am. Dec. 382; *Ellet v. St. Louis &c. R. Co.*, 76 Mo. 518; *Southern Pac. R. Co. v. Tarin*, 108 Fed. 734, 54 L. R. A. 240.

⁴¹ *Condy v. St. Louis &c. R. Co.*, 13 Mo. App. 588; *Quackenbush v. Chicago &c. R. Co.*, 73 Iowa 458, 35 N. W. 523, 34 Am. & Eng. R. Cas. 545; *Smith v. Chicago &c. R. Co.*, 108 Mo. 243, 18 S. W. 971; *Chicago &c. R. Co. v. Arnol*, 144 Ill. 261, 19 L. R. A. 313, 2 Am. Negl. Cas. 694. See also *Birmingham R. &c. Co. v. Yates*, 169 Ala. 381, 53 So. 915; *Farnon v. Railroad*, 180 Mass. 212, 62 N. E. 254; *Baltimore &c. R. Co. v. Harbin*, 160 Ind. 441, 67 N. E. 109; *Louisville &c. R. Co. v. Deason*, 29 Ky. L. 1259, 96 S. W. 1115; *Johnson v. Atlantic &c.*

R. Co., 125 Va. 136, 99 S. E. 558; *Bartlett v. Baltimore &c. R. Co.* (W. Va.), 99 S. E. 322. In *Dorr v. Lehigh Val. R. Co.*, 211 N. Y. 369, 105 N. E. 652, L. R. A. 1915D, 368, Ann. Cas. 1915C, 763n, it was held that a railroad company is liable for injury to a passenger by sudden application of the emergency brake to avoid striking a traveler at a highway crossing if the company was negligent in failing to warn the traveler or observe his danger in time to avoid injury without resort to such violent means. But suddenly stopping a train or car in an emergency to avoid an obstacle or injury to a person on the track or the like, where there is no negligence on the part of the company in so doing or creating the emergency does not make it liable to a passenger, *Craig v. Boston Elev. R. Co.*, 207 Mass. 548, 93 N. E. 575, and other Massachusetts cases there cited; *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604. See also *Chicago &c. R. Co. v. James* (Kans.), 100 Pac. 641; *Stewart v. Central Vt. R. Co.*, 86 Vt. 398, 85 Atl. 745, 44 L. R. A. (N. S.) 433. But compare *Willis v. St. Joseph R. &c. Co.* 111 Mo. App. 580, 86 S. W. 567. Failure to apply brakes may constitute negligence. *Tillett v. Norfolk &c. R. Co.*, 118 N. Car. 1031, 24 S. E. 111. Sudden start may be negligence

arily incident to the movement of trains are risks which the passenger assumes.⁴² Where the law requires trains of one railroad company to come to a stop before crossing the track of another it may be an actionable wrong to attempt to cross without coming to a full stop.⁴³ So, also, it is an actionable breach of the carrier's duty to leave cars or other things in such a position that injury is caused to passengers thereby.⁴⁴ The speed at which trains are run is, as a general rule, a matter to be determined by the railroad company, and where there is no

under some circumstances. *Spearman v. California &c. R. Co.*, 57 Cal. 432, 2 Am. Negl. Cas. 170.

⁴² *Huston &c. R. Co. v. Harris* (Tex. Civ. App.), 120 S. W. 500; *Choate v. San Antonio &c. R. Co.*, 90 Tex. 82, 36 S. W. 247; *Norfolk &c. R. Co. v. Rhodes* 109 Va. 176, 63 S. E. 445; *Louisville &c. R. Co. v. Hale*, 102 Ky. 600, 44 S. W. 213, 214, 42 L. R. A. 295 (citing text).

⁴³ *Grand Rapids &c. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135; *Railroad Co. v. Greenwood*, 99 Ala. 501, 14 So. 495. In the notes to *Katzenberger v. Lawo* (90 Tenn. 235), 13 L. R. A. 185, will be found a useful collection of authorities upon the subject of the effect of disobedience of statutes and municipal ordinances. See also *Railway Co. v. Smith*, 70 Ark. 179, 67 S. W. 865. For a case of injury by collision at a crossing of one road by another, see *Kellow v. Central &c. R. Co.*, 68 Iowa 470, 27 N. W. 466, 56 Am. Rep. 858, 21 Am. & Eng. R. Cas. 485.

⁴⁴ *Farlow v. Kelly*, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. ed. 726; *Curtis v. Central &c. R. Co.*, 6 McLean (U. S.) 401; *Kellow v. Central &c. R. Co.*, 68 Iowa 470, 23 N. W. 740,

27 N. W. 466, 56 Am. Rep. 858; *Tyrrell v. Eastern R. Co.*, 111 Mass. 546; *St. Joseph &c. R. Co. v. Hedge*, 44 Nebr. 448, 62 N. W. 887; *Walker v. Erie &c. R. Co.*, 63 Barb. (N. Y.) 260; *Hoffman v. Lehigh Val. R. Co.*, 177 N. Y. S. 140, 188 App. Div. 414; *East Line &c. R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834, 34 Am. & Eng. R. Cas. 367; *Burke v. Manchester &c. R. Co.*, 18 W. R. 694, 22 L. T. R. 442. See generally *Montgomery &c. R. Co. v. Boring*, 51 Ga. 582; *Railroad Co. v. Murphy*, 198 Ill. 462, 64 N. E. 1011; *Atchinson &c. R. Co. v. Holloway*, 71 Kans. 1, 80 Pac. 31, 114 Am. St. 462 (running of freight train between station and passenger train); *Clerc v. Railroad*, 107 La. 370, 31 So. 886, 90 Am. St. 319; *Kird v. Railway*, 109 La. 525, 33 So. 587, 94 L. R. A. 452, 94 Am. St. 452; *Lynch v. Railroad*, 8 App. Div. 458, 40 N. Y. S. 775; *Baker v. Railroad*, 28 App. Div. 316, 50 N. Y. S. 999; *McCord v. Railway*, 134 N. Car. 53, 45 S. E. 1031; *Virginia &c. R. Co. v. Sanger* 15 Grat. (Va.) 230; *Carrico v. West Va. etc. R. Co.*, 35 W. Va. 389, 14 S. E. 12, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

statute or municipal ordinance, it is very seldom, indeed, that a charge of negligence can be successfully maintained upon evidence that the rate of speed was very great.⁴⁵ There may, however, be peculiar circumstances involved in the particular case which will justify the conclusion that there was negligence in running at a high rate of speed,⁴⁶ but it would require peculiar circumstances or conditions to make any ordinary rate of speed an element of negligence. The violation of a statute or valid municipal ordinance prescribing the rate of speed, however,

⁴⁵ *St. Louis &c. R. Co. v. Woods*, 96 Ark. 311, 131 S. W. 869, 33 L. R. A. (N. S.) 855n; *Norfolk &c. R. Co. v. Ferguson*, 79 Va. 241. See also *Huston v. Vicksburg &c. R. Co.*, 39 La. Ann. 796, 2 So. 562, 34 Am. & Eng. R. Cas. 76; *Terry v. Jewett*, 78 N. Y. 338; *Chicago &c. R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126; *East Tennessee &c. R. Co. v. Winters*, 85 Tenn. 240, 1 S. W. 790. See generally *Cleveland &c. R. Co. v. Newell*, 75 Ind. 542, 544; *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315.

⁴⁶ *Lehigh &c. R. Co. v. Dupont*, 128 Fed. 840; *Johnsen v. Oakland &c. R. Co.*, 127 Cal. 608, 60 Pac. 170; *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; *Central &c. R. Co. v. Johnston*, 106 Ga. 130, 32 S. E. 78; *Indianapolis &c. R. Co. v. Hall*, 106 Ill. 371; *Illinois &c. R. Co. v. Lenier*, 202 Ill. 624, 67 N. E. 398, 95 Am. St. 266; *Louisville &c. R. Co. v. Pedigo*, 108 Ind. 481, 483, 8 N. E. 627; *Louisville &c. R. Co. v. Jones*, 108 Ind. 551, 572, 9 N.

E. 476; *Terre Haute &c. R. Co. v. Clark*, 73 Ind. 168; *Keating v. Detroit &c. R. Co.*, 104 Mich. 418, 62 N. W. 575; *Bishop v. St. Paul &c. R. Co.*, 48 Minn. 26, 50 N. W. 927; *O'Toole v. Central Park &c. R. Co.*, 35 N. Y. St. 591, 12 N. Y. S. 347; *Huston &c. R. Co. v. Cheatham*, 52 Tex. Civ. App. 1, 113 S. W. 777. See also *Lynn v. Southern Pac. Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; *Indiana Union Tract. Co. v. Love*, 180 Ind. 442, 99 N. E. 1005; *McMahon v. New Orleans R. &c. Co.*, 127 La. 544, 53 So. 857, 32 L. R. A. (N. S.) 346; *Olund v. Worcester &c. St. R. Co.*, 206 Mass. 544, 92 N. E. 720; *St. Louis &c. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113; *Railway Co. v. Stewart*, 68 Ark. 606, 61 S. W. 169, 82 Am. St. 311. In *Chesapeake &c. R. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833, it was held error to charge that it was negligence to run a train at an unusually high rate of speed. See generally *Schexnaydre v. Texas &c. R. Co.*, 46 La. Ann. 248, 14 So. 513, 49 Am. St. 321; *Railroad Co. v. Smith*, 31 S. C. R. (Canada) 367.

may be negligence or at least evidence of negligence on the part of the carrier.⁴⁷

§ 2403 (1589a). **Vestibuled trains—Leaving doors or gates open.**^{47a}—Vestibuled trains have come into such general use, and are apparently so much safer than others, that it might be argued with some degree of plausibility that there might be negligence in failing to furnish such a train, especially if it was customarily furnished by the railroad company and this was relied upon by the passenger without any knowledge or notice to the contrary; but it is held or conceded in all the cases that railroad companies are not bound to furnish such trains.⁴⁸ If, however, the carrier does do so, it is liable to a passenger who is without fault on his part for injury caused by the negligence of the carrier in permitting the appliances to get out of order or needlessly leaving the vestibule door open at an improper time.⁴⁹ And the

⁴⁷ This is considered in another chapter, but we here refer to a few of the recent causes. *James v. Oakland Trac. Co.*, 10 Cal. App. 785, 103 Pac. 1082; *McFeat v. Phila. &c. R. Co.*, 5 Penn. (Del.) 52, 62 Atl. 898; *Collison v. Illinois Cent. R. Co.*, 239 Ill. 532, 88 N. E. 251; *Illinois Cent. R. Co. v. Andrews*, 116 Ill. App. 8; *Weber v. Kansas City &c. R. Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819n, 18 Am. St. 541.

^{47a} This section is cited in *Olwieri v. Hines*, 271 Fed. 939, 940.

⁴⁸ *Sansom v. Southern R. Co.*, 111 Fed. 887; *Bronson v. Oakes*, 76 Fed. 734; *St. Louis &c. R. Co. v. Oliver*, 92 Ark. 432, 123 S. W. 662; *Chicago &c. R. Co. v. Simpson*, 87 Ark. 335, 112 S. W. 875. It is expressly so held in *Pittsburg &c. R. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988, but it is also said that if the carrier advertised that its

train was a vestibuled train it would be liable to one who relied thereon and by reason of its not being vestibuled was induced to pass from one car to another and injured because they were not vestibuled.

⁴⁹ *Bronson v. Oakes*, 76 Fed. 734; *Crandall v. Minneapolis &c. R. Co.*, 96 Minn. 434, 105 N. W. 185, 113 Am. St. 653, 2 L. R. A. (N. S.) 645. See also *Robinson v. United States &c. Society*, 132 Mich. 695, 94 N. W. 211, 102 Am. St. 436 (passenger not negligent in passing from one of such cars to another); *Robinson v. Chicago &c. R. Co.*, 135 Mich. 254, 97 N. W. 689; *Wagoner v. Wabash R. Co.*, 118 Mo. App. 239, 94 S. W. 293. The passenger, it is said, where such trains are run generally has a right to assume that the vestibules are safe for the purpose for which they are intended, and may

same has likewise been held as to gates of an electric car.⁵⁰ But it has been held not to be negligence to run an ordinary car for local traffic in a vestibuled train where its nature can be plainly seen;⁵¹ nor to open the doors of a vestibuled coach as the train is about to stop at the station,⁵² nor to have the trap door open where the vestibule is at the rear end of the last car and improperly used by a passenger.⁵³

§ 2404 (1590). **Station buildings—Depots—Negligence in maintaining.**—A railroad company is under a duty to exercise ordinary and reasonable care to so construct and maintain station buildings, or depots and appurtenances, that they shall be safe for use by passengers.⁵⁴ The duty respecting the construction

be so used in going from one car to another. See *Chicago &c. R. Co. v. Simpson*, 87 Ark. 335, 112 S. W. 875; *Pittsburgh &c. R. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988; *Johnston v. St. Louis &c. R. Co.*, 150 Mo. App. 304, 130 S. W. 413, and case cited in last preceding note.

⁵⁰ *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406.

⁵¹ *Sansom v. Southern R. Co.*, 111 Fed. 887. See also *Pittsburgh &c. R. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988; *Louisville &c. R. Co. v. Gregory*, 141 Ky. 747, 133 S. W. 805, 35 L. R. A. (N. S.) 317.

⁵² *Union Pac. R. Co. v. Brown*, 73 Kans. 233, 84 Pac. 1026.

⁵³ *St. Louis &c. R. Co. v. Dyer*, 115 Ark. 262, 170 S. W. 1013. *Chicago &c. R. Co. v. Simpson*, 87 Ark. 335, 112 S. W. 875.

⁵⁴ *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. ed. 235; *Arkansas Mid. R. Co. v. Robinson*, 96 Ark. 32, 130 S. W. 536; *St. Louis &c. Ry. Co. v. Fuqua*, 114 Ark. 112, 169 S. W. 786; *Toledo &c. R. Co. v.*

Grush, 67 Ill. 262, 16 Am. Rep. 618; *Louisville &c. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *McDonald v. Chicago &c. R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *Rodick v. Maine Cent. R. Co.*, 109 Maine 530, 85 Atl. 41; *Liscomb v. New Jersey &c. R. Co.*, 6 Lans. (N. Y.) 75; *Burgess v. Great Western &c. R. Co.*, 6 C. B. N. S. 923. 3 *Thomp. Neg.* (2d ed.) § 2678, et seq. See *Cincinnati &c. Co. v. Peters*, 80 Ind. 168, 3 Am. Neg. Cas. 133, and authorities cited, p. 142; *Maxfield v. Maine Cent. R. Co.*, 100 Maine 79, 60 Atl. 710; *St. Louis &c. R. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550, 551 (citing text). The text is also cited in *Cogdell v. Wilmington &c. R. Co.*, 124 N. Car. 302, 32 S. E. 706, 710. See also *Eichhorn v. Railway Co.*, 130 Mo. 575, 32 S. W. 993; *Railroad Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274; *Dotson v. Railroad Co.*, 68 N. J. L. 679, 54 Atl. 827; *Cincinnati &c. R. Co. v. Giboney*, 124 Ky. 806, 100 S. W. 216. In *Johnson v. Florida East Coast R. Co.*,

and maintenance of station buildings is not so rigorous as that imposed upon railroad carriers in relation to road-beds, tracks, cars, appliances and the like. Some of the cases seem to lose sight of the difference between the duty respecting station buildings and that respecting means and modes of conveyance, but the well-reasoned cases recognize the distinction and affirm that a railroad company that exercises ordinary care in constructing and maintaining station buildings and appurtenances in a reasonably safe condition for use is not guilty of negligence.⁵⁵

66 Fla. 415, 63 So. 713, 715, 50 L. R. A. (N. S.) 561n, Ann. Cas. 1916 C, 1210 (citing text). it is said that "a primary duty of a railroad common carrier imposed by law is to maintain a suitable and safe place for the delivery of baggage to passengers at their destination on the carriers line; and, in so far as it affects the safety of passengers in the delivery of their baggage, this duty cannot be delegated to another, whether it be a separate and independent corporation or a mere employe, so as to relieve the carrier of its legal liability for an injury to the passenger caused by the negligence of those engaged in delivering baggage to a passenger on the premises used by the carrier for that purpose."

⁵⁵ Taylor v. Pennsylvania R. Co., 50 Fed. 755; Batton v. South &c. R. Co., 77 Ala. 591, 54 Am. Rep. 80, 23 Am. & Eng. R. Cas. 514; St. Louis &c. R. Co. v. Woods, 96 Ark. 311, 131 S. W. 869, 33 L. R. A. (N. S.) 855n, and note; Falls v. San Francisco &c. R. Co., 97 Cal. 114, 31 Pac. 901; Chicago &c. R. Co. v. Mahara, 47 Ill. App. 208; Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874, 7 L. R. A.

687, 27 Am. & Eng. R. Cas. 132; Pere Marquette R. Co. v. Strange, 171 Ind. 160, 84 N. E. 819, 823, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041n (citing text); McNaughton v. Illinois Cent. R. Co., 136 Iowa 177, 113 N. W. 844; Maxfield v. Maine Cent. R. Co., 100 Maine 79, 60 Atl. 710; Moreland v. Boston &c. R. Co., 141 Mass. 31, 6 N. E. 225; Cazneau v. Fitchburg R. Co., 161 Mass. 355, 37 N. E. 311; Lafflin v. Buffalo &c. R. Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; Beltz v. Buffalo &c. Ry. Co., 222 N. Y. 433, 119 N. E. 81; Hoffman v. Lehigh Val. R. Co., 177 N. Y. S. 140, 188 App. Div. 414; Pendleton &c. R. Co. v. Shires, 18 Ohio St. 255; Hayman v. Pennsylvania R. Co., 118 Pa. St. 508, 11 Atl. 815; Bernhardt v. Western &c. R. Co., 159 Pa. St. 360, 28 Atl. 140; Texas &c. R. Co. v. Brown, 78 Tex. 397, 14 S. W. 1034; Owen v. Great Western &c. R. Co., 46 L. J. Q. B. 486. See also ante, § 1794, and post, § 2493. If care is used to provide reasonably safe platforms the carrier is not liable. Stokes v. Suffolk &c. R. Co., 107 N. Car. 178, 11 S. E. 991; Michigan &c. R. Co. v. Coleman, 28 Mich.

There is really no valid reason why a railroad company should be held to a higher degree of care in maintaining its station buildings than that to which an individual owner of buildings used for ordinary business purposes is held. The reasoning of the cases⁵⁶ which laid the foundation for the strict American doctrine as to the degree of care required of carriers using steam as a motive power can not, it is obvious, have any application to buildings and structures prepared for the use of travelers.^{56a} Modes and means of conveyance employed by railroad companies do not require "powerful and dangerous agencies," but buildings and structures in themselves neither require the employment of "dangerous and powerful agencies" nor possess unusual elements of danger. The duty to exercise ordinary care to maintain station buildings and appurtenances in a reasonably safe condition extends, however, to platforms, approaches, urinals and the like.⁵⁷

440; *Hanrahan v. Manhattan &c. R. Co.*, 53 Hun 420, 6 N. Y. S. 395. The general statement in *Louisville &c. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193, as to the degree of care required in maintaining station buildings, is erroneous. See also for citation, many of the cases on both sides, *Fremont &c. R. Co. v. Hagblad*, 72 Nebr. 773, 101 N. W. 1033, 4 L. R. A. (N. S.) 254, 257, 258; and note in 33 L. R. A. (N. S.) 855.

⁵⁶ Such for example as *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. ed. 502.

^{56a} The text is quoted with approval in *Davis v. South Side Elevated R. Co.*, 292 Ill. 378, 127 N. E. 66, 10 A. L. R. 254, 257, also reviewing authorities and disapproving intimation in earlier Illinois cases to the contrary.

⁵⁷ *St. Louis &c. R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105, 8 Am. & Eng. R. Cas. 198; *Chicago &c. R. Co. v. Scates*, 90 Ill. 586; *Lake Shore &c. R. Co. v. Ward*, 135 Ill. 511, 26 N. E. 520, 35 Ill. App. 423; *Louisville &c. R. Co. v. Treadway*, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; *Kentucky &c. Co. v. McKinney*, 9 Ind. App. 213, 36 N. E. 448, 3 Am. Neg. Cas. 30; *Missouri &c. R. Co. v. Neiswanger*, 41 Kans. 621, 21 Pac. 582, 13 Am. Rep. 304; *Louisville &c. R. Co. v. Wolfe*, 80 Ky. 82, 5 Am. & Eng. R. Cas. 625; *Turner v. Vicksburg &c. R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514, 3 Am. Negl. Cas. 526; *Baltimore &c. R. Co. v. Chambers*, 81 Md. 371, 32 Atl. 201; *Warren v. Fitchburg &c. R. Co.*, 90 Mass. 227, 85 Am. Dec. 700; *Gaynor v. Old Colony R. Co.*, 100 Mass. 208; *McKone v. Michigan &c. R. Co.*, 51 Mich. 601, 17 N. W.

§ 2405 (1590a). **Station buildings—Lighting.**—There is a slight conflict in the authorities as to whether a railroad company is bound to light its station buildings,⁵⁸ but it seems clear to us that where the use of the buildings is such that ordinary care requires that they be lighted, then it is the duty of the company to provide them with lights so that they will be reasonably

74, 47 Am. Rep. 596; *Christie v. Chicago &c. R. Co.*, 61 Minn. 161, 63 N. W. 482; *Union &c. R. Co. v. Sue*, 25 Nebr. 772, 41 N. W. 801; *Hulbert v. New York &c. R. Co.*, 40 N. Y. 145; *Weston v. New York &c. R. Co.*, 73 N. Y. 595; *Brassell v. New York &c. R. Co.*, 84 N. Y. 241; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Gulf &c. R. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278; *Texas &c. R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388; *San Antonio &c. R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256; *Alexandria &c. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289; *Burgess v. Great Western &c. R. Co.*, 6 C. B. N. S. 923. See also *Alabama &c. R. Co. v. Godfrey*, 156 Ala. 202, 47 So. 185, 130 Am. St. 76; *Joyce v. Metropolitan St. Ry. Co.*, 219 Mo. 344, 118 S. W. 21 (citing text); *Chicago &c. R. Co. v. Walker*, 217 Ill. 605, 75 N. E. 520; *Cassady v. Texas &c. R. Co.*, 131 La. 626, 60 So. 15; *Powell v. Phila. &c. R. Co.*, 220 Pa. St. 638, 70 Atl. 268, 20 L. R. A. (N. S.) 1019n.

⁵⁸ Most of the authorities hold that it is. *Railway Co. v. Battle*, 69 Ark. 369, 63 S. W. 805; *Railway Co. v. Wood*, 104 Fed. 663; *Alabama &c. R. Co. v. Arnold*, 80 Ala. 600, 2 So. 337; *Alabama &c. R. Co. v. Arnold*, 84 Ala. 159, 4 So. 359, 5 Am. St. 354; *Fordyce v. Merrill*,

49 Ark. 277, 5 S. W. 329, 2 Am. Negl. Cas. 144; *Louisville &c. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968; *Ohio &c. R. Co. v. Stansberry*, 132 Ind. 533, 32 N. E. 218; *Cleveland &c. R. Co. v. Harvey*, 45 Ind. App. 153, 90 N. E. 318 (even at flag station); *Merryman v. Chicago &c. R. Co.*, 135 Iowa 591, 113 N. W. 357; *St. Louis &c. R. Co. v. Marshal*, 71 Kans. 866, 81 Pac. 169; *Louisville &c. R. Co. v. Payne*, 133 Ky. 539, 118 S. W. 352, 19 Ann. Cas. 294; *Peniston v. Chicago &c. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444; *Reynolds v. Texas &c. R. Co.*, 37 La. Ann. 694, 3 Am. Negl. Cas. 528; *Moses v. Louisville &c. R. Co.*, 39 La. Ann. 649, 20 So. 567, 4 Am. St. 231, 30 Am. & Eng. R. Cas. 556; *Forsyth v. Boston &c. R. Co.*, 103 Mass. 510; *Wentworth v. Eastern &c. R. Co.*, 143 Mass. 248, 9 N. E. 563; *Buenemann v. St. Paul &c. R. Co.*, 32 Minn. 390, 18 Am. & Eng. R. Cas. 153; *Waller v. Missouri &c. R. Co.*, 59 Mo. App. 410; *Jarvis v. Brooklyn &c. R. Co.*, 133 N. Y. 623, 30 N. E. 1150; *Wagner v. Atlantic &c. R. Co.*, 147 N. Car. 315, 61 S. E. 171, 19 L. R. A. (N. S.) 1028; *Messenger v. Val. City &c. R. Co.*, 21 N. Dak. 82, 128 N. W. 1023, 32 L. R. A. (N. S.) 881n; *Beard v. Connecticut &c. R. Co.*, 48 Vt. 101; *Alexandria &c. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289; *Patten v. Chicago &c. R. Co.*,

safe for use by passengers who themselves exercise ordinary care.⁵⁹ In a recent case it is said that among its duties are the following: "(a) It is the duty of a railway company to announce the approach of a station where passengers are to disembark; (b) to afford passengers reasonable time and opportunity under the circumstances to embark and disembark; (c) to provide reasonable platform facilities for persons to disembark and embark with safety; (d) to keep the station and platforms, at night, lighted in a reasonable manner; and (e) to keep the depot and platform free from dangerous obstructions."⁶⁰ As care to be ordinary care must, in legal contemplation, be such care as is proportionate to the danger,⁶¹ it follows that, with very rare exceptions, it may be affirmed that, as a matter of law, there is a duty to light railroad station buildings and such appurtenances as travelers may rightfully use. But this duty does not require that light be provided at unusual places,⁶² or places where travelers have no right to go, nor at unreasonable times.⁶³

32 Wis. 524; *Quaife v. Chicago &c. R. Co.*, 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821; *Ellis v. Railway Co.*, 120 Wis. 645, 98 N. W. 942; *Martin v. Great Northern &c. R. Co.*, 16 C. B. 179; *Nicholson v. Lancashire &c. R. Co.*, 3 Hurls. & C. 534. But see *Reed v. Axtell*, 84 Va. 231, 4 S. E. 587; *Wallace v. Wilmington &c. R. Co.*, 8 Houst. (Del.) 529, 18 Atl. 818.

⁵⁹ *Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 84 N. E. 819, 823, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041n (citing text); *Abbott v. Oregon R. Co.*, 46 Ore. 549, 80 Pac. 1012, 114 Am. St. 885 (citing text). See also *Toledo &c. R. Co. v. Stevenson*, 122 Ill. App. 654.

⁶⁰ *Atchison &c. R. Co. v. Calhoun*, 18 Okla. 75, 89 Pac. 207, 11 Ann. Cas. 681.

⁶¹ *St. Louis &c. R. Co. v. Bar-*

nett, 65 Ark. 255, 45 S. W. 550, 551 (citing text).

⁶² *Missouri &c. R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905; *Gunderman v. Missouri &c. R. Co.*, 58 Mo. App. 370.

⁶³ *Louisville &c. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Heinlein v. Boston &c. R. Co.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. 676; *Bradley v. Railway Co.*, 107 Mich. 243, 65 N. W. 102; *Abbott v. Oregon &c. R. Co.*, 46 Ore. 549, 80 Pac. 1012, 114 Am. St. 885. But compare *Gerhart v. Railroad Co.*, 110 Mo. App. 105, 84 S. W. 100. The place, time and character of the light may depend largely on circumstances. See *Railroad Co. v. Marshall*, 71 Kans. 866, 81 Pac. 169; *Duell v. Railway Co.*, 115 Wis. 516, 92 N. W. 269; *Railroad Co. v. Ricketts*, 18 Ky. L. 687, 37 S. W. 952.

§ 2406. **Station buildings—Waiting room—Heating.**—As elsewhere shown it has been held that carriers should heat their cars when necessary for the comfort and health of passengers,⁶⁴ and this duty has been held to extend to reasonable heat, light and ventilation at passenger stations or waiting rooms, even in the absence of any statutory requirement.⁶⁵ In some states there are statutes requiring such heating for a reasonable time before the arrival and departure of trains.⁶⁶ But the duty to heat, at least in the absence of statute, does not extend to bare licensees, and one who came to a station an unreasonable period before train time, without a ticket, was held in a recent case to be a mere licensee to whom the company owed no such duty.⁶⁷

§ 2407 (1591). **Duty to protect passengers from injury by third persons.**—The rule affirmed by the weight of authority is that a railroad carrier is bound to exercise a high degree of care to protect its passengers from injury by fellow passengers and

⁶⁴ *Atlantic &c. R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas. 553; *Roark v. Missouri Pac. R. Co.*, 163 Mo. App. 705, 147 S. W. 499; *St. Louis &c. R. Co. v. Campbell*, 30 Tex. Civ. App. 35, 69 S. W. 451, *affd.* in 97 Tex. 645.

⁶⁵ *Drummy v. Minneapolis &c. R. Co.*, 153 Iowa 479, 133 N. W. 655, and many other cases so hold as to heating. *St. Louis &c. Ry. Co. v. Wilson*, 70 Ark. 136, 66 S. W. 661, 91 Am. St. 74, 76 (citing § 1590) *ante*; *Cincinnati &c. R. Co. v. Mounts*, 31 Ky. L. 1162, 104 S. W. 748; *Chicago &c. R. Co. v. Groner*, 43 Tex. Civ. App. 264, 95 S. W. 1118; *Texas &c. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720; *International &c. R. Co. v. Doolan*, 56 Tex. Civ. App. 503, 120 S. W. 1118. These Texas cases so held even under circum-

stances where the Texas statute does not require it. So does the case of *Williams v. Southern R. Co.*, 102 Miss. 617, 59 So. 850.

⁶⁶ *Williams v. Southern R. Co.*, 102 Miss. 617, 59 So. 850; *International &c. R. Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. 778; *Texas &c. R. Co. v. Mayes*, 4 Tex. Civ. App. Cas. § 159, 15 S. W. 43; *Southern Kansas R. Co. v. Caylor* (Tex. Civ. App.) 135 S. W. 1087, *St. Louis &c. R. Co. v. Lowe* (Tex. Civ. App.), 97 S. W. 1087, *affd.* in 102 Tex. 592. See also *Ward v. Louisville &c. R. Co.*, 168 Ky. 826, 183 S. W. 211. But see while road was under federal control, *Commonwealth v. Louisville &c R. Co.* 189 Ky. 309, 224 S. W. 847.

⁶⁷ *Barnett v. Minneapolis &c. R. Co.*, 123 Minn. 153, 143 N. W. 263, 48 L. R. A. (N. S.) 262 (no statute involved).

third persons.⁶⁸ But while it is incumbent on the carrier to exercise that degree of care it is not liable if such care is used, for there is no liability unless there is negligence.⁶⁹ It is to be understood that a carrier is not a guarantor of the safety of its passengers under all circumstances; it is required only to exercise requisite care, and it can not well be held responsible for an assault by one passenger on another which its servants had no reason to anticipate.⁷⁰ Thus, a carrier was held not liable

⁶⁸ King v. Ohio &c. R. Co., 22 Fed. 413; Batton v. South &c. R. Co., 77 Ala. 591, 54 Am. Rep. 80; Atchison &c. R. Co. v. Weber, 33 Kans. 543, 6 Pac. 877, 52 Am. Rep. 543, 21 Am. & Eng. R. Cas. 418; Southern &c. R. Co. v. Rice, 38 Kans. 398, 16 Pac. 817, 5 Am. St. 766; Winnegar v. Central &c. R. Co., 85 Ky. 547, 4 S. W. 237; Kinney v. Louisville &c. R. Co., 99 Ky. 59, 34 S. W. 1066; New Orleans &c. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689; Illinois &c. R. Co. v. Minor, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627; Spohn v. Missouri &c. R. Co., 101 Mo. 417, 14 S. W. 880; Sira v. Wabash &c. R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. 386; Eads v. Metropolitan &c. R. Co., 43 Mo. App. 536; Hoff v. Public Service Ry. Co., 91 N. J. L. 641, 103 Atl. 209; Britton v. Atlanta &c. R. Co., 88 N. Car. 536, 43 Am. Rep. 749; Pittsburgh &c. R. Co. v. Hinds, 53 Pa. St. 512, 91 Am. Dec. 224; Pittsburg &c. R. Co. v. Pillow, 76 Pa. St. 510, 18 Am. Rep. 424; Texas &c. R. Co. v. Dick, 26 Tex. Civ. App. 256, 63 S. W. 895, 897 (citing text); Texas &c. R. Co. v. Johnson, 2 Tex. App. (Civ. Cas.) 154. See also Brown v. Chicago &c. R. Co., 139 Fed. 972, 2 L. R. A. (N. S.) 105, and note (citing text);

Alabama &c. R. Co. v. Sampley, 169 Ala. 372, 53 So. 142; Starr v. Chicago &c. R. Co., 156 Iowa 311, 136 N. W. 524; Spangler v. St. Joseph &c. R. Co., 68 Kans. 46, 74 Pac. 607, 63 L. R. A. 634, 104 Am. St. 391; note in 97 Am. St. 526-532; May v. Shreveport Trac. Co., 127 La. 420, 53 So. 671, 32 L. R. A. (N. S.) 206n; post, § 2490. But compare Winona &c. R. Co. v. Rosseau, 48 Ind. App. 24, 93 N. E. 1028.

⁶⁹ Illinois &c. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Putnam v. Broadway &c. R. Co., 15 Abb. Pr. N. S. (N. Y.) 383; Felton v. Chicago &c. R. Co., 69 Iowa 577, 29 N. W. 618, 27 Am. & Eng. R. Cas. 229; Chicago &c. R. Co. v. Pillsburg, 123 Ill. 9, 14 N. E. 22, 5 Am. St. 483, 31 Am. & Eng. R. Cas. 24; Lake Erie &c. R. Co. v. Arnold, 26 Ind. App. 190, 59 N. E. 394, 395 (citing text). See also Louisville &c. Ry. Co. v. Dott, 161 Ky. 759, 171 S. W. 438, L. R. A. 1915 C, 681n; Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. 519 and note; Brown v. Chicago &c. R. Co., 139 Fed. 972, 2 L. R. A. (N. S.) 105 and note.

⁷⁰ Stutsky v. Brooklyn Heights R. Co., 88 N. Y. S. 358; Taylor v.

to a passenger for injuries caused by his voluntary interference in an altercation between strangers and the servant of the carrier.⁷¹ And a similar decision was rendered where one had a difficulty with rowdies on the street and got into a street car while the trouble was going on and was injured by a missile.⁷² So, a carrier was absolved from liability for injuries to a passenger resulting from the uncoupling of his car by a drunken fellow passenger while the train was in motion.⁷³ So, it was held that there was no liability for injuries to a passenger from an explosion of a bomb brought into the car by a fellow passenger where there was nothing in its appearance to indicate its dangerous character to the trainmen;⁷⁴ and the conclusion was the same in a case where negro tramps, caught stealing a ride, were arrested and placed in a coach, and while attempting to escape therefrom, made a murderous assault on a passenger in the coach.⁷⁵ In all these instances the acts complained of were held not such as the carrier could have been expected to anticipate. Whether the care the law requires was exercised must generally be determined upon the facts of the particular case.

§ 2408 (1591a). Protection of colored passengers.—It is very plain that a colored passenger upon a railway train is entitled to the same protection against drunken and violent men seeking to molest, outrage and humiliate him as a white passenger. "This protection," it has been held, "must be afforded by the conductor to the extent of all the power with which he is clothed

Atlantic &c. R. Co., 78 S. Car. 552, 59 S. E. 641; *Brown v. Chicago &c. R. Co.*, 139 Fed. 972, 2 L. R. A. (N. S.) 105n, 3 Ann. Cas. 251. See also *Irwin v. Louisville &c. R. Co.*, 161 Ala. 489, 50 So. 62, 135 Am. St. 153, 18 Ann. Cas. 772; *Ormandroyd v. Fitchburg &c. R. Co.*, 193 Mass. 130, 78 N. E. 739, 118 Am. St. 457; *McWilliams v. Lake Shore &c. R. Co.*, 146 Mich. 216, 109 N. W. 272; *Rice v. Chicago &c. R. Co.*, 153 Mo. App. 35, 131 S. W. 374.

⁷¹ *Gardner v. Interborough Rapid Transit Co.*, 45 Misc. 424, 90 N. Y. S. 373.

⁷² *Louisville &c. R. Co. v. Dott*, 161 Ky. 759, 171 S. W. 438, L. R. A. 1915C, 681n.

⁷³ *Texas &c. R. Co. v. Storey*, 29 Tex. Civ. App. 483, 68 S. W. 534.

⁷⁴ *East Indian R. v. Kalidas Mukerjee* [1901], App. Cas. 396, 70 L. J. P. C. 63, 84 L. T. 210.

⁷⁵ *Savannah &c. R. Co. v. Boyle*, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104.

by the company or the law, and his failure to afford it, when he has acknowledged that there is occasion for his interference, will subject the company to liability in damages."⁷⁶ On similar grounds a street railroad company owning and conducting a public park was held liable to colored patrons assaulted by lawless white persons, where it appeared that the company had knowledge of a conspiracy on the part of these persons to commit the assaults, and did not warn the colored people of the danger, and its employes in charge of the park put forth no efforts to protect them.⁷⁷

§ 2409 (1591b). Protection from injury by strikers.—It may be said generally that a carrier is not, as to its passengers, charged with negligence in attempting to operate its cars during a strike of its employes, unless the conditions are such that it ought to know, or ought reasonably to anticipate that it can not do so, and at the same time guard its passengers from violence by the exercise of the utmost care on its part.⁷⁸ The fact that troops had been ordered out to restrain violence in connection with a strike, and the fact that the governor had issued a proclamation commanding riotously disposed persons to disperse, have been held insufficient to charge a carrier with notice that it was dangerous to operate its cars, but rather to amount to an invitation to operate the road under the protection of the troops.⁷⁹

⁷⁶ *Richmond &c. R. Co. v. Jefferson*, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. 87. See also *Quinn v. Louisville &c. R. Co.*, 98 Ky. 231, 32 S. W. 742, 17 Ky. L. 811, 32 S. W. 742; *International &c. R. Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. 233.

⁷⁷ *Indianapolis St. R. Co. v. Dawson*, 31 Ind. App. 605, 68 N. E. 909.

⁷⁸ *Fewings v. Mendenhall*, 83 Minn. 237, 86 N. W. 96, 55 L. R. A. 713; and 88 Minn. 336, 93 N. W. 127, 97 Am. St. 519, 60 L. R. A. 601 (on second appeal). See also *Bos-*

worth v. Union R. Co., 25 R. I. 202, 55 Atl. 490; and post, § 2489. And see as to duty to anticipate and guard against crowds, *South Covington &c. R. Co. v. Harris*, 152 Ky. 750, 154 S. W. 35; *Kuhlen v. Boston &c. R. Co.*, 193 Mass. 341, 79 N. E. 815, 118 Am. St. 516, 7 L. R. A. (N. S.) 729. But compare *Chicago &c. R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 5 Am. St. 483; and see *Leclair v. Tacoma R. &c. Co.*, 62 Wash. 157, 113 Pac. 268.

⁷⁹ *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982. See as to

§ 2410 (1591c). Protection of female passengers from insults and annoyance.—It is also the duty of the carrier to exercise care for the protection of female passengers from insults and obscenity from fellow passengers and employes.⁸⁰ But the law does not demand that the watchfulness of the carrier over female passengers shall be continuous and unrelaxed. Hence, a carrier was held not liable for an assault upon a female passenger while the trainmen were absent from the train in the performance of their duties,⁸¹ or to eat their meals at an eating station.⁸² It has been held that damages for humiliation caused by the use of profane language in the presence of female passengers can not be recovered unless it is shown that this misconduct was known to the trainmen.⁸³ In an action for indignity and insult by the use of offensive language it has been held that it is sufficient to allege that the language used was profane, vulgar, obscene and indecent without setting out the specific language used,⁸⁴ but the language should be proved as near as possible on the trial of the action.⁸⁵

§ 2411 (1592). Termination of the relation of carrier and passenger.—The general rule is that the relation of carrier and pas-

liability of carrier for delay and failure to carry passenger to destination because of strike, and what damages are recoverable, *Louisville &c. Ry. &c. Co. v. Comley* 169 Ky. App. 11, 183 S. W. 207.

⁸⁰ *Birmingham R. &c. Co. v. Parker*, 161 Ala. 248, 50 So. 55; *Southern R. Co. v. Lee*, 167 Ala. 268, 52 So. 648. *Chicago &c. R. Co. v. Griffin*, 68 Ill. 499; *Quinn v. Louisville &c. R. Co.*, 98 Ky. 231, 32 S. W. 742, 17 Ky. L. 811; *Louisville &c. R. Co. v. Finn*, 16 Ky. L. 57; *Lucy v. Chicago &c. R. Co.*, 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551; *Texas &c. R. Co. v. Jones (Tex.)*, 39 S. W. 124; *Carpenter v. Trinity &c. R. Co.*, 55 Tex. Civ. App. 627, 119 S. W. 335.

⁸¹ *Segal v. St. Louis &c. R. Co.*,

35 Tex. Civ. App. 517, 80 S. W. 233; *International &c. R. Co. v. Duncan*, 55 Tex. Civ. App. 440, 121 S. W. 362 (and had no reason to anticipate it).

⁸² *Thweatt v. Houston &c. R. Co.*, 31 Tex. Civ. App. 227, 71 S. W. 976.

⁸³ *Missouri &c. R. Co. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327.

⁸⁴ *St. Louis &c. R. Co. v. Wright*, 33 Tex. Civ. App. 80, 75 S. W. 565.

⁸⁵ *St. Louis &c. R. Co. v. Wright*, 33 Tex. Civ. App. 80, 75 S. W. 565. See also *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136, 66 S. W. 661, 91 Am. Rep. 74. And see also, upon the general subject of this section, post, § 2498.

senger does not terminate until the passenger has alighted from the train and left, or at least had a reasonable time to leave, the place where passengers are discharged.⁸⁶ But while in the depot the degree of care is usually held not to be as high as that resting on the carrier while the passenger is on the train.⁸⁷ Nor does the duty extend beyond a reasonable time in which to leave the depot or alighting place,⁸⁸ but what is a reasonable time

⁸⁶ *Central R. Co. v. Whitehead*, 74 Ga. 441; *Jeffersonville &c. R. Co. v. Parmalee*, 51 Ind. 42; *Glenn v. Lake Erie &c. R. Co.* (Ind. App.), 73 N. E. 861, 862 (citing text); *Gaynor v. Old Colony R. Co.*, 100 Mass. 208, 97 Am. Dec. 96; *McKimble v. Boston &c. R. Co.*, 139 Mass. 542, 2 N. E. 97, 21 Am. & Eng. R. Cas. 213; *Burnham v. Wabash &c. R. Co.*, 91 Mich. 523, 52 N. W. 14; *Timpson v. Manhattan &c. Co.*, 52 Hun 489, 5 N. Y. S. 684; *Ormond v. Hayes*, 60 Tex. 180; *St. Louis &c. R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Texas &c. R. Co. v. Dick*, 26 Tex. Civ. App. 256, 63 S. W. 895, 896 (citing text); *Imhoff v. Chicago &c. R. Co.*, 20 Wis. 344. See also *Melton v. Birmingham Ry. Co.*, 153 Ala. 95, 45 So. 151, 16 L. R. A. (N. S.) 467n; *Barringer v. St. Louis &c. R. Co.*, 73 Ark. 548, 85 S. W. 94, 95 (citing text); *Chicago &c. R. Co. v. Wood*, 104 Fed. 663; *Miller v. Pac. Elec. Ry. Co.*, 169 Cal. 107, 145 Pac. 1023; *Fitzgerald v. Southern Pac. Co.*, 36 Cal. App. 660, 173 Pac. 91; *Chicago &c. R. Co. v. Schmelling*, 197 Ill. 619, 64 N. E. 714, 717 (citing text); *Boyle v. Waters*, 199 Mich. 478, 166 N. W. 114; *Vancleve v. St. Louis &c. R. Co.*, 107 Mo. App. 96, 80 S. W. 706, 707 (citing text). In many of the

cases cited it is said in general terms that the relation does not cease until the passenger has alighted and left the place, but of course there may be cases in which the passenger may cease to be such by unreasonable delay or refusal to leave, and perhaps a more exact statement of the rule would be that the relation of carrier and passenger does not ordinarily terminate until he has had a reasonable opportunity to safely alight and to leave the place where passengers are discharged. See *Glenn v. Lake Erie &c. R. Co.* (Ind. App.), 73 N. E. 861, 862, 165 Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 873, and note, 112 Am. St. 255.

⁸⁷ Ante, § 2404.

⁸⁸ *Glenn v. Lake Erie &c. R. Co.*, 165 Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 874, 112 Am. St. 255 (citing text); *Louisville &c. R. Co. v. Bays*, 142 Ky. 400, 134 S. W. 450, 34 L. R. A. (N. S.) 678; *Schley v. Susquehanna &c. R. Co.*, 227 Pa. St. 494, 76 Atl. 207, 136 Am. St. 906, 19 Ann. Cas. 1019. See also *Quantz v. Southern R. Co.*, 137 N. Car. 136, 49 S. E. 79; *Ratteree v. Galveston &c. Ry. Co.*, 36 Tex. Civ. App. 197, 81 S. W. 566. But there may be cases in which he may remain on the car after reaching the point to which his fare is paid. *Anderson v.*

must often depend upon the circumstances of the particular case. Where a passenger leaves the train and voluntarily walks along the track the relation ceases.⁸⁰ The fact that a passenger of the company is intoxicated has been held not to increase its duty to him after he leaves its depot.⁹⁰ A person who leaves his place as a passenger to assist an employe of the company, but returns to it, does not lose his rights as a passenger,⁹¹ nor does one who leaves the train for the purpose of being transferred to another train.⁹² Nor does one necessarily lose his right as a passenger where he temporarily leaves the train for a

Railway Co., 196 Mo. 442, 93 S. W. 394, 113 Am. St. 748. In *Turner v. Wabash Ry. Co.* (Mo. App.), 211 S. W. 101, an aged and infirm passenger was held not deprived of his status of a passenger by waiting five minutes for assistance before attempting to alight alone. See also where passenger was asleep, *Bass v. Cleveland &c. R. Co.*, 142 Mich. 177, 105 N. W. 151, 2 L. R. A. (N. S.) 875. See also note to this case, as to what is a reasonable time.

⁸⁹ *Finnegan v. Chicago &c. R. Co.*, 48 Minn. 378, 51 N. W. 122, 15 L. R. A. 399; *Buckley v. Old Colony R. Co.*, 161 Mass. 26, 36 N. E. 583; *Allerton v. Boston &c. R. Co.*, 146 Mass. 251, 15 N. E. 621. See *Cincinnati &c. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. 144, 3 Am. Negl. Cas. 186; *Jones v. Boston &c. R. Co.*, 163 Mass. 245, 39 N. E. 1019; *Chicago &c. R. Co. v. Barrett*, 16 Ill. App. 17; *Drew v. Central &c. R. Co.*, 51 Cal. 425; *Knight v. Portland &c. R. Co.*, 56 Maine 234, 96 Am. Dec. 449. See also *King v. Central of Ga. R. Co.*, 107 Ga. 754, 33 S. E. 839, 840 (citing

text); *Abbott v. Oregon &c. R. Co.*, 46 Ore. 549, 80 Pac. 1012, 114 Am. St. 885; *Johnson v. Boston &c. R. Co.*, 125 Mass. 75; *Hendricks v. Chicago &c. R. Co.*, 136 Mo. 548, 38 S. W. 297. And compare *Keater v. Scranton Trac. Co.*, 191 Pa. St. 102, 43 Atl. 86, 71 Am. St. 758, 44 L. R. A. 546. But see where he is carried beyond his destination and directed by the conductor, *Miller v. Pacific Elec. Ry. Co.*, 169 Cal. 107, 145 Pac. 1023.

⁹⁰ *Rozwadosfskie v. International &c. R. Co.*, 1 Tex. Civ. App. 487, 20 S. W. 872.

⁹¹ *Cumberland &c. R. Co. v. Myers*, 55 Pa. St. 288; *Ormond v. Hayes*, 60 Tex. 180; *Railway Co. v. Salzman*, 52 Ohio St. 558, 40 N. E. 891, 31 L. R. A. 261, 49 Am. St. 745. See *Brown v. Scaboro*, 97 Ala. 316, 12 So. 289, 58 Am. & Eng. R. Cas. 364. See also *Flynn v. St. Louis &c. Co.*, 113 Mo. App. 185, 87 S. W. 560, 563 (citing text), and holding plaintiff still a passenger while getting his umbrella off of a street car platform).

⁹² *Colorado Springs &c. R. Co. v. Petit*, 37 Colo. 326, 86 Pac. 121; *Koran v. Metropolitan St. R. Co.*,

purpose connected with his journey and remains on the premises of the company.⁹⁸ And it is held by the Supreme Court of the United States in a very recent case that a carrier which has ac-

85 Kans. 707, 118 Pac. 875; Millett v. New York &c. R. Co., 211 Mass. 486, 98 N. E. 574; Wilson v. Detroit United R. Co., 167 Mich. 107, 132 N. W. 762; Dwinelle v. New York &c. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. 611, 44 Am. & Eng. R. Cas. 384; Bugge v. Seattle Etrc. Co., 54 Wash. 483, 103 Pac. 824; Killmyer v. Wheeling Trac. Co., 72 W. Va. 148, 77 S. E. 908, 48 L. R. A. (N. S.) 683n, Ann. Cas. 1915C, 1220n. See Parsons v. New York &c. R. Co., 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. 450; Chicago &c. R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901; State v. Grand Trunk &c. R. Co., 58 Maine 176, 4 Am. Rep. 258. This rule was applied to a street railway passenger in a very recent case in Illinois (two judges dissenting), and the company was held liable where the car from which he had alighted left the track and struck him while he was going to the proper place to take another car for which he had a transfer. Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334. The court refused to follow Creamer v. West End Ry. Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. 456, and Chattanooga Ry. Co. v. Boddy, 105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885, and cited other Illinois decisions and the following cases in support of the majority opinion. Whilt v. Public Serv. Corp., 76 N. J. L. 729, 72

Atl. 420, 74 Atl. 568; Keator v. Scranton Trac. Co., 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. 758; and the Colorado and Michigan cases above cited in this note. See also Boa v. San Francisco &c. Terminal Ry. (Cal.), 187 Pac. 2. But compare Willingham v. Birmingham Ry. Co., 203 Ala. 351, 83 So. 95.

⁹⁸ Atchison &c. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; Jeffersonville &c. R. Co. v. Riley, 39 Ind. 568; St. Louis &c. R. Co. v. Coulson, 8 Kans. App. 4, 54 Pac. 2; Laub v. Railway Co., 118 Mo. App. 488, 94 S. W. 550; Missouri &c. R. Co. v. Price, 48 Tex. Civ. App. 210, 106 S. W. 700; Texas &c. R. Co. v. Gray (Tex. Civ. App.), 71 S. W. 316. See generally Watson v. East Tennessee &c. R. Co., 92 Ala. 320, 8 So. 770; Central &c. R. Co. v. Peacock, 69 Md. 257, 14 Atl. 704, 9 Am. St. 425; Dodge v. Boston &c. Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. 541; Conroy v. Chicago &c. R. Co., 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419; Alabama &c. R. Co. v. Coggins, 88 Fed. 455. Thus he may alight temporarily for exercise and relief from fatigue of the journey or the like. Central of Ga. R. Co. v. Stovis, 169 Ala. 361, 53 So. 746; St. Louis &c. R. Co. v. Glossup, 88 Ark. 225, 114 S. W. 247; Gannon v. Chicago &c. R. Co., 141 Iowa 37, 117 N. W. 966, 23 L. R. A. (N. S.) 1061; Serviss v. Ann

cepted a passenger for transportation beyond its own line does not discharge its duty by delivering him at the junction point, during a heavy rain, with no other shelter than that afforded by a "switch shanty."⁹⁴

Arbor &c. R. Co., 169 Mich. 564,
135 N. W. 343; Layne v. Chesa-
peake &c. R. Co., 66 W. Va. 607,
67 S. E. 1103.

⁹⁴ Texas &c. R. Co. v. Bigger,
239 U. S. 330, 36 Sup. Ct. 126, 60
L. ed. 310, Ann. Cas. 1916C, 317.

CHAPTER LXXVI.

TICKETS, FARES AND PASSES.

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§ 2415 (1593). **Tickets and fares—Generally.**—According to the generally accepted doctrine a ticket, in the ordinary form, is a voucher, token or receipt, rather than a contract, adopted for convenience, to show that a passenger has paid his fare from

the place or station named therein as the place of departure to the place or station named therein as the place of destination.¹ But, while it is true that tickets seldom constitute or express the whole contract and that the law and the reasonable rules and regulations of the company must usually be looked to, yet we think that a ticket may be both a receipt and a contract, and in so far as it is a contract its terms should be held binding, at least under ordinary circumstances.² In a case recently decided by the Supreme Court of Appeals of Virginia, it is said that a ticket may be both a receipt and a contract, or may be or

¹ *Mouritz v. New York &c. R. Co.*, 23 Fed. 765; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. 148; *Aiken v. Southern R. Co.*, 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. 107; *Georgia R. &c. Co. v. Baker*, 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. 246; *Indianapolis St. R. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 260, 265, 266, citing numerous cases from many courts; *Kansas City &c. R. Co. v. Rodebaugh*, 38 Kans. 45, 5 Am. St. 715 and note, 25 Am. & Eng. Encyc. of L. 1074; *Illinois Cent. R. Co. v. Fleming*, 148 Ky. 473, 146 S. W. 1110; *Burnham v. Grand Trunk R. Co.* 63 Maine 298, 18 Am. Rep. 220; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Sears v. Eastern R. Co.*, 96 Mass. 433, 92 Am. Dec. 780; *Logan v. Hannibal &c. R. Co.*, 77 Mo. 663, 12 Am. & Eng. R. Cas. 140; *Boling v. St. Louis &c. R. Co.*, 189 Mo. 219, 88 S. W. 35; *Sanden v. Northern Pac. R. Co.*, 43 Mont. 209, 115 Pac. 408, 34 L. R. A. (N. S.) 711n; *Johnson v. Concord R. Co.*, 46 N. H. 213, 88 Am. Dec. 199; *Gordon v. Manchester &c. R. Co.*,

52 N. H. 596, 13 Am. Rep. 97; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Cleveland &c. R. Co. v. Bartram*, 11 Ohio St. 457; *Baltimore &c. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Kent v. Baltimore &c. R. Co.*, 45 Ohio St. 284, 4 Am. St. 539; *Dickinson v. Bryant (Okla.)*, 172 Pac. 432; *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. 639; *McCollum v. Southern Pac. R. Co.*, 31 Utah 494, 88 Pac. 663.

² Many of the cases above cited hold that a mere notice limiting liability or the like printed on the ticket is not binding because it is not a contract, but when shown to be part of the contract, if it is such as the law permits, we think it is binding, and there can, we think, be no doubt that such is the case as to terms and stipulations in the contract part of the ticket, especially where it is signed by the purchaser. See *Central Trust Co. v. East Tenn. &c. R. Co.*, 65 Fed. 332; *Mosher v. St. Louis &c. R. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324,

contain at the same time a contract of carriage and a regulation of the carrier, although its primary function is to serve as evidence, as between the conductor and the passenger, of the latter's right to transportation.⁸ Fare is "the price of passage or

32 L. ed. 249; *Melville v. Baltimore &c. R. Co.*, 2 Mack. (D. C.) 63; *Terre Haute &c. R. Co. v. Fitzgerald*, 47 Ind. 79; *Walker v. Price*, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392, 395 (quoting this note); *Fonseca v. Cunard &c. Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. 660; *Boling v. St. Louis &c. Ry. Co.*, 189 Mo. 219, 88 S. W. 25; *Leyser v. Chicago &c. R. Co.*, 138 Mo. App. 34, 119 S. W. 1068; *Johnson v. Concord R. Co.*, 46 N. H. 213, 88 Am. Dec. 199; *Steers v. Liverpool &c. R. Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711, 715; *Gulf &c. R. Co. v. Daniels (Tex.)*, 29 S. W. 426; *Richmond &c. R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620; *Burke v. Southeastern R. Co.*, L. R. 5 C. P. Div. 1. Compare also *Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85. In *Indianapolis St. R. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261, 265, 273 (citing text), it is held that a ticket is ordinarily a mere token or evidence of the right, and not the contract, but it is said that it is otherwise in the class of cases last above referred to in this note. We think it is generally understood by the traveling public that it is the duty of a ticket agent to sell tickets and not to make contracts for transportation apart from such tickets, that

the ticket is regarded as the contract, in so far at least as the terms are therein expressed, and that the custom to print notices, conditions and limitations therein is so well known that purchasers might well be required to take notice thereof. See *Burn v. Chicago &c. R. Co.*, 153 Ill. App. 319; *Freeman v. Atchison &c. R. Co.*, 71 Kans. 327, 80 Pac. 592, 6 Ann. Cas. 118; *Brian v. Oregon &c. R. Co.*, 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 20 Ann. Cas. 311. There is much force in the reasoning of *Ross, J.*, in *Callaway v. Mellett*, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. 238, and in the article on "Tickets" in 1 Har. Law Rev. 17, showing that unused tickets are not mere vouchers or receipts, and that the accepted definition applies with more exactness to a canceled ticket. See also *Sleeper v. Pennsylvania R. Co.*, 100 Pa. St. 259, 45 Am. Rep. 380, 9 Am. & Eng. R. Cas. 291; *Duling v. Philadelphia &c. R. Co.*, 66 Md. 120, 6 Atl. 592; *Shelton v. Erie R. Co. (N. J.)*, 66 Atl. 403. If regarded as a contract it is a contract between the person presenting the ticket and the carrier, though the ticket is paid for by another. *Georgia &c. R. Co. v. Brown*, 120 Ga. 380, 47 S. E. 942.

⁸ *Louisville &c. R. Co. v. Rieley*, 121 Va. 469, 93 S. E. 574, 575, L. R. A. 1918A, 775 (citing this section and others). The court also held

the sum paid or to be paid for carrying the passenger."⁴ A ticket is evidence of a contract to carry and the right to passage, but the contract itself is implied by law except in so far as it is expressed in the ticket, or, according to some decisions, otherwise agreed to. Upon the theory that it is not itself the written contract, parol evidence has been held admissible to prove the terms of the contract in fact entered into between the company and the passenger,⁵ or the representations made by the agent, at the time the ticket was purchased, as to stop-over privileges or the like.⁶ But the terms of the contract, or certain conditions and limitations which enter into and form part of the con-

that where it is serving such primary function the time limit contained in it, whether on its face or back or within its folds, is a regulation of the carrier, the validity of which is to be determined upon the sole inquiry of its reasonableness without regard to its validity as a contract, and it is the only evidence as between the conductor and passenger of the latter's right of transportation. The following cases were disapproved: *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; *Norman v. Southern Ry. Co.*, 65 S. Car. 517, 44 S. E. 83, 95 Am. St. 809; *Dagnall v. Southern Ry. Co.*, 69 S. Car. 110, 48 S. E. 97, and *Norman v. E. C. Ry. Co.*, 161 N. Car. 330, 77 S. E. 345, Ann. Cas. 1914D, 917n.

⁴ Per Marvin, J., in *Chase v. New York Cent. R. Co.*, 26 N. Y. 523, 526.

⁵ See authorities cited in the first note to this section; also *Ames v. Southern Pac. Co.*, 141 Cal. 728, 75 Pac. 310, 99 Am. St. 98, 101 (citing text); *Hayes v. Wabash R. Co.*, 163 Mich. 174, 128 N. W. 217, 31 L.

R. A. (N. S.) 229n. See also *Creech v. Atlantic &c. R. Co.*, 174 N. Car. 61, 93 S. E. 453, L. R. A. 1918D, 1030, referring to other annotations and reviewing recent cases. But compare *Rolfs v. Atchison &c. R. Co.*, 66 Kans. 272, 71 Pac. 526.

⁶ *New York &c. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. ed. 71; *Ames v. Southern Pac. Co.*, 141 Cal. 728, 75 Pac. 310, 311, 99 Am. St. 98, 101 (citing text); *Pittsburgh &c. R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703; *Kansas City &c. R. Co. v. Little*, 66 Kans. 378, 71 Pac. 820, 61 L. R. A. 122, 97 Am. St. 376; *Burnham v. Grand Trunk R. Co.*, 63 Maine 298, 18 Am. Rep. 208; *Murdock v. Boston &c. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Hayes v. Wabash R. Co.*, 163 Mich. 174, 128 N. W. 217, 31 L. R. A. (N. S.) 229n; *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. 469; *Van Kirk v. Pennsylvania R. Co.*, 76 Pa. St. 66, 18 Am. Rep. 404; *Robinson v. Louisville &c. R. Co.*, 2 Lea (Tenn.) 594.

tract, are frequently written or printed on the face of the ticket, and where such is the case we think the better rule is that a passenger has no right to rely upon the representations of an agent or conductor which are contrary to its express limitations and conditions.⁷ A railroad ticket is not negotiable as com-

⁷ Walker v. Price, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392, 395 (quoting text); McClure v. Philadelphia &c. R. Co., 34 Md. 532, 6 Am. Rep. 345; Pennington v. Philadelphia &c. R. Co., 62 Md. 95; Boling v. St. Louis &c. R. Co., 189 Mo. 219, 88 S. W. 35, 39 (citing text); Boice v. Hudson River R. Co., 61 Barb. (N. Y.) 611; Houston &c. R. Co., v. Lee, 104 Tex. 82, 133 S. W. 868. See also Boylan v. Hot Springs R. Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. ed. 290; Central Trust Co. v. East Tenn. &c. R. Co., 65 Fed. 332; Hall v. Memphis &c. R. Co., 15 Fed. 57; Melville v. Baltimore &c. R. Co., 2 Mackey (D. C.) 63; Norton v. Consolidated R. Co., 79 Conn. 109, 63 Atl. 1087, 118 Am. St. 132; Pennington v. Illinois Cent. R. Co., 252 Ill. 584, 97 N. E. 289, 37 L. R. A. (N. S.) 983; Kiley v. Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. 460; Van Dusan v. Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. 354n; Howard v. Chicago &c. R. Co., 61 Miss. 194; Shelton v. Erie R. Co., 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 111 Am. St. 704; Nicholson v. Brooklyn Heights R. Co., 118 App. Div. 13, 103 N. Y. S. 310; Ketcheson v. Southern Pac. Co., 19 Tex. Civ. App. 288, 46 S. W. 907; Missouri &c. R. Co. v. Murphy (Tex.), 35

S. W. 66; Gulf &c. R. Co. v. Daniels (Tex.), 29 S. W. 426; Drummond v. Southern Pac. R. Co., 7 Utah 118, 25 Pac. 733; Virginia &c. R. Co. v. Hill, 105 Va. 729, 54 S. E. 872, 6 L. R. A. (N. S.) 899; Richmond &c. R. Co. v. Ashy, 79 Va. 130, 56 Am. Rep. 620; Loy v. Northern Pac. R. Co., 68 Wash. 33, 122 Pac. 372. Although as we have seen, there are many cases which hold that the purchaser of a ticket is not expected to look for a notice limiting liability or the like on an ordinary ticket and is not bound thereby, in the absence of knowledge of such notice, yet where he has such knowledge and accepts and uses the ticket without objection we think he is bound thereby, and so we think he should expect and take notice of reasonable regulations of transportation and conditions and limitations on special tickets or tickets purchased at a reduced rate. Many of the cases involving questions as to rights under limited tickets, stop-over privileges and the like either decide or assume this to be the law. See Boston &c. R. Co. v. Proctor, 83 Mass. 267, 79 Am. Dec. 729; Boylan v. Hot Springs R. Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. ed. 290; Johnson v. Philadelphia &c. R. Co., 63 Md. 106; Edwards v. Lake Shore &c. R. Co., 81 Mich. 364, 45 N. W. 827,

mercial paper, although it may be transferable unless otherwise provided, and a person who purchases a ticket in good faith and for a valuable consideration from one who has stolen or fraudulently obtained it from the company does not thereby acquire a good title.⁸ As a general rule, one who purchases a through ticket is bound to pursue the usual and direct route over the company's road and is not entitled to go by way of a longer and more circuitous line owned by the same company,⁹ nor is he entitled to stop-over on the way unless given that privilege.¹⁰ So, a ticket for passage in one direction, that is,

21 Am. St. 527; *Nolan v. New York &c. R. Co.*, 9 Jones & S. (N. Y.) 541; *McRea v. Wilmington &c. R. Co.*, 88 N. Car. 526, 43 Am. Rep. 745; *Bowers v. Pittsburgh &c. R. Co.*, 158 Pa. St. 302, 27 Atl. 893; *Missouri &c. R. Co. v. Murphy* (Tex.), 35 S. W. 66; *Shedd v. Troy &c. R. Co.*, 40 Vt. 88; *Farewell v. Grand Trunk R. Co.*, 15 U. C. C. P. 427. But compare *Puckett v. Southern R. Co.*, 9 Ga. App. 589, 71 S. E. 944; *Louisville &c. R. Co. v. Fish* (Ky.), 127 S. W. 519, 43 L. R. A. (N. S.) 584. The question is suggested but not decided in *Little Rock &c. R. Co. v. Record*, 74 Ark. 125, 85 S. W. 421, 423, 109 Am. St. 67, 70 (citing text), and a review of many of the cases will be found in the note in 84 Am. St. 397, et seq.

⁸ *Frank v. Ingalls*, 41 Ohio St. 560, 21 Am. & Eng. R. Cas. 277; *Levinson v. Texas &c. R. Co.*, 17 Tex. Civ. App. 617, 43 S. W. 901, 902 (citing text). But see 1 Harv. Law. Rev. 17. So where the holder has obtained the ticket by fraud. *Brown v. Missouri &c. R. Co.*, 64 Mo. 536; *Moore v. Ohio River R. Co.*, 41 W. Va. 160, 23 N. E. 539.

⁹ *Bennett v. New York Central &c. R. Co.*, 69 N. Y. 594, 25 Am. Rep. 250; *Illinois Cent. R. Co. v. Billington*, 17 Ky. L. 271, 30 S. W. 885; *Church v. Chicago &c. R. Co.*, 6 S. Dak. 235, 60 N. W. 854; *Milroy v. Chicago &c. R. Co.*, 98 Iowa 188, 67 N. W. 276, 26 L. R. A. 616; *Whitham v. Chicago &c. R. Co.*, 43 Wash. 30, 85 Pac. 852. Compare also *Saunders v. Atlantic Coast R. Co.*, 101 S. Car. 11, 85 S. E. 167. But see *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 35 So. 764.

¹⁰ *Roberts v. Koehler*, 30 Fed. 94; *Drew v. Central Pac. R. Co.*, 51 Cal. 425; *Dixon v. New England R.*, 179 Mass. 242, 60 N. E. 581; post, § 2419. See also *Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, 27 Atl. 914, 22 L. R. A. 251, 39 Am. St. 654; *Louisville &c. R. Co. v. Klyman*, 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. 755; *Cheney v. Boston &c. R. Co.*, 52 Mass. 121, 45 Am. Dec. 190, and note; *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 25 N. W. 349. So it is held that the passenger is not entitled to pay two partial fares for a single journey. London

from a specified place of departure to a specified destination, is not good for a reverse trip, or passage in the opposite direction.¹¹ The issuance of a ticket for passage from one place to another does not necessarily imply that all passenger trains will stop at both places, contrary to the rules of the company, even where it is marked "good for passenger trains only," and it is the duty of the purchaser, before taking passage on any particular train, to inquire and ascertain that it does stop.¹²

&c. R. Co. v. Hinchcliffe (1903), 2 Ky. B. 32. But see *Horton v. Erie R. Co.*, 86 App. Div. 379, 83 N. Y. S. 733. Compare also *State v. Arbuckle*, 188 Ind. 444, 124 N. E. 395 (through passenger can not pay from initial to intermediate point and from there to destination and thereby get less than through rate where approved schedule on file provides otherwise). Mileage, excursion and commutation suburban rates may be granted. *Spriggs v. Baltimore &c. R. Co.*, 8 Int. Com. 443. And a rate may, in a proper case, be made higher in one direction than in the other. *MacLoon v. Boston &c. R. Co.* 9 Int. Com. 642; *Hewins v. New York &c. R. Co.*, 10 Int. Com. 221.

¹¹ *Kelley v. Boston &c. R. Co.*, 67 Maine 163, 24 Am. Rep. 19 and note; *Coleman v. New York &c. R. Co.*, 106 Mass. 160. See also *Pennsylvania R. Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Godfrey v. Ohio &c. R. Co.*, 116 Ind. 30, 18 N. E. 61. But it may be good from an intermediate point to the destination, that is, the holder may commence his journey between the specified place of departure and place of destination and go over the portion of the route, in a con-

tinuous trip, from such intermediate point to the destination specified. *Auerbach v. New York Central &c. R. Co.*, 89 N. Y. 281, 284, 42 Am. Rep. 290; *Georgia R. Co. v. Clarke*, 97 Ga. 706, 25 S. E. 368.

¹² *Pittsburgh &c. R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703; *Ohio &c. R. Co. v. Applewhite*, 52 Ind. 540, 546; *Ohio &c. R. Co. v. Swarthout*, 67 Ind. 567, 33 Am. Rep. 104; *Chicago &c. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Pittsburgh &c. R. Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243; *Martindale v. Kansas City &c. R. Co.*, 60 Mo. 508; *Logan v. Hannibal &c. R. Co.*, 77 Mo. 663; *Dietrich v. Pennsylvania &c. R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711; *Trotlinger v. East Tennessee &c. R. Co.*, 11 Lea (Tenn.) 533; *Texas &c. R. Co. v. Ludlam* (Tex.), 26 S. W. 430, followed in *Texas &c. R. Co. v. Ludlam*, 57 Fed. 481. See ante, vol. I, § 229; *Atchison &c. R. Co. v. Gants*, 38 Kans. 608, 17 Pac. 54, 5 Am. St. 780; *Hancock v. Louisville &c. R. Co.*, 27 Ky. L. 434, 85 S. W. 210; *New York &c. R. Co. v. Feely*, 163 Mass. 205, 40 N. E. 20; *Boehm v. Duluth &c. R. Co.*, 91 Wis. 592, 65 N. W. 506. But com-

§ 2416 (1593a). **Rate of fare—State regulation—Interstate Commerce Act.**—Railroad carriers of passengers, like common carriers of freight, have no right to exact unreasonable compensation or rates of toll,¹³ but it is said that “unless prohibited from doing so by statute there seems to be no good reason why a railroad company which has established uniform and reasonable rates of fare at which all may purchase tickets, may not for special reasons sell certain persons tickets at less rate. So long as it may issue passes and transport persons free, if it chooses to do so, there seems to be no valid reason why it may not sell a person a ticket for half price, without incurring any liability therefor to others.”¹⁴ It has even been held, where a statute required railroad companies to give all persons reasonable and equal terms, that a student who has been sold a season ticket for a reasonable price could not complain because other students had been sold similar tickets for half price.¹⁵ A state has power

pare *Richmond &c. R. Co. v. Ashley*, 79 Va. 130, 52 Am. Rep. 620; *Albin v. Gulf &c. R. Co.*, 43 Tex. Civ. App. 170, 95 S. W. 589 (where the train had habitually stopped there the passenger was not obliged to inform himself); *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. 469; *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. 386.

¹³ *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812; *Illinois Cent. R. Co. v. People*, 108 U. S. 541, 2 Sup. Ct. 839, 27 L. ed. 818; *Stone v. Farmers' Loan &c. Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. ed. 636; *Stone v. New Orleans &c. R. Co.*, 116 U. S. 352, 6 Sup. Ct. 349, 391, 29 L. ed. 651; *Stone v. Illinois Cent. R. Co.*, 116 U. S. 347, 6 Sup. Ct. 348, 388, 1191, 29 L. ed. 650, 23 Am. & Eng. R. Cas. 597; *Johnson v. Pensacola*

&c. R. Co., 16 Fla. 623, 26 Am. Rep. 731; *Ruggles v. People*, 91 Ill. 256; *Illinois Cent. R. Co. v. People*, 95 Ill. 313; *McDuffee v. Portland &c. R. Co.*, 52 N. H. 430, 13 Am. Rep. 72. The usual rate is generally to be considered. *Cist v. Michigan Cent. R.*, 10 Int. Com. 217.

¹⁴ 3 *Wood Railroads*, (Minor's ed.) 1658. Carrier may withdraw lower rate which it has been giving as a gratuity to a particular person. *Illinois Cent. R. Co. v. Dunnigan*, 95 Miss. 749, 50 So. 443, 24 L. R. A. (N. S.), 503 Ann. Cas. 1912A, 159n. But even if the statement quoted in the text is correct at common law, it may be otherwise under a statute such as the Interstate Commerce Law.

¹⁵ *Spofford v. Boston &c. R. Co.*, 128 Mass. 326. See also *Johnson v. Pensacola &c. R. Co.*, 16 Fla. 623, 26 Am. Rep. 731. But see *Atwater v. Delaware &c. R. Co.*, 48

to regulate, within its own jurisdiction, the rates of fare and charges for the transportation of passengers to and from points within the state, at least in the absence of any provision in the company's charter relinquishing that right;¹⁶ but the power to regulate does not include the power to destroy, and, under the pretense of regulating fares, a state can not require a railroad company to carry passengers without reward or for such a sum as to virtually amount to a confiscation or taking of property without compensation or due process of law.¹⁷ As to interstate

N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543; *Northrop v. Richmond*, 105 Va. 341, 53 S. E. 963; *Larrison v. Chicago R. Co.*, 1 Int. Com. 147, 369; *Philips v. Railway Co.*, 114 Ga. 284, 40 S. E. 268. As to whether carrier is liable to statutory penalty where it collects more than the statutory fare by mistake, see *Chicago &c. R. Co. v. McDermott*, 106 Ark. 170, 152 S. W. 983, 44 L. R. A. (N. S.) 281n.

¹⁶ *Chicago &c. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Stone v. Farmers' Loan &c. Co.*, 116 U. S. 307, 6 Sup. Ct. 348, 388, 1191, 29 L. ed. 636; *Chicago &c. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Wellman v. Chicago &c. R. Co.*, 83 Mich. 592, 47 N. W. 489; *St. Louis &c. R. Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452. As held in several of these cases, this may be done by the medium of a commission. Under a statute authorizing a certain charge "per mile" it has been held that the same fare could be charged for part of a mile. *Jonesboro &c. R. Co. v.*

Brookfield, 87 Ark. 409, 112 S. W. 977. Compare *Louisville &c. R. Co. v. Berry*, 58 Fla. 300, 50 So. 579. For franchise rate held to apply to any line subsequently built or purchased by the suburban railway company, as well as existing lines, see *West Bloomfield Twp. v. Detroit United Ry.*, 146 Mich. 198, 109 N. W. 258, 117 Am. St. 628. Fare charged on train where ticket is not purchased can not exceed statutory maximum. *Zagelmeyer v. Cincinnati &c. R. Co.*, 102 Mich. 214, 60 N. W. 436, 47 Am. St. 514; *Fulmer v. Southern R. Co.*, 67 S. Car. 262, 45 S. E. 196. But it has been held that it may where the passenger has given him a receipt entitling him to a refund of the extra fare and bringing the total in such case within the statutory limit. *Reese v. Penna. R. Co.*, 131 Pa. St. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. 818. And see *Allen v. Chicago &c. Ry. Co.*, 116 Minn. 119, 133 N. W. 462, Ann. Cas. 1913A, 1197n. But compare *Baltimore &c. Road v. Boone*, 45 Md. 344.

¹⁷ *Stone v. Farmers' Loan &c. Co.*, 116 U. S. 307, 6 Sup. Ct. 348, 388, 1191, 23 Am. & Eng. R. Cas. 577; *Georgia R. &c. Co. v. Smith*,

transportation, the subject is now governed very largely by the interstate commerce law,¹⁸ and the entire matter of rate regulation will be considered in another chapter. But in this connection it may be well to call attention to a recent case in which it is held that where a passenger desired to go over the longer of two routes because he could thereby reach his destination sooner and supposed his ticket read that way, but was given a ticket over the shorter route and it would have been a violation of the Interstate Commerce Law to carry him over the longer route on such ticket, as he was told and should have known he could not recover for being ejected as the damages were not the proximate result of the act or omission of the ticket agent but of his own heedless conduct in attempting to ride upon the ticket and it was his duty to buy a ticket for the part of the journey for which his ticket was not good or pay a cash fare.¹⁹

128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377, 35 Am. & Eng. R. Cas. 511; Attorney-General v. Boston &c. R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112; Chicago &c. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970. See also Chicago &c. R. Co., v. Dey, 35 Fed. 866, 1 L. R. A. 744; Lake Shore &c. R. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858 (statute requiring mileage books unconstitutional); Pensacola &c. R. Co. v. State, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661; Atchison &c. R. Co. v. Campbell, 61 Kans. 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. 328; State v. Fremont &c. R. Co., 23 Nebr. 117, 36 N. W. 305; Beardsley v. New York &c. R. Co., 162 N. Y. 230, 56 N. E. 488 (same); Commonwealth v. Atlantic Coast Line R. Co., 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086n, 117 Am. St. 977 (same).

¹⁸ See Wabash &c. R. Co. v. Il-

linois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244, 26 Am. & Eng. R. Cas. 1; Louisville &c. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671; Larrison v. Chicago &c. R. Co., 1 Int. Com. 147; Smith v. Railroad Co., 1 Int. Com. 208; Savery v. New York &c. R. Co., 2 Int. Com. 338; and numerous authorities cited in chapter on Rate Regulation and Interstate Commerce Act. A state statute making a ticket good for a certain number of years is not applicable to tickets for interstate transportation. Lafarlar v. Grand Trunk R. Co., 84 Maine 286, 24 Atl. 848, 17 L. R. A. 111; Boston &c. R. Co. v. Trafton, 151 Mass. 229, 23 N. E. 829. See also as to effect of schedule Arbuckle v. State, 188 Ind. 444, 124 N. E. 395.

¹⁹ Saunders v. Atlantic Coast R. Co., 101 S. Car. 11, 85 S. E. 167. Compare also Seaboard Air Line

§ 2417 (1594). **Ticket as evidence of passenger's rights—Loss of ticket.**—As a general rule, a ticket (or pass) is the only evidence, as between the conductor and the passenger, of the latter's right to transportation. He must produce it when demanded, and if he has no ticket or fails to exhibit it in accordance with the rules of the company, and refuses to pay the proper fare, he may be expelled.²⁰ The fact that he may have had a ticket, but lost it, makes no difference.²¹ He should, how-

R. Co. v. Patrick, 10 Ala. App. 341, 65 So. 437; Melody v. Great Northern Ry. Co., 25 S. Dak. 606, 127 N. W. 543, 30 L. R. A. (N. S.) 568, Ann. Cas. 1912C, 727.

²⁰ Hall v. Memphis &c. R. Co., 15 Fed. 57, 9 Am. & Eng. R. Cas. 348; New York &c. R. Co. v. Bennett, 50 Fed. 496; Baggett v. Baltimore &c. R. Co., 3 App. Cas. (D. S.) 522, 22 Wash. L. Rep. 441; Chicago &c. R. Co. v. Griffin, 68 Ill. 499; Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238, 18 Am. & Eng. R. Cas. 339; Atchison &c. R. Co. v. Gants, 38 Kans. 608, 17 Pac. 54, 5 Am. St. 780; Louisville &c. R. Co. v. Breckenridge, 17 Ky. L. 1303, 34 S. W. 702; Western Maryland R. Co. v. Stocksedale, 83 Md. 245, 34 Atl. 880; Bradshaw v. South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481, 16 Am. & Eng. R. Cas. 386; Frederick v. Marquette &c. R. Co., 37 Mich. 342, 26 Am. Rep. 531; Mahoney v. Detroit City R. Co., 93 Mich. 612, 53 N. W. 793, 18 L. R. A. 335, 32 Am. St. 528, 36 Cent. L. J. 90; Van Dusan v. Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. 354; Hibbard v. New York &c. R. Co., 15 N. Y. 455; Townsend v. New York &c. R. Co., 56 N. Y. 295, 15 Am.

Rep. 419; Sheldon v. Lake Shore &c. R. Co., 29 Ohio St. 214; Peabody v. Oregon &c. Co., 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823 and note; Reese v. Pennsylvania R. Co., 131 Pa. St. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. 818; Louisville &c. R. Co. v. Fleming, 14 Lea (Tenn.) 128; Prince v. International &c. R. Co., 64 Tex. 144; McKay v. Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 44 Am. & Eng. R. Cas. 395, 9 L. R. A. 132, 26 Am. St. 913; Price v. Chesapeake &c. R. Co., 46 W. Va. 538, 33 S. E. 255, 256 (quoting text, and applying it to conductor's check); Yorton v. Milwaukee &c. R. Co., 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23, 6 Am. & Eng. R. Cas. 322.

²¹ Downs v. New York &c. R. Co., 36 Conn. 287, 4 Am. Rep. 77; Harp v. Southern R. Co., 119 Ga. 927, 47 S. E. 206, 100 Am. St. 212; Chicago &c. R. Co. v. Willard, 31 Ill. App. 435; Frederick v. Marquette &c. R. Co., 37 Mich. 342, 26 Am. Rep. 531; Armstrong v. Pullman Co., 108 Miss. 25, 66 So. 283 (citing Mitchell v. Southern Ry. Co., 77 Miss. 917, 27 So. 834, and distinguishing Kansas City &c. Ry. Co. v. Riley, 68 Miss. 765, 9 So. 443, 13

ever, be given a reasonable time to search for his ticket.²² There is much conflict among the authorities upon the general subject,²³ but we think that the general rule which is supported

L. R. A. 38, 24 Am. St. 309; *Alabama &c. Ry. Co. v. Holiner*, 75 Miss. 371, 23 So. 187; *Ripley v. New Jersey R. Co.*, 31 N. J. L. 388; *Petrie v. Pennsylvania &c. R. Co.*, 42 N. J. L. 449; *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703, 34 Atl. 11; *Crawford v. Cincinnati &c. R. Co.*, 26 Ohio St. 580; *Cresson v. Philadelphia &c. R. Co.*, 11 Phila. (Pa.) 597; *Adams v. Southern Ry. Co.*, 103 S. Car. 327, 87 S. E. 1007 (if he is given a reasonable time to search for it and refuses to pay fare); *Gulf &c. R. Co. v. McCormick*, 45 Tex. Civ. App. 425, 100 S. W. 202; *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125; *Duke v. Great Western R. Co.*, 14 U. C. Q. B. 377; *Cooper v. London &c. R. Co.*, L. R. 4 Exch. Div. 88. See also *Brown v. Louisville &c. R. Co.*, 103 Ky. 211, 44 S. W. 648; *Nutter v. Southern R. Co.*, 25 Ky. L. 1700, 70 S. W. 470; *Van Dusan v. Grand Trunk R. Co.*, 97 Mich. 439, 56 N. W. 848, 37 Am. St. 354; *Garrison v. United R.*, 97 Md. 347, 55 Atl. 371, 99 Am. St. 452; *Monnier v. New York &c. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. 619. But compare *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Schofield v. Pennsylvania Co.*, 112 Fed. 855, 56 L. R. A. 224; *Chicago &c. R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. 256 and note; Kan-

sas City &c. R. Co. v. Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. 25; *Cherry v. Chicago &c. R. Co.*, 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830.

²² *Maples v. New York &c. R. Co.*, 38 Conn. 557, 9 Am. Rep. 434; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Robson v. New York Cent. R. Co.*, 21 Hun (N. Y.) 387; *Clark v. Wilmington &c. R. Co.*, 91 N. Car. 506, 49 Am. Rep. 647, 18 Am. & Eng. R. Cas. 366; *Louisville &c. R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347; *International &c. R. Co. v. Wilkes*, 68 Tex. 617, 5 S. W. 491, 2 Am. St. 515, 34 Am. & Eng. R. Cas. 331. See also *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Ferguson v. Railroad Co.*, 98 Mich. 533, 57 N. W. 801; *Knowles v. Norfolk R. Co.*, 102 N. Car. 59, 9 S. E. 7. If he is given such time and does not find it and refuses to pay fare he may be ejected. *Adams v. Southern Ry. Co.*, 103 S. Car. 327, 87 S. E. 1007, distinguishing *Smith v. Southern Ry. Co.*, 88 S. Car. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708, and other cases holding that the conductor must heed the reasonable explanation of a passenger who has a ticket but not a proper one because of the fault of the carrier's agent.

²³ In the following cases the rule stated in the beginning of this section or its application was de-

both by the weight of authority and the better reason is as we have stated it, and that it applies, ordinarily, wherever the traveler has no ticket at all or the ticket is not apparently valid on its face. The rule, and the reasons for it are thus stated in a recent case: "The law settled by the great weight of authority * * * is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. The reason for this is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting fares. The conductor can not decide from the statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. To do so would take more time than the conductor can spare in the proper and safe discharge of his manifold and

nied, under the particular circumstances, and the company was held liable. *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *New York &c. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. ed. 71; *Head v. Georgia &c. R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. 434; *Lake Erie &c. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464, and cases cited; *Chicago &c. R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. 256; *Evansville &c. R. Co. v. Cates*, 14 Ind. App. 172, 41 N. E. 712, and numerous cases cited; *Ellsworth v. Chicago &c. R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173; *Philadelphia &c. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97; *Murdock v. Boston &c. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307, 21 Am. & Eng. R. Cas. 268; *Hufford v. Grand Rapids R. Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. 859; *Finch v. Northern Pac. R. Co.*,

47 Minn. 36, 49 N. W. 329, 40 Am. St. 308; *Appleby v. St. Paul &c. R. Co.*, 54 Minn. 169, 55 N. W. 1117; *Morrill v. Minneapolis St. Ry. Co.*, 103 Minn. 362, 115 N. W. 395, 123 Am. St. 341; *Kansas City &c. R. Co. v. Riley*, 68 Miss. 765, 9 So. 443, 13 L. R. A. 38, 24 Am. St. 309. (Distinguished in *Armstrong v. Pullman Co.*, 108 Miss. 25, 66 So. 283); *English v. Delaware &c. Co.*, 66 N. Y. 454, 23 Am. Rep. 69; *Missouri &c. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066; *Texas &c. R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400; *Yorton v. Milwaukee &c. R. Co.*, 62 Wis. 367, 21 N. W. 516. Most of these cases, however, can be distinguished, upon the ground that the ticket was apparently valid on its face, or had been wrongfully cancelled by the conductor, who afterwards demanded fare, or the like.

important duties, and it would render the company constantly subject to fraud, and consequent loss. The passenger must submit to the inconvenience of either paying his fare or ejection and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent."²⁴ It does not necessarily follow, however, that the railroad company may not be liable where the passenger has, in fact, a right to his passage at the ticket rate, and he is afforded no opportunity to get a ticket or is misled or given a wrong or defective ticket by the company's agent, or the like. Many of the courts have held, erroneously as it seems to us, that if he offers to explain the facts to the conductor and the latter ejects him in accordance with the rules of the company, the conductor may be justified as between himself and the company, but not as between himself,

²⁴ Per Taft, J., in *Poulin v. Canadian Pac. R. Co.*, 52 Fed. 197, 17 L. R. A. 800. The rule and the reasons for it are also well stated in the leading case of *Frederick v. Marquette &c. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531, approved and followed in *Brown v. Rapid City R. Co.*, 134 Mich. 591, 96 N. W. 925; and in *Jones v. Omaha &c. St. R. Co.*, 95 Nebr. 798, 146 N. W. 959; and in *Louisville &c. R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574, L. R. A. 1918A, 775, 777, (citing text). See also *Mosher v. St. Louis &c. R. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. ed. 249; *Hot Springs R. Co. v. Delaney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. 913; *Norton v. Consolidated R. Co.*, 79 Conn. 109, 63 Atl. 1087, 118 Am. St. 132; *Southern R. Co. v. Hawkins*, 28 Ky. L. 364, 89 S. W. 258; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Kleven v. Great Northern R. Co.*, 70 Minn. 79, 72 N. W. 828; *Mitchell v.*

Southern Co., 77 Miss. 917, 27 So. 834; *Shelton v. Erie R. Co.*, 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 118 Am. St. 704, 9 Ann. Cas. 883; *Runyon v. Pennsylvania R. Co.*, 74 N. J. L. 225, 68 Atl. 107; *Stricker v. Pennsylvania Co.*, 60 N. J. L. 230, 37 Atl. 776; *Weber v. Rochester &c. R. Co.*, 145 App. Div. 84, 129 N. Y. S. 304; *Mullin v. Long Island R. Co.*, 136 App. Div. 733, 121 N. Y. S. 458; *Monnier v. New York Cent. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. 619; *Shelton v. Railroad Co.*, 29 Ohio St. 214; *Peabody v. Oregon &c. Co.*, 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823; *McKay v. Ohio R. Co.*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132. Conductor may not, however, eject a passenger because the ticket is not correct where the conductor knows that it is due to the fault of the ticket agent. *Parish v. Ulster &c. R. Co.*, 192 N. Y. 353, 85 N. E. 153.

as a representative of the company, and the traveler, and that the traveler may recover as for a wrongful expulsion.²⁵ Some of these cases, however, have been severely criticised,²⁶ and it seems to us, that while the traveler may have a right of action against the company in such a case, there is no wrongful expulsion, if it is accomplished in a proper manner, and that he can not recover upon that theory. Several of the courts, indeed, hold that he must pay his fare and seek his remedy in an action for breach of the contract.²⁷ It may be that some of the cases

²⁵ *Cleveland &c. R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. 429; *Evansville &c. R. Co. v. Cates*, 14 Ind. App. 172, 41 N. E. 712; *Morrill v. Minneapolis St. Ry. Co.*, 103 Minn. 362, 115 N. W. 395, 123 Am. St. 341, and cases there reviewed; *Georgia &c. R. Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747, 22 Am. St. 499. See also *Schofield v. Railroad Co.*, 112 Fed. 855, 56 L. R. A. 224; *Baltimore &c. R. Co. v. Thornton*, 188 Fed. 868; *Pennsylvania Co. v. Lenhart*, 120 Fed. 61; *St. Louis &c. R. Co. v. Baty*, 88 Ark. 282, 114 S. W. 218; *Indianapolis St. R. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261, and cases cited; *Cincinnati &c. R. Co. v. Carson*, 145 Ky. 81, 140 S. W. 71; *Chicago &c. R. Co. v. Newburn*, 27 Okla. 9, 110 Pac. 1065, 30 L. R. A. (N. S.) 432n; *Smith v. Southern Ry. Co.*, 88 S. Car. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708; *Campbell v. Southern Ry. Co.*, 94 S. Car. 95, 77 S. E. 745; *Memphis St. R. Co. v. Graves*, 110 Tenn. 232, 75 S. W. 729, 100 Am. St. 803; *Texas &c. R. Co. v. Payne*, 99 Tex. 46, 87 S. W. 330, 70 L. R. A. 946, 122 Am. St. 603; *Huston &c. R. Co. v. Lee* (Tex.), 123 S. W. 154.

²⁶ Harv. L. Rev., 353; 42 Cent. L. J. 117.

²⁷ *Hall v. Memphis &c. R. Co.*, 15 Fed. 57; *Goins v. Western R. Co.*, 68 Ga. 190; *Western Maryland R. Co. v. Stocksdales*, 83 Md. 245, 34 Atl. 880; *Frederick v. Marquette &c. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Shelton v. Lake Shore &c. R. Co.*, 29 Ohio St. 214; *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. 913, 44 Am. & Eng. R. Cas. 395; *Yorton v. Milwaukee &c. R. Co.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 33, 6 Am. & Eng. R. Cas. 322; *Baldwin's American R. R. Law*, 292, 293. See also *Montgomery Trac. Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851n (citing text); *Norton v. Consolidated R. Co.*, 79 Conn. 109, 63 Atl. 1087; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Kiley v. Chicago City R. Co.*, 189 Ill. 384, 59 N. E. 794, 795, 52 L. R. A. 626, 82 Am. St. 460, citing numerous decisions; *Spink v. Railroad Co.*, 21 Ky. L. 778, 52 S. W. 1067; *Western &c. R. Co. v. Schaun*, 97 Md. 563, 55 Atl. 701; *Carter v. Southern R. Co.*, 75 S. Car. 355, 55 S. E. 771.

to which we have just referred are contrary to the weight of authority²⁸ in holding that the only remedy is an action for breach of contract, and in stating the measure of damages, but whether the action be in contract or in tort, for the breach of a contract or for the violation of a duty imposed by law, the gist of the action can not well be the expulsion of the traveler, where there is no unnecessary force, in accordance with the rules of the company, when he has no ticket or evidence of his right to transportation valid on its face or such as those rules reasonably require, and refuses to pay his fare. The wrong lies back of that, and it is well settled that a complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory.²⁹

²⁸ See *Northern Pac. R. Co. v. Pauson*, 70 Fed. 585, 30 L. R. A. 730; *Zion v. Southern Pac. R. Co.*, 67 Fed. 500; *Gorman v. Southern Pac.*, 97 Cal. 1, 31 Pac. 1112, 33 Am. St. 157; *Central &c. R. Co. v. Roberts*, 91 Ga. 513, 519, 18 S. E. 315; *Pennsylvania Co v. Bray*, 125 Ind. 229, 25 N. E. 439; *Everett v. Chicago &c. R. Co.*, 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207; *Louisville &c. R. Co. v. Gaines*, 18 Ky. L. 387, 36 S. W. 174; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399; *Cherry v. Kansas City &c. R. Co.*, 52 Mo. App. 499; *Cherry v. Chicago &c. R. Co.*, 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695n, 109 Am. St. 830; *Dossett v. Atlantic &c. R. Co.*, 156 N. Car. 439, 72 S. E. 491; *Ann Arbor R. Co. v. Amos*, 85 Ohio St. 300, 97 N. E. 978, 43 L. R. A. (N. S.) 587; *Poole v. Northern Pac. R. Co.*, 16 Ore. 261, 19 Pac. 107, 8 Am. St. 289; *Arnold v. Rhode Island Co.*, 28 R. I. 118, 163, 66 Atl. 60, 125 Am. St. 721; *Cincinnati &c. R. Co. v. Harris*, 115 Tenn. 501, 91 S. W.

211, 5 L. R. A. (N. S.) 779; notes in 122 Am. St. 644, and Ann. Cas. 1912C, 730; note to *Poulin v. Canadian Pac. R. Co.*, in 32 Am. L. Reg. 153.

²⁹ See dissenting opinion in *Indianapolis St. R. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261, 284 (quoting text). See also *Moss v. North Carolina R. Co.*, 122 N. Car. 889, 29 S. E. 410, 411 (quoting text); *Virginia &c. R. Co. v. Hill*, 105 Va. 729, 54 S. E. 872, 6 L. R. A. (N. S.) 899 (citing text); *Louisville &c. R. Co. v. Rieley*, 121 Va. 469, 93 S. E. 574, L. R. A. 1918A, 775, 777 (citing text); *Loy v. Northern Pac. R. Co.*, 68 Wash. 33, 122 Pac. 372. Many of the authorities are reviewed, and this section is cited with approval in a carefully considered and well-reasoned opinion in *Shelton v. Erie R. Co.* (N. J.), 66 Atl. 403. The rule which we think is supported by the better reason, although as we have shown, there is sharp conflict among the authorities, is thus stated by Mr.

§ 2418 (1594a). **Conclusiveness of tickets—Decisions partially reconciled.**—It is impossible to reconcile all the decisions upon the subject of the last preceding section. Many of them, however, may be reconciled by noting the difference in the facts. If the ticket is good on its face, and is so declared by the company's agent, and the passenger is without fault, there is much reason for holding that he can recover for being ejected merely because it does not comply with some unknown regulation of the company; but if it is insufficient on its face we think there is equal reason for holding that it is ordinarily conclusive, for the time being, as between the holder and the conductor, and that the holder can not refuse to pay fare, resist the conductor, and recover damages in tort for the ejection. Many of the decisions note this distinction and some of the others may also be reconciled by noting it.⁸⁰ It

Freeman: "If by a mistake of one of the officers of the company he is not furnished with a proper ticket or check evidencing his right to be carried to his destination, his right nevertheless remains, and if for want of the requisite evidence of that right another servant of the company refuses to carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. But as the rule requiring him to show a proper ticket or to pay his fare, if demanded, is a reasonable one, he will not be justified in refusing compliance with it, and in remaining in the car until forcibly expelled, merely for the purpose of heaping up damages. He should either pay the fare demanded or quit the train; and in either case we think he ought to recover, as a part of his damages, reasonable

compensation for the indignity put upon him by the company through the default of its servant. But he can add nothing to his claim by remaining in the car until forcibly ejected, for the rule under which he is ejected being reasonable, is a complete protection to the company and its servants against the recovery of any damages, directly or indirectly for an assault made necessary by his own obstinacy, if no more violence than is required for his ejection is used. Such a case stands upon an entirely different ground from that of a passenger who has a proper ticket and is nevertheless expelled." Note to *Commonwealth v. Power*, 7 Metc. (Mass.) 596, 41 Am. Dec. 465, 475. See also *Peabody v. Oregon Ry. &c. Co.*, 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823n.

⁸⁰ See dissenting opinion in *Indianapolis St. R. Co. v. Wilson*,

has also been held that a ticket invalid on its face as contrary to the conditions and orders of the interstate commerce commission confers no right to passage and is not required to be accepted by the conductor, and the ejection of the holder who refuses to pay does not render the carrier liable.⁸¹ So, in regard to parol evidence and explanations, the nature of the particular ticket may be important. If it is a mere token or check not purporting to be the entire contract nor to state its terms, it may well be that, in some cases at least, parol evidence may be admissible to show the real contract, but if it purports to set out the entire contract upon its face, and contains valid limitations and conditions we think, it may well be treated by the conductor as conclusive, and that it can not, ordinarily at least, be contradicted by parol evidence.⁸²

161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 276, and cases there reviewed. See also *Trezona v. Chicago &c. R. Co.*, 107 Iowa 22, 77 N. W. 486, 43 L. R. A. 136. But compare *Indiana R. Co. v. Orr*, 41 Ind. App. 426, 84 N. E. 32 and cases cited, ante in § 2417n, 19; also *Illinois Cent. R. Co. v. Albright*, 54 Ind. App. 203, 100 N. E. 885. See as to mutilated ticket being sufficient. *Chicago &c. R. Co. v. Conley*, 6 Ind. App. 9, 32 N. E. 96. And see generally *Western R. Co. v. Stockdale*, 83 Md. 245, 34 Atl. 880; *Dixon v. New England R.*, 179 Mass. 242, 60 N. E. 581; *Monnier v. New York &c. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. 619; and cases reviewed in *Arnold v. Rhode Island Co.*, 28 R. I. 118, 163, 66 Atl. 60, 125 Am. St. 721n; also *Montgomery Trac. Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851n.

⁸¹ *Melody v. Great Northern Ry.*

Co., 25 S. Dak. 606, 127 N. W. 543, 30 L. R. A. (N. S.) 568, Ann. Cas. 1912C, 727. But see *Cherry v. Chicago &c. R. Co.*, 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695n, 109 Am. St. 830.

⁸² See *New York &c. R. Co. v. Bennett*, 50 Fed. 496; *McGhee v. Reynolds*, 117 Ala. 413, 23 So. 68; *Walker v. Price*, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392 and note; *Rolfs v. Atchison R. Co.*, 66 Kans. 272, 71 Pac. 526; *Fonseca v. Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 25 Am. St. 660; *New York &c. R. Co. v. Feely*, 163 Mass. 205, 40 N. E. 20; *Boling v. Railroad Co.*, 189 Mo. 219, 88 S. W. 35; *Eastman v. Maine &c. R. Co.*, 70 N. H. 240, 46 Atl. 54; *Bullock v. Delaware &c. R. Co.*, 60 N. J. L. 24, 36 Atl. 773, 37 L. R. A. 417; *Shelton v. Erie R. Co.* (N. J.), 66 Atl. 403; *Simis v. New York R. Co.*, 1 Misc. 179, 20 N. Y. S. 639; *Missouri &c. R. Co. v. Harrison*, 97 Tex. 611, 80 S. W. 1139; *Ketchison v. Southern*

§ 2419 (1595). **Stop-over privileges.**—As we shall see, a through ticket over several lines does not require the passenger to make a continuous trip over all such lines without stopping, but it does usually require him, after he has commenced his journey on any one of them to complete it as far as he is going upon that particular line. So, an ordinary ticket over one line is for one continuous trip, and if the passenger voluntarily leaves the train, upon which he has commenced it, at an intermediate point he can not resume it by virtue of such ticket, contrary to the rules of the company, on another train or at another time.⁸³ This rule does not, of course, fully apply where the journey is interrupted, without his fault, by an accident or the like.⁸⁴

R. Co., 19 Tex. Civ. App. 288, 46 S. W. 907. But compare *Hutchins v. Pennsylvania R. Co.*, 181 N. Y. 186, 73 N. E. 972, 106 Am. St. 537; *New York R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. ed. 71; *Northern Pac. R. Co. v. Pauson*, 70 Fed. 585, 30 L. R. A. 730; *Erie R. Co. v. Littell*, 128 Fed. 546; *Pittsburg R. Co. v. Street*, 26 Ind. App. 224, 59 N. E. 404; *Ellsworth v. Chicago R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173. In *Teddards v. Southern Ry.*, 97 S. Car. 153, 81 S. E. 474, 475, it is held that the conductor must heed reasonable explanations of the passenger and that the carrier can eject him only at the peril of being able to justify the ejection.

⁸³ *Roberts v. Koehler*, 30 Fed. 94; *Drew v. Central Pac. R. Co.*, 51 Cal. 425; *Churchill v. Chicago &c. R. Co.*, 67 Ill. 390; *Stone v. Chicago &c. R. Co.*, 47 Iowa 82, 29 Am. Rep. 458; *McClure v. Philadelphia &c. R. Co.* 34 Md. 532, 6 Am. Rep. 345; *Cheney v. Boston &c. R. Co.*, 11 Metc. (Mass.) 121, 45 Am. Dec.

190, and note; *Sears v. Eastern R. Co.*, 96 Mass. 433, 92 Am. Dec. 780; *Dixon v. New England R. Co.*, 179 Mass. 242, 60 N. E. 581; *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 25 N. W. 349, 22 Am. & Eng. R. Cas. 402; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, 27 Atl. 914, 22 L. R. A. 251, 39 Am. St. 654; *Hamilton v. New York Cent. R. Co.*, 51 N. Y. 100; *Cleveland &c. R. Co. v. Bartram*, 11 Ohio St. 457; *Railroad Co. v. Klyman*, 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. 755; *Gulf &c. R. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318, 52 Am. & Eng. R. Cas. 230; *Ashton v. Railway Co.* (1904), 2 K. B. 313; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510. See also *Walker v. Wabash &c. R. Co.*, 15 Mo. App. 333, 16 Am. & Eng. R. Cas. 380.

⁸⁴ *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711; *Gulf &c. R. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L.

Where his ticket gave the passenger no right to stop-over it was held that the fact that the company's conductor had previously allowed others to stop-over on similar tickets, did not entitle him to do so, in violation of a rule of the company, although such rule had been adopted within a few months of the time he purchased his ticket and its existence was unknown to him.³⁵ The right of railroad companies to make reasonable regulations upon this subject is well settled.³⁶ Most companies give stop-over privileges upon compliance with certain conditions, but if there is a regulation permitting passengers to stop over on certain conditions, it seems that a passenger must, at his peril, ascertain what those conditions are and comply with them, if he wishes to stop over without forfeiting his right to proceed on the same ticket.³⁷ There are however, cases in which the company has been held liable where an authorized agent had agreed to give the passenger stop-over privileges or had misled him and he was expelled or prevented from stopping over and continuing his journey without paying additional fare.³⁸ So,

R. A. 318; *Wilsey v. Louisville &c. R. Co.*, 83 Ky. 511, 39 Am. & Eng. R. Cas. 418. See also *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25.

³⁵ *Johnson v. Concord &c. R. Co.*, 4 N. H. 213, 88 Am. Dec. 199. See also *Gulf &c. R. Co. v. Moody* (Tex.), 30 S. W. 574; *International R. Co. v. Best*, 93 Tex. 344, 55 S. W. 315.

³⁶ See ante, § 229. In Maine, however, the statute prohibits railroad companies from denying stop-over privileges. *Carpenter v. Grand Trunk R. Co.*, 72 Maine 388, 39 Am. Rep. 340, 3 Am. & Eng. R. Cas. 432; *Dryden v. Grand Trunk R. Co.*, 60 Maine 512. See also *Robinson v. Southern Pac. Co.*, 105 Cal. 526; 38 Pac. 94, 722, 28 L. R. A. 773.

³⁷ *Oil Creek &c. R. Co. v. Clark*, 72 Pa. St. 231. See also *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *McClure v. Philadelphia &c. R. Co.*, 34 Md. 532, 6 Am. Rep. 345; *Johnson v. Philadelphia &c. R. Co.*, 63 Md. 106; *Kellett v. Chicago &c. R. Co.*, 22 Mo. App. 356; *Beebe v. Ayres*, 28 Barb. (N. Y.) 275; *Denny v. New York Cent. R. Co.*, 5 Daily (N. Y.) 50; *Wentz v. Erie &c. R. Co.*, 3 Hun (N. Y.) 241; *Breen v. Texas &c. R. Co.*, 50 Tex. 43; *Yorton v. Milwaukee &c. R. Co.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23.

³⁸ *Burnham v. Grand Trunk R. Co.*, 63 Maine 298, 18 Am. Rep. 220; *Tarbell v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 51; *Palmer v. Railroad Co.*, 3 S. Car. 580, 16 Am. Rep. 750; *New York &c. R. Co. v. Winter*, 143 U. S. 60, 12 Sup.

of course, the contract, as evidenced by the ticket itself, may give him stop-over privileges, but a ticket containing a provision or notice that it is "good for one seat from Philadelphia to Pittsburg,"³⁹ or good until a certain number of days after date, or the like, is good only for one continuous passage, and does not give a right to stop over and make the journey piecemeal.⁴⁰

§ 2420 (1596). Through tickets—Coupons.—There is some conflict among the authorities upon the subject of through tickets over several different roads, but the rule which is supported both by the better reason and by the weight of authority is that even when the ticket does not expressly provide that the first company is acting for the other companies merely as their agent in selling it, the rights of the passenger and the duties and responsibilities of the different companies are substantially the same as if the ticket had been purchased at the office of each company separately, unless there is something in the contract making the first company responsible beyond its own line.⁴¹

Ct. 356, 36 L. ed. 71. See also Louisville &c. R. Co. v. Scott, 141 Ky. 538, 133 S. W. 800, 34 L. R. A. (N. S.) 206, Ann. Cas. 1912C, 547.

³⁹ Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711.

⁴⁰ Terry v. Flushing &c. R. Co., 13 Hun (N. Y.) 359; Dumphy v. Erie R. Co., 10 Jones & S. (N. Y.) 128; Craig v. Great Western R. Co., 24 U. C. Q. B. 504.

⁴¹ Mosher v. St. Louis &c. R. Co., 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. ed. 249; Dresser v. Canadian Pac. R. Co., 116 Fed. 281; Kansas City &c. R. Co. v. Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. 25; Lundy v. Central Pac. R. Co., 66 Cal. 191, 56 Am. Rep. 100; Hood v. New York &c. R. Co., 22 Conn. 1, 502; Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238, 18

Am. & Eng. R. Cas. 339; Chicago &c. R. Co. v. Mulford, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; Hartan v. Eastern R. Co., 114 Mass. 44; Boling v. St. Louis &c. R. Co., 189 Mo. 219, 88 S. W. 35, 40; Brian v. Oregon &c. R. Co., 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 464, 20 Ann. Cas. 311 (citing text); Pennsylvania Co. v. Loftis, 72 Ohio St. 288, 74 N. E. 179, 181, 106 Am. St. 597 (citing text); Nichols v. Southern R. Co., 23 Ore. 123, 31 Pac. 296, 18 L. R. A. 55, 37 Am. St. 664; Pennsylvania R. Co. v. Schwarzenberger, 45 Pa. St. 208, 84 Am. Dec. 490; Young v. Pennsylvania R. Co., 115 Pa. St. 112, 7 Atl. 741, 28 Am. & Eng. R. Cas. 114; Nashville &c. R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852; Gulf

A consequence of this rule is that the purchaser, after completing his journey on one line, need not take the first connecting train on the next line, but may stop over and use the ticket upon one of the connecting lines at any time within the life of the ticket.⁴² In other words, the contract is, in effect, an entire and separate contract with each company over whose road it is issued, and the traveler is not obliged to make a continuous journey, without stop, over all the different roads, but he is obliged to make a continuous trip, in the absence of any stop-over privileges, over any one of the particular roads after he has once begun his journey over that road. Another conse-

&c. R. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. 787; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424. See also McCollum v. Southern Pac. Co., 31 Utah 494, 88 Pac. 663. But see Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333 and note; Watkins v. Pennsylvania R. Co., 10 Mack. (21 D. C.) 1; Wolff v. Central R. &c. Co., 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441; Head v. Railway Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. 434; Chicago &c. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749; Louisville &c. R. Co. v. Spurling 160 Ky. 819, 170 S. W. 192, 195, Ann. Cas. 1916A, 487 (citing text); Najac v. Boston &c. R. Co., 89 Mass. 329, 83 Am. Dec. 686; Cherry v. Chicago &c. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830; Talcott v. Railroad Co., 159 N. Y. 461, 54 N. E. 1; Hutchins v. Pennsylvania R. Co., 181 N. Y. 186, 73 N. E. 972, 106 Am. St. 537; Candee v. Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec.

566; Mytton v. Midland R. Co., 4 H. & N. 615; Great Western R. Co. v. Blake, 7 H. & N. 987; Kent v. Midland R. Co., L. R. 10 Q. B. 1. It may be responsible where the contract is joint or a partnership exists. See ante, §§ 2183, 2184; Croft v. Baltimore &c. R. Co., 1 McAr. (U. S. C. C.) 492; Champion v. Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376, and note.

⁴² Little Rock &c. R. Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584, 586; Milnor v. New York &c. R. Co., 4 Daly (N. Y.) 355; Auerbach v. New York Cent. R. Co., 89 N. Y. 281, 42 Am. Rep. 290, 6 Am. & Eng. R. Cas. 334; Knight v. Portland &c. R. Co., 56 Maine 234, 96 Am. Dec. 449; Brooke v. Grand Trunk R. Co., 15 Mich. 332; Nichols v. Southern Pac. Co., 23 Ore. 123, 31 Pac. 296, 18 L. R. A. 55, 58, 37 Am. St. 664. See also Spencer v. Lovejoy Co., 96 Ga. 657, 23 S. E. 836, 51 Am. St. 152 (coupon ticket); Brian v. Oregon &c. R. Co., 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 20 Ann. Cas. 311.

quence of the rule is that the traveler, where his through ticket is limited as to time, must begin his journey over the last connecting line within the time limited in the ticket or coupon over that line, and if he does not do so it will not be good over such line even though he may have begun his journey at the original place of departure on a connecting line in time to have completed it over all the lines but was prevented from so doing by delay on one of such prior connecting lines.⁴³ In several cases it has been suggested, but not decided, that the first company can only be presumed to act as agent of the connecting lines, so as not to become liable for their defaults, where the ticket issued is a coupon ticket and each coupon purports to be the ticket of the connecting line over which it is used;⁴⁴ but, while most of the authorities we have cited in support of the general rule were cases in which coupon tickets were issued, we see no good reason why the rule should not apply where through tickets are issued in other forms so long as there is nothing to indicate that the first company intended to guaranty through transportation or to assume liability for the acts of others and did not act merely as their agent.⁴⁵ It is usually provided that

⁴³ *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *Gulf &c. R. Co. v. Looney*, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. 787, 52 Am. & Eng. R. Cas. 197. See also *Boling v. St. Louis &c. R. Co.*, 189 Mo. 219, 88 S. W. 35; *Brian v. Oregon &c. R. Co.*, 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 20 Ann. Cas. 311. In *Gulf &c. R. Co. v. Looney*, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471n, 34 Am. St. 787, it is held that if the ticket is a joint contract and not a coupon ticket, the expiration of the time limit owing to delay of one of the connecting carriers does not prevent its use, but that it is otherwise if the ticket is a coupon ticket constitut-

ing a separate contract with each carrier. If the last day is Sunday, and the last company runs no train on that day, he may, it seems, take passage on the first train the next day. *Little Rock &c. R. Co. v. Dean*, 43 Ark. 529, 51 Am. Rep. 584, 21 Am. & Eng. R. Cas. 279.

⁴⁴ See *Louisville &c. R. Co. v. Weaver*, 9 Lea (Tenn.) 38, 42 Am. Rep. 654; *Gulf &c. R. Co. v. Looney*, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. 787, 52 Am. & Eng. R. Cas. 197.

⁴⁵ See *Hood v. New York &c. R. Co.*, 22 Conn. 1, 502. But compare *Central Trust Co. v. Wabash &c. R. Co.*, 31 Fed. 247; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238. See gener-

coupons shall not be good if detached, but, as the contract is regarded as the distinct and separate contract of each road over whose line a coupon calls for transportation, it has been held that a ticket with part of the coupons attached is assignable or transferable, in the absence of any provision prohibiting its transfer, and good over the roads for which the attached coupons are issued, even in the hands of one who has bought it at a reduced rate.⁴⁶ Their assignability may, however, be restricted by provisions in the contract.⁴⁷ The sale of a ticket to a station on a connecting line creates no implied contract that any particular train will stop at that station or that it will be reached without change of cars or waiting at other stations for other trains.⁴⁸

ally *Romero v. McKernan*, 88 N. Y. S. 365; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 319, 21 L. ed. 297; *Mauritz v. New York &c. R. Co.* 23 Fed. 769; *Milnor v. New York &c. R. Co.*, 53 N. Y. 363.

⁴⁶ *Nichols v. Southern Pac. Co.*, 23 Ore. 123, 31 Pac. 296, 18 L. R. A. 55, 37 Am. St. 664.

⁴⁷ *Drummond v. Southern Pac. R. Co.*, 7 Utah 118, 25 Pac. 733; *Coody v. Central Pac. R. Co.*, 4 Saw. (U. S. C. C.) 114; *Granier v. Louisiana &c. R. Co.*, 42 La. Ann. 880. And where a commutation coupon book provides that no coupon will be received if detached otherwise than by the conductor it is held that the passenger is not entitled to travel on a detached coupon even though he himself had detached it. *Norfolk &c. R. Co. v. Wysor*, 82 Va. 250. See also *Boston &c. R. Co. v. Chipman*, 146 Mass. 107, 14 N. E. 940, 4 Am. St. 293; *Louisville &c. R. Co. v. Harris*, 9 Lea. (77 Tenn.) 180, 42 Am. Rep. 668. But com-

pare *Rouser v. North Park St. R. Co.*, 97 Mich. 565, 56 N. W. 937; *Fairfield v. Louisville &c. R. Co.*, 94 Miss. 887, 48 So. 513, 136 Am. St. 611, 19 Ann. Cas. 456 (inadvertently detached); *Wightman v. Chicago &c. R. Co.*, 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185n, 9 Am. St. 778 (same).

⁴⁸ *Atchison &c. R. Co. v. Cameron*, 66 Fed. 709. See also *Duling v. Philadelphia &c. R. Co.*, 66 Md. 120, 6 Atl. 592; *Ohio &c. R. Co. v. Swarthout*, 67 Ind. 567, 33 Am. Rep. 104; *Chicago &c. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Atchison &c. R. Co. v. Gants*, 38 Kans. 608, 17 Pac. 54, 5 Am. St. 780; *Louisville &c. R. Co. v. Miles*, 100 Ky. 84, 37 S. W. 486; *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. 386. It has been held that neither a ticket agent nor a conductor has authority to make a special contract binding the carrier to carry the passenger on schedule time. *Gerarady v. Louisville &c. R. Co.*, 102 N. Y. S. 548.

§ 2421 (1597). **Round trip tickets.**—A round trip excursion ticket is good until used, in the absence of any limitation or notice to the contrary at the time of its purchase.⁴⁹ Where it is used by the purchaser in going to the station named therein and is then sold and transferred by him, it is valid in the hands of the holder, in the absence of any restrictions as to transferring it, and entitles him to a return passage, subject to its limitations as to time and the like.⁵⁰ Where such a ticket contained a statement that it was “not good for passage if detached,” the first four words being upon the “going part” and the words “if detached” being upon the “returning part,” it was held that it was good for passage where both parts were presented to the conductor on the “going” trip in good faith, although they had become detached by accident.⁵¹ So, where the return coupon of a round trip ticket was taken up by mistake on the going trip, and the going coupon was presented for return passage with an explanation of the facts, it was held that it was the duty of the conductor to accept it and that the passenger could not be rightfully ejected.⁵² But where one of the conditions of

⁴⁹ *Pennsylvania R. Co. v. Spicker*, 105 Pa. St. 142, 23 Am. & Eng. R. Cas. 672. An unlimited ticket may be good as long as the period prescribed by the statute of limitations for similar contracts. *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. 146; *Cassiano v. Galveston Ry. Co. (Tex.)*, 82 S. W. 806.

⁵⁰ *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. 589; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53, 47 N. W. 312.

⁵¹ *Wightman v. Chicago &c. R. Co.*, 73 Wis. 169, 40 N. W. 689, 9 Am. St. 778. But it would be otherwise if the holder had violated the contract by purposely detaching them himself, and a conductor is not bound to accept a

detached coupon in such a case, at least without seeing the entire ticket, *Norfolk &c. R. Co. v. Wyssor*, 82 Va. 250, 26 Am. & Eng. R. Cas. 234; *Boston &c. R. Co. v. Chipman*, 146 Mass. 107, 14 N. E. 940, 4 Am. St. 293, 34 Am. & Eng. R. Cas. 336; *Louisville &c. R. Co. v. Harris*, 9 Lea (Tenn.) 180, 42 Am. Rep. 668, 16 Am. & Eng. R. Cas. 374; *De Lucas v. New Orleans &c. R. Co.*, 38 La. Ann. 930. But see as to waiver, *Thompson v. Truesdale*, 61 Minn. 129, 63 N. W. 259, 52 Am. St. 579.

⁵² *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439. See also *Rouser v. North Park St. R. Co.*, 97 Mich. 565, 56 N. W. 937; *Sawyer v. Norfolk So. R. Co.*, 171 N. Car. 13, 86 S. E. 166. But see ante, §§ 2415, 2417.

a round trip ticket requires it to be stamped and signed at the destination before it is good for the return trip, it has often been held that the holder who has neglected to have this done is not entitled to return passage thereon, and may be ejected, for refusing to pay fare, although he then offers to prove his identity.⁵³

§ 2422 (1598). **Limited tickets.**—The right of a railroad company, on the absence of statutory restriction, to limit the time within which a ticket over its road shall be good is

⁵³ Mosher v. St. Louis &c. R. Co., 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. ed. 249; Boylan v. Hot Springs R. Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. ed. 290; Western Maryland R. Co. v. Stocksdale, 83 Md. 245, 34 Atl. 880; Edwards v. Lake Shore &c. R. Co., 81 Mich. 364, 45 N. W. 827, 21 Am. St. 527; Boling v. St. Louis &c. R. Co., 189 Mo. 219, 88 S. W. 35; Bowers v. Pittsburg R. Co., 158 Pa. St. 302, 27 Atl. 893; Watson v. Railroad Co., 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454. So of course, if he wrongfully refuses to make proper proof of his identity. Central R. Co. v. Cannon, 106 Ga. 828, 32 S. E. 874; Sinnott v. Railroad Co., 104 Tenn. 233, 56 S. W. 836; Abram v. Railway Co., 83 Tex. 61, 18 S. W. 321. But see Gulf &c. R. Co. v. St. John, 13 Tex. Civ. App. 257, 35 S. W. 501; Texas &c. R. Co. v. Payne, '99 Tex. 46, 87 S. W. 330, 70 L. R. A. 946, 122 Am. St. 603; Pittsburgh &c. R. Co. v. Coll, 37 Ind. App. 232, 76 N. E. 816; Southern R. Co. v. Cassell, 28 Ky. L. 1230, 92 S. W. 281; Bal-

timore &c. R. Co. v. Hudson, 117 Ky. 995, 80 S. W. 454, 92 S. W. 947; Southern R. Co. v. Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536. Most of the cases last cited hold that the passenger's rights are not affected by the agent's arbitrary refusal to stamp or validate the return portion of the ticket, and that he may recover for ejection when using it. See especially to this effect, Pittsburgh &c. R. Co. v. Coll, 37 Ind. App. 232, 76 N. E. 16; Ft. Worth &c. R. Co. v. Jones, 38 Tex. Civ. App. 192, 85 S. W. 37. But compare McGhee v. Reynolds, 117 Ala. 413, 23 So. 68; Ketcheson v. Southern Pac. R. Co., 19 Tex. Civ. App. 288, 46 S. W. 907; Houston &c. R. Co. v. Arey, 18 Tex. Civ. App. 457, 44 S. W. 894; Central Trust Co. v. Railway Co., 65 Fed. 332. The mere fact that there is a blank space left for the purchaser to sign does not require him to sign it at the time it is validated unless the validating agent requests it. Illinois Cent. R. Co. v. William, 147 Ky. 52, 143 S. W. 760.

well settled.⁵⁴ But the limitation must be reasonable.⁵⁵ Subject to this qualification a ticket may be limited even to a single day or a particular train.⁵⁶ A limited ticket is not good for

⁵⁴ *Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209; *Pennington v. Illinois Cent. R. Co.*, 252 Ill. 584, 97 N. E. 289, 37 L. R. A. (N. S.) 983 (in consideration of reduced fare); *Burn v. Chicago &c. Ry. Co.*, 153 Ill. App. 319; *Churchill v. Chicago &c. R. Co.*, 67 Ill. 390; *Hanlon v. Illinois &c. R. Co.*, 109 Iowa 136, 80 N. W. 223; *Freeman v. Atchison &c. R. Co.*, 71 Kans. 327, 50 Pac. 592, 6 Ann. Cas. 118; *Rawitzky v. Louisville &c. R. Co.*, 40 La. Ann. 47, 3 So. 387; *Boston &c. R. Co. v. Proctor*, 83 Mass. 267, 79 Am. Dec. 729; *Illinois R. Co. v. Marlett*, 75 Miss. 956, 23 So. 583; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. 452; *Maxson v. Pennsylvania R. Co.*, 49 Misc. 502, 97 N. Y. S. 962; *Hill v. Syracuse &c. R. Co.*, 63 N. Y. 101; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *St. Louis &c. R. Co. v. Johnson*, 25 Okla. 833, 108 Pac. 378; *Craig v. Great Western R. Co.*, 24 U. C. Q. B. 504; *Farewell v. Grand Trunk R. Co.*, 15 U. C. C. P. 427.

⁵⁵ *Krueger v. Chicago &c. R. Co.*, 68 Minn. 445, 71 N. W. 683, 64 Am. St. 487; *Brian v. Oregon &c. R. Co.*, 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 20 Ann. Cas. 311. Thus, if the company runs no train on the day to which it is limited, or if it is a round-trip ticket, and there is not time to make the round trip within the period of limitation, or if it is a

through ticket over connecting lines, and the time is too short to reach the last line, where there is no delay within such period, we suppose the traveler could take the first train on the next day. See *Texas &c. R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400; *Gulf &c. R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510; *Little Rock &c. R. Co. v. Dean*, 43 Ark. 529, 51 Am. Rep. 584; *Elliott v. Southern Pac. Co.*, 145 Cal. 441, 79 Pac. 420, 423, 68 L. R. A. 393, 397, 398 (citing text, and holding that, although the company failed to perform its part of the contract because of a strike, the purchaser could not use the return part of a ticket on an entirely independent journey long after the time limited had expired). See as to limitation by mere notice, *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; *Norman v. Railway Co.*, 65 S. Car. 517, 44 S. E. 83, 95 Am. St. 809, with which compare *Johnson v. Concord R. Co.*, 46 N. H. 213, 88 Am. Dec. 199. Whether the time limited in the particular case is reasonable has been held a question for the jury. *Gulf &c. R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

⁵⁶ *McClure v. Philadelphia &c. R. Co.*, 34 Md. 532, 6 Am. Rep. 345; *Howard v. Chicago &c. R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313; *State v. Campbell*, 32 N. J.

passage after the time to which it is limited has expired, and, as a general rule, one who presents such a ticket and refuses to pay his fare or produce a proper ticket may be expelled from the train.⁵⁷ Substantially the same rules apply in this respect to commutation or mileage tickets as to single tickets.⁵⁸ We have already considered the rule as to limited through tickets.⁵⁹ As the language of the ticket is that of the carrier and as forfeitures are "odious," in case of ambiguity and doubt, it will be construed most strongly against the carrier.⁶⁰ Under this rule it has been held that when a

L. 309; *Gale v. Delaware &c. R. Co.*, 7 Hun (N. Y.) 670; *Muckle v. Rochester &c. R. Co.*, 79 Hun 32, 29 N. Y. S. 732; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Missouri &c. R. Co. v. Murphy* (Tex.), 35 S. W. 66; *Shedd v. Troy &c. R. Co.*, 40 Vt. 88; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510. See also *Coburn v. Morgan's Louisiana &c. R. Co.*, 105 La. 398, 29 So. 882; *New York &c. R. Co. v. Feeley*, 163 Mass. 205, 40 N. E. 20; *Johnson v. Concord R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199; *McRae v. Wilmington R. Co.*, 88 N. Car. 526, 43 Am. Rep. 745; *St. Louis &c. R. Co. v. Johnson*, 25 Okla. 833, 108 Pac. 378; *England v. International R. Co.*, 32 Tex. Civ. App. 86, 73 S. W. 24.

⁵⁷ *Lewis v. Western &c. R. Co.*, 93 Ga. 225, 18 S. E. 650; *Churchill v. Chicago &c. R. Co.*, 67 Ill. 390; *Freeman v. Atchison &c. R. Co.*, 71 Kans. 327, 80 Pac. 592, 593 (quoting text); *Rawitzky v. Louisville &c. R. Co.*, 40 La. Ann. 47, 3 So. 387; *Pennington v. Philadelphia &c. R. Co.*, 62 Md. 95, 18 Am. & Eng. R. Cas. 310, and note; *Boling v. St. Louis &c. R. Co.*, 189 Mo. 219, 88 S. W. 35; *State v. Campbell*,

32 N. J. L. 309; *Grogan v. Chesapeake &c. R. Co.*, 39 W. Va. 415, 19 S. E. 563; also authorities cited in the first note to this section. See also *Louisville &c. R. Co. v. Rieley*, 121 Va. 469, 93 S. E. 574, L. R. A. 1918A, 775, 777 (citing text).

⁵⁸ *Lillis v. St. Louis &c. R. Co.*, 64 Mo. 464, 27 Am. Rep. 255; *Sherman v. Chicago &c. R. Co.*, 40 Iowa 45; *Powell v. Pittsburg &c. R. Co.*, 25 Ohio St. 70. See also as to return tickets, *Rawitzky v. Louisville &c. R. Co.*, 40 La. Ann. 47, 3 So. 387, 31 Am. & Eng. R. Cas. 129; *Arnold v. Pennsylvania R. Co.*, 115 Pa. St. 135, 8 Atl. 213, 2 Am. St. 542.

⁵⁹ Ante, § 2420.

⁶⁰ *Auerbach v. New York Cent. R. Co.*, 89 N. Y. 281, 42 Am. Rep. 290, 6 Am. & Eng. R. Cas. 334; *Evans v. St. Louis &c. R. Co.*, 11 Mo. App. 463; *Lundy v. Central Pac. R. Co.*, 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100; *Little Rock &c. R. Co. v. Dean*, 43 Ark. 529, 51 Am. Rep. 584; *Cleveland &c. R. Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. 245 (citing text).

ticket is required to be used on or before a specified day it is sufficient if the trip is begun upon the particular line and the ticket presented before midnight of such day, although the journey is not completed upon such line until after that time.⁶¹ So, in one case, where the ticket provided that it should not be "good for passage after nine days from date of sale," it was held sufficient that the journey was commenced, although not completed within that time,⁶² but this decision seems to us to be of doubtful soundness.⁶³ It has also been held that a ticket marked "good this trip only," although dated, is good on any subsequent day until used, but this decision has also been criticised.⁶⁴ In some states it is provided by statute that tickets

⁶¹ *Evans v. St. Louis &c. R. Co.*, 11 Mo. App. 463; *Auerbach v. New York Cent. R. Co.*, 89 N. Y. 281, 42 Am. Rep. 290; *Georgia Southern R. Co. v. Bigelow*, 68 Ga. 219; *Cleveland &c. R. Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. 245; *Rutherford v. St. Louis &c. R. Co.*, 28 Tex. Civ. App. 625, 67 S. W. 161; *Illinois Cent. R. Co. v. Harris*, 81 Miss. 208, 32 So. 309.

⁶² *Lundy v. Central Pac. R. Co.*, 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100, 18 Am. & Eng. R. Cas. 309. See also *Morningstar v. Railroad Co.*, 135 Ala. 251, 33 So. 156; *Louisville &c. R. Co. v. Stephen*, 13 Ky. L. 687; *Auerbach v. New York &c. R. Co.*, 89 N. Y. 281, 42 Am. Rep. 290. In *Stevens v. Wichita &c. R. Co.*, 45 Tex. Civ. App. 196, 100 S. W. 807, a round-trip ticket limited to four days from date of issuance having been purchased by plaintiff for his wife, and she having left the destination in time to return within the time limit of the ticket, there was a delay so that she missed the train at a connecting point. There

was another train leaving such point on that day, but it did not run through, and she waited until the next day, her ticket having expired the day before, when she took the train running through. It was held that she was not bound to take the train which would not carry her through, and was entitled to ride from the connecting point to the original starting place on her ticket on the day she presented it.

⁶³ See *Mitchell v. Southern R. Co.*, 77 Miss. 917, 27 So. 834; *Brian v. Oregon &c. R. Co.*, 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n; *Gulf &c. R. Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. 399.

⁶⁴ *Pier v. Finch*, 24 Barb. (N. Y.) 514. See also *Boice v. Hudson R. Co.*, 61 Barb. (N. Y.) 611; *Texas &c. Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. 841, which seems to us to go to the other extreme. A ticket "good for this day and train only" has been held good for any train during the day of its date. *Gale v. Delaware &c. R. Co.*, 7 Hun (N. Y.) 670.

shall be good for a certain number of years from their date, notwithstanding any limitation therein, but such a statute has no extraterritorial force and does not govern a ticket sold at a station in another state for transportation from such station to a place within the state which enacted the statute,⁶⁵ nor does it apply where a ticket is used in another state, although purchased in the state in which the statute exists for transportation from a place therein to a place in such other state.⁶⁶ Where the ticket makes no provision as to the time of use, and there is no statute specially limiting its life, it seems that the ordinary statute of limitations would apply from the date of issue.⁶⁷ It has been held, in accordance with what we believe to be the better rule, although the authorities are conflicting, that a traveler has no right to rely upon the verbal representations or statements of an agent having no authority in the premises that a ticket will be good contrary to the express limitations on its face.⁶⁸ This must certainly be the true rule where the

⁶⁵ *Lafarier v. Grand Trunk R. Co.*, 84 Maine 286, 24 Atl. 848, 17 L. R. A. 111.

⁶⁶ *Boston &c. R. Co. v. Trafton*, 151 Mass. 229, 23 N. E. 829; *Carpenter v. Grand Trunk R. Co.*, 72 Maine 388, 39 Am. Rep. 340.

⁶⁷ *Cassiano v. Galveston &c. R. Co. (Tex.)*, 82 S. W. 806; *Freeman v. Atchison &c. R. Co.*, 71 Kans. 327, 80 Pac. 592. See also *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, 68 Am. St. 146; *Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209.

⁶⁸ *Pennington v. Illinois Cent. R. Co.*, 252 Ill. 584, 97 N. E. 289, 37 L. R. A. (N. S.) 983; *Pennington v. Philadelphia &c. R. Co.*, 62 Md. 95; *McClure v. Philadelphia &c. R. Co.*, 34 Md. 532, 6 Am. R. 345; *Boise v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611; *Gulf &c. R. Co. v. Daniels (Tex.)*, 29

S. W. 426; *Louisville &c. R. Co. v. Rieley*, 121 Va. 469, 93 S. E. 574, 575, 576, L. R. A. 1918A, 775 (citing text). See also *Freeman v. Atchison &c. R. Co.*, 71 Kans. 327, 80 Pac. 592, 6 Ann. Cas. 118; *Walker v. Price*, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392. But compare *Callowday v. Mellett*, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. 238; *Hayes v. Wabash R. Co.*, 163 Mich. 174, 128 N. W. 217, 31 L. R. A. (N. S.) 229n; *Nelson v. Long Island R. Co.*, 7 Hun (N. Y.) 140; *Norman v. E. Car. R. Co.*, 161 N. Car. 330, 77 S. E. 345, Ann. Cas. 1914D, 917; *Dagnall v. Southern R. Co.*, 69 S. Car. 110, 48 S. E. 97; *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140. See also ante, §§ 2415, 2416. The text is cited in *San Antonio &c. R. Co. v. Newman*, 17 Tex. Civ. App. 606, 43 S. W. 915, 918.

ticket contains the real contract, or the representations were not made at the time the ticket was purchased, or the agent had no apparent authority to make them. The mere checking of baggage on such a ticket after the time has expired will not operate as a waiver of the limitation,⁶⁹ nor will the mere fact that others, or the traveler himself, may have been permitted to ride on other occasions on the same or a similar ticket after it had expired, prevent the company from enforcing the contract.⁷⁰ But the limitation may be waived and the time extended by an authorized officer of the company.⁷¹

§ 2423 (1599). Non-transferable tickets.—In the absence of anything to the contrary a ticket is transferable, being regarded as evidencing a contract to carry the bearer.⁷² But a railroad company may issue non-transferable tickets, and limited tickets sold at a reduced rate are usually issued in that form. The ticket may expressly provide that it shall not be transferred, or it may provide that it shall be void if presented by any one other than the original holder, and it is held that the words

⁶⁹ *Wentz v. Erie R. Co.*, 3 Hun (N. Y.) 241.

⁷⁰ *Sherman v. Chicago &c. R. Co.*, 40 Iowa 45; *Duling v. Philadelphia &c. R. Co.*, 66 Md. 120, 6 Atl. 592; *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Johnson v. Concord &c. R. Co.*, 46 N. H. 213, 88 Am. Dec. 199; *Hill v. Syracuse &c. R. Co.*, 63 N. Y. 101; *Dietrich v. Pennsylvania Co.*, 71 Pa. St. 432, 10 Am. Rep. 711. See also *Trotlinger v. East Tennessee &c. R. Co.*, 11 Lea (Tenn.) 533, 13 Am. & Eng. R. Cas. 49; *Hanlon v. Railroad Co.*, 109 Iowa 136, 80 N. W. 223. But compare *Thompson v. Truesdale*, 61 Minn. 129, 63 N. W. 259, 52 Am. St. 579, 2 Am. & Eng. R. Cas. (N. S.) 105.

⁷¹ *Randall v. New Orleans &c. R. Co.*, 45 La. Ann. 778, 13 So. 166.

See also *Elliott v. Southern Pac. Co.*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393; *Pennington v. Railroad Co.*, 69 Ill. App. 628; *Jevons v. Union Pac. R. Co.*, 70 Kans. 491, 78 Pac. 817 (issuance of ticket on date later than that limited on its face).

⁷² *Hudson v. Kansas Pac. R. Co.*, 3 McCr. (U. S. C. C.) 249, 9 Fed. 879; *Spencer v. Lovejoy*, 96 Ga. 657, 23 S. E. 836, 51 Am. St. 152; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. 589; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53, 47 N. W. 312; *Nichols v. Southern Pac. R. Co.*, 23 Ore. 123, 31 Pac. 296, 18 L. R. A. 55, 37 Am. St. 664; *International &c. R. Co. v. Ing*, 29 Tex. Civ. App. 398, 68 S. W. 722 (citing text).

"non-transferable," or words of similar import, will restrict the right to use the ticket to the original purchaser.⁷³ If a ticket which is not transferable is procured and issued in the name of one person the conductor is justified in refusing to honor it when presented by another, although it was really purchased for the latter.⁷⁴ It has been held that, although a ticket is not transferable and is therefore invalid in the hands of the third person who presents it, the conductor has no right both to refuse to honor it and to take it up and retain it without permitting the holder to ride upon it,⁷⁵ unless the contract gives him that right.⁷⁶ But it has also been held that one who presents a non-transferable commutation ticket issued to another, without attempting to conceal his identity, is entitled to the same care and protection as other passengers where it has been accepted and his right to ride upon it has been recognized by the conductor.⁷⁷ In some of the states statutes have been

⁷³ *Bitterman v. Louisville &c. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. ed. 171 (carriers may issue reduced rate non-transferable excursion tickets under interstate commerce law); *Cody v. Central Pac. R. Co.*, 4 Sawy. (U. S. C. C.) 114; *Robostelli v. New York &c. R. Co.*, 33 Fed. 796, 34 Am. & Eng. R. Cas. 515; *Way v. Chicago &c. R. Co.*, 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431; *Granier v. Louisiana &c. R. Co.*, 42 La. Ann. 880, 8 So. 614; *Friedenrich v. Baltimore &c. R. Co.*, 53 Md. 201; *Walker v. Wabash &c. R. Co.*, 15 Mo. App. 333, 16 Am. & Eng. R. Cas. 380; *Post v. Chicago &c. R. Co.*, 14 Nebr. 110, 45 Am. Rep. 100, 9 Am. & Eng. R. Cas. 345; *Drummond v. Southern Pac. R. Co.*, 7 Utah 118, 25 Pac. 733; *Langdon v. Howells*, L. R. 4 Q. B. Div. 337. See also *Kirby v. Union Pac. R. Co.*, 51 Colo. 509, 119 Pac. 1042,

Ann. Cas. 1913B, 461; *Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. 452; *Delaware &c. R. Co. v. Frank*, 110 Fed. 689.

⁷⁴ *Chicago &c. R. Co. v. Bannerman*, 15 Ill. App. 100. But compare *Jevons v. Union Pac. R. Co.*, 70 Kans. 491, 78 Pac. 817.

⁷⁵ *Post v. Chicago &c. R. Co.*, 14 Nebr. 110, 45 Am. Rep. 100.

⁷⁶ *Drummond v. Southern Pac. R. Co.*, 7 Utah 118, 25 Pac. 733. It has been held that a stipulation for a forfeiture, if the ticket is found in the hands of another, may justify the conductor in taking it up after it gets back into the hands of the original purchaser. *Friedenrich v. Baltimore &c. R. Co.*, 53 Md. 201.

⁷⁷ *Robostelli v. New York &c. R. Co.*, 33 Fed. 796, 34 Am. & Eng.

enacted to prevent ticket brokerage or scalping,⁷⁸ but it was held where a traveler purchased a ticket, the assignability of which was not restricted, from a scalper in New York that he might maintain an action against the railroad company in Pennsylvania, for a refusal to carry him on the ticket, notwithstanding a statute of the latter state made it unlawful for any one other than an authorized agent of the company to sell tickets.⁷⁹

§ 2424 (1599a). Identification of purchaser of ticket.—A railroad company may provide and require that one presenting a non-transferable reduced-rate ticket shall identify himself as the original purchaser, by writing his signature for comparison with the signature on the ticket; and if this is not satisfactory, or at least such as ought to be satisfactory, to the conductor or agent, to produce other proof of his identity.⁸⁰ The carrier's agent is not compelled to accept as final the holder's verbal assurance of his identity, nor is he required to institute other inquiries

R. Cas. 515. But see *Beard v. International &c. Ry. Co.* (Tex. Civ. App.), 171 S. W. 553.

⁷⁸ As to the validity and effect of such statutes, see *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. 329; *State v. Fry*, 81 Ind. 7; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *People v. Warden*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. 763; *People v. Caldwell*, 168 N. Y. 671, 61 N. E. 1132; *State v. Ray*, 109 N. Car. 736, 14 S. E. 83, 14 L. R. A. 529; *State v. Clark*, 109 N. Car. 739, 14 S. E. 84; *State v. Thompson*, 47 Ore. 492, 84 Pac. 476; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472; note in 24 L. R. A. 152, 27 Am. & Eng. Ency. of L. (2d ed.) 198; ante, § 868. See also as to right of carrier to injunction,

Bitterman v. Louisville &c. R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. ed. 171; *Lytle v. Galveston &c. R. Co.*, 100 Tex. 292, 99 S. W. 396, 10 L. R. A. (N. S.) 437.

⁷⁹ *Sleeper v. Pennsylvania R. Co.*, 100 Pa. St. 259, 45 Am. Rep. 380, 9 Am. & Eng. R. Cas. 291. The statute did not, however, make the purchase or use of a ticket obtained from an unauthorized person an offense. Compare also *Southern Pac. Ry. Co. v. Schuyler*, 227 U. S. 601, 33 Sup. Ct. 277, 57 L. ed. 662, 43 L. R. A. (N. S.) 901n.

⁸⁰ *Baltimore &c. R. Co. v. Hudson*, 117 Ky. 995, 80 S. W. 454, 25 Ky. L. 2154; *Southern &c. R. Co. v. Hamilton*, 54 Fed. 468. See also *Pittsburg &c. R. Co. v. Coll*, 37 Ind. App. 232, 76 N. E. 816; *Sinnot v. Louisville &c. R. Co.*, 104 Tenn. 233, 56 S. W. 836.

with a view of satisfying himself on this subject. It is the duty of the person tendering the ticket to furnish this evidence.⁸¹ It has been held, however, that a condition in a ticket that the holder should identify himself to the satisfaction of the conductors, agents or representatives of the railway company, does not require the passenger to satisfy the conductor of his identity as the original purchaser, but only requires identification by such proof as would satisfy the mind of a reasonable, conscientious and prudent man selected by the parties to pass on the question.⁸² Where the passenger refuses to sign his name for the purposes of identification when requested to do so he may be treated as a trespasser and ejected from the train.⁸³ It has been held that though a ticket is, by its terms, subject to forfeiture to the company if used by any person other than the one to whom it is issued, yet the company has no right to enforce the forfeiture where it is so used by a person without the permission of the holder.⁸⁴

§ 2425 (1600). Commutation and mileage tickets.—In the absence of any statutory provision upon the subject, a railroad company is under no obligation to sell commutation or mileage tickets, but it has been held that when it has established com-

⁸¹ *Baltimore &c. R. Co. v. Hudson*, 117 Ky. 995, 80 S. W. 454, 25 Ky. L. 2154; *Southern R. Co. v. Barlow*, 104 Ga. 213, 30 S. E. 732, 69 Am. St. 166; *Head v. Georgia Pacific R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. 434. See also *Central R. &c. Co. v. Cannon*, 106 Ga. 828, 32 S. E. 874.

⁸² *Southern R. Co. v. Cassell*, 28 Ky. L. 1230, 92 S. W. 281. Compare *Marlow v. Southern Pac. Co.*, 151 Cal. 383, 90 Pac. 928, 121 Am. St. 127.

⁸³ *Southern R. Co. v. Hamilton*, 54 Fed. 464; *Ketcheson v. Southern Pac. R. Co.*, 19 Tex. Civ. App. 288, 46 S. W. 907; *Dangerfield v. Atchison &c. R. Co.*, 62 Kans. 85,

61 Pac. 405; § 2421. But see where the passenger does offer to sign and the conductor refuses the offer. *Norfolk &c. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757, 44 Am. St. 884.

⁸⁴ *Mueller v. Chicago &c. R. Co.*, 75 Minn. 109, 77 N. W. 566. Stipulations as to forfeiture have often been upheld. *Baltimore &c. R. Co. v. Evans*, 169 Ind. 410, 82 N. E. 773, 14 L. R. A. (N. S.) 368n; *Feidenrich v. Baltimore &c. R. Co.*, 53 Md. 201; *Colton v. Delaware &c. R. Co.*, 80 N. J. L. 592, 77 Atl. 1020; *Harris v. Delaware &c. R. Co.*, 77 N. J. L. 278, 72 Atl. 50.

mutation rates and keeps such tickets for sale to the public, the refusal to sell a ticket of that kind, or make such rates to a particular individual under the same circumstances and upon the same conditions as they are sold to the rest of the public is an unjust and illegal discrimination.⁸⁵ In Massachusetts a statute was enacted providing that "every railroad corporation operating within this commonwealth shall provide and have on sale, for twenty dollars, mileage tickets representing one thousand miles, which shall be accepted and received for fare and passage upon all railroad lines in this commonwealth, as well and under like condition as upon the line or lines of the corporation issuing such ticket." This was held unconstitutional upon the grounds that it authorized one railway company to determine the conditions upon which another railroad company must carry passengers and that it compelled one company to carry passengers on the credit of another, thus taking property for the public use without compensation or the owner's consent.⁸⁶ As we have elsewhere shown, a mileage ticket, limited to a certain time does not entitle the holder to passage after the expira-

⁸⁵ *State v. Delaware &c. R. Co.*, 48 N. J. L. 55, 2 Atl. 803, 23 Am. & Eng. R. Cas. 543, 57 Am. Rep. 543. See also *Indianapolis R. Co. v. Rinard*, 46 Ind. 293; *Larrison v. Chicago &c. R. Co.*, 1 Int. Com. Com. 147; *Associated &c. Grocers v. Missouri Pac. R. Co.*, 1 Int. Com. Com. 156; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699.

⁸⁶ *Attorney-General v. Boston &c. R. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112, 56 Am. & Eng. R. Cas. 59. Two members of the court, however, dissented, and the decision has met with some criticism. See 7 Harv. L. Rev. 356. But other cases are to the same effect. *Beardsley v. New*

York &c. R. Co., 162 N. Y. 230, 56 N. E. 488; *Lake Shore &c. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858. See also *Commonwealth v. Atlantic &c. R. Co.*, 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086n, 117 Am. St. 983. But compare *Stephens v. Central of Ga. Ry. Co.*, 138 Ga. 625, 75 S. E. 1091, 42 L. R. A. (N. S.) 541n, Ann. Cas. 1913E, 609. Conditions can not be imposed contrary to those of a valid statute. *Parish v. Ulster &c. R. Co.*, 192 N. Y. 353, 85 N. E. 153. As to validity of statutes or orders of railroad commission as to use of mileage books or tickets, see note in 7 L. R. A. (N. S.) 1086, and *Railroad Com. v. Louisville &c. R. Co.*, 140 Ga. 817, 80 S. E. 327, L. R. A. 1915E, 902n.

tion of the time specified, although the whole number of miles for which it is good has not been traveled.⁸⁷ The conductor may, in accordance with the provisions of the ticket or the rules and regulations of the company, refuse to accept detached coupons, and may expel the traveler, who refuses to pay his fare, if he does not produce a proper ticket or mileage book and permit the conductor to properly detach the coupons.⁸⁸ A passenger has no right to require the conductor to take the coupons from the back part of a mileage book instead of the front part.⁸⁹ A regulation of the company that monthly commutation tickets shall be surrendered to the conductor on the last trip taken during the period for which it is issued is reasonable and it has been held that the purchaser of such a ticket with the regulation indorsed upon it may be ejected, if he fails or refuses to surrender it on his last trip or pay the regular fare, even though he may have accidentally lost it.⁹⁰ It is not uncommon for railroad companies to require the holder of a non-transferable mileage book or commutation ticket to sign his name when requested by the conductor for identification, and we have no doubt that such a regulation is reasonable. But a family commutation ticket, which, on its face purports to

⁸⁷ Ante, § 2422, note 58; *Lillis v. St. Louis &c. R. Co.*, 64 Mo. 464, 27 Am. Rep. 255. As to redemption of the unused portion, see *Smith v. Philadelphia &c. R. Co.*, 11 Pa. Co. Ct. 555; *Sidman v. Richmond &c. R. Co.*, 3 Interstate Com. Com. 512, 27 Am. & Eng. Ency. of L. (2d ed.) 200.

⁸⁸ *Downs v. New York &c. R. Co.*, 36 Conn. 287, 4 Am. Rep. 77; *Ripley v. New Jersey &c. Co.*, 31 N. J. L. 388; *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703, 34 Atl. 11; *Crawford v. Cincinnati &c. R. Co.*, 26 Ohio St. 580; *Bennett v. Railroad Co.*, 7 Phila (Pa.) 11; *Norfolk &c. R. Co. v. Wysor*, 82 Va. 250, 26 Am. & Eng. R. Cas.

235. See also *Marshall v. Boston &c. R. Co.*, 145 Mass. 164, 13 N. E. 384. But compare *Fairfield v. Louisville &c. R. Co.*, 94 Miss. 887, 48 So. 513, 136 Am. St. 611, 19 Ann. Cas. 456.

⁸⁹ *Eaton v. McIntire*, 88 Maine 578, 34 Atl. 525. There are two reasons for this. It is customary to take them from the front rather than the back, and the right to determine from what part they shall be taken belongs, on principle, to the conductor, whose duty it is to detach them, rather than to the passenger.

⁹⁰ *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703, 34 Atl. 11.

be for the use of a man and his family, authorizes his son, who resides with him as a member of the family, to travel thereon, in the absence of anything to the contrary, although he is over twenty-one years of age.⁹¹ Where a mileage ticket is issued by a road owning two lines or owning one and leasing another, purporting to be good for a certain number of miles on one and a certain number of miles on the other, the holder of the ticket, after having traveled on the one line for the specified number of miles for which it is good on that line, is not entitled to use upon the same line the unused mileage good over the other line.⁹²

§ 2426 (1601). **Excursion tickets.**—It has been held that an excursion ticket constituting or containing a special contract is conclusive evidence of the terms of the contract, and that advertisements of the excursion are not admissible to vary its terms.⁹³ The rule that a railroad company may limit the use of a ticket to a certain day or train is peculiarly applicable in such cases, and, where the ticket contains such a stipulation it can not be used on any other day or train.⁹⁴ Nor can such a ticket, which

⁹¹ *Chicago &c. R. Co. v. Chisholm*, 79 Ill. 584. But it was also said in this case that it would be otherwise if there was a regulation of the carrier, of which the purchaser was informed at the time of the purchase, that a son over twenty-one years old could not ride on the ticket. And see *Granier v. Louisiana &c. R. Co.*, 42 La. Ann. 880, 8 So. 614. See generally as to such tickets, *Grimes v. Minneapolis &c. R. Co.*, 37 Minn. 66, 33 N. W. 33; *Knopf v. Richmond &c. R. Co.*, 85 Va. 769, 8 S. E. 787, 37 Am. & Eng. R. Cas. 140.

⁹² *Terre Haute &c. R. Co. v. Fitzgerald*, 47 Ind. 79. In this case the ticket was a "thousand-mile ticket" good for seven hun-

dred miles over one line and three hundred over the other.

⁹³ *Howard v. Chicago &c. R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313. See also *International &c. R. Co. v. Ing*, 29 Tex. Civ. App. 398, 68 S. W. 722 (citing text).

⁹⁴ *Central R. &c. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315; *Atkinson v. Southern R. Co.*, 114 Ga. 146, 39 S. E. 888, 55 L. R. A. 223; *Pennington v. Philadelphia &c. R. Co.*, 62 Md. 95, 18 Am. & Eng. R. Cas. 310; *Howard v. Chicago &c. R. Co.*, 61 Miss. 194; *State v. Campbell*, 32 N. J. L. 309; *Nolan v. New York &c. R. Co.*, 41 N. Y. Sup. Ct. 541; *McRae v. Wilmington &c. R. Co.*, 88 N. Car. 526, 43 Am. Rep. 745, 18 Am. & Eng. R. Cas. 316; *McElroy v. Railroad Co.*, 7 Phila.

is bought at a reduced rate and conditioned to be good only for a "continuous trip" to the destination specified, be used on a train which does not make, and is not scheduled to make, the through trip, but stops at an intermediate point.⁹⁵ But the time limited for a round trip must not be so short that a passenger who uses due diligence can not commence his return trip on some train within the time, or it will be unreasonable.⁹⁶ It has also been held that, while a railroad company may run an excursion train at reduced rates, and may enforce a rule requiring passengers to purchase tickets, as a condition upon which they may obtain the benefit of such rates, against all who, by their own fault, fail to comply with it, yet, if one is unable to procure a ticket through the fault of the company, he may take passage upon such train, and, upon a tender of the ticket rate of fare, will be entitled to all the rights and privileges that a ticket would afford him.⁹⁷ The fact that the ticket was issued by one described therein as "excursion agent" has been held not sufficient, without more, to show that he was in charge of the train and responsible for its operation, but rather to indicate that the ticket was sold by such person as the carrier's agent.⁹⁸

(Pa.) 206; *England v. International &c. R. Co.*, 32 Tex. Civ. App. 86, 73 S. W. 24. But see where the ticket contains no such stipulation or notice, *Southern R. Co. v. Flanigan*, 10 Ga. App. 745, 74 S. E. 85.

⁹⁵ *Johnson v. Philadelphia &c. R. Co.*, 63 Md. 106, 18 Am. & Eng. R. Cas. 304.

⁹⁶ *Texas &c. R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400.

⁹⁷ *Chicago &c. R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. 256. In this case the company was held liable for his expulsion upon refusal to pay the full regular fare. See also *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am.

Dec. 276; *Cleveland &c. R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. 429, and authorities there cited. *Ammons v. Railway*, 138 N. Car. 555, 51 S. E. 127; *Rivers v. Kansas City &c. R. Co.*, 86 Miss. 571, 38 So. 508. See generally as to rights of one who can not get ticket before train starts. *Kozminsky v. Oregon &c. R. Co.*, 36 Utah 454, 104 Pac. 570, 24 L. R. A. (N. S.) 758n. But a company may abandon its custom to run trains on certain days at reduced rates. *Johnson v. Georgia R. Co.*, 108 Ga. 496, 34 S. E. 127, 46 L. R. A. 502.

⁹⁸ *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725, 85 S. W. 627.

§ 2427 (1601a). **Mutilated tickets.**—It is held in a comparatively recent case that a ticket is mutilated within the meaning of a provision on its face invalidating it for mutilation when it is deprived of some essential part. It is not enough that it is torn into two pieces, where both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket and that no fraud is intended.⁹⁹ On this subject it has been said: “It is plain that if a ticket has been torn in two, and the two parts, preserved, fit exactly together in such a way as to make it indisputable that they are parts of the same ticket and together form the entire ticket, there has been no mutilation, except in a purely physical sense. Nothing essential to a valid ticket has been removed; only its physical symmetry has been marred. The only reasonable object to be accomplished by a regulation like the one now under consideration is to prevent fraud. It would, of course, be grossly unfair to the railroad company to require it to honor only a part of a ticket, for in that case two or more persons, only one of whom had paid any consideration to the company might be enabled to ride on the same ticket. But if the plaintiff’s evidence is to be believed, she furnished to the conductor of the train conclusive evidence that a fraud had not, and could not have been, perpetrated by her.”¹

§ 2428 (1601b). **Rules requiring passengers to exhibit tickets to gate keepers before entering trains.**—A railroad company has an undoubted right to make and enforce rules requiring persons passing through the gates for the purpose of taking trains to exhibit their tickets to the gate keeper² and have them punched

⁹⁹ Young v. Central R. Co., 120 Ga. 25, 47 S. E. 556, 65 L. R. A. 436, 102 Am. St. 68, citing Wightman v. Chicago &c. R. Co., 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. 778. See also Fairfield v. Louisville &c. R. Co., 94 Miss. 887, 48 So. 513, 136 Am. St. 611, 19 Ann. Cas. 456. A street railway company may, pursuant to its rules, refuse a transfer ticket mu-

tilated after coming into the possession of the passenger receiving it, but cannot refuse a ticket mutilated before given him. Koch v. New York City R. Co., 95 N. Y. S. 559.

¹ Young v. Central R. Co., 120 Ga. 25, 47 S. E. 556, 65 L. R. A. 436, 102 Am. St. 68.

² St. Louis &c. R. Co. v. Dyer, 115 Ark. 262, 170 S. W. 1013.

by him, and forbidding passengers to pass through any gate after the train indicated by his ticket has started or to board any train while in motion. Such or similar rules seem absolutely necessary to preserve to the defendant control of its grounds, and to enable it to receive and discharge passengers with order, and to the safety, comfort, and convenience of the passengers.³ All persons having notice of such rules, and a reasonable opportunity to comply with them, are bound to observe them in order to have a right to pass through the gates or to take a train at the company's depot; and the company has a right to enforce such rules, and to prevent their violation, and to use such force as may be reasonably necessary to that end. If, in no such case it may use force, then the right to enforce the rules and prevent their violation is but a barren right.⁴ But the company is liable in damages of course, for unwarranted assaults and other misconduct in such cases committed by the gate keeper.⁵ It has been held that a rule providing that the holders of defaced tickets should be refused admittance to trains and the matter referred to the ticket receivers for investigation was unreasonable and not to be enforced against a ticket holder who presents a defaced ticket in good faith to the gate keeper in the condition in which he got it. The holding is that he is not obliged to get the indorsement of the ticket receiver because the genuineness of the ticket has been questioned by the gate-man. This would not only subject the innocent passenger to great inconvenience, but in many cases would also make it impossible for him to get such indorsement in time to take the train. Where a passenger is subjected to inconvenience by the

³ *St. Louis &c. Ry. Co. v. Blythe*, 94 Ark. 153, 126 S. W. 386, 29 L. R. A. (N. S.) 299n.

⁴ *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433, 46 N. W. 907; *Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. 422. See also as to the right to require passengers to show their tickets

before entering the train, *St. Louis &c. Ry. Co. v. Blythe*, 94 Ark. 153, 126 S. W. 386, 29 L. R. A. (N. S.) 299n; *Chicago &c. R. Co. v. Boger*, 1 Ill. App. 478; *Pittsburg &c. R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68.

⁵ *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219.

enforcement of such a rule his right to resulting damages, it is said, would be clear provided he was without fault in the matter.⁶

§ 2429(1602). **Conductor's checks.**—It is customary for conductors to give checks, in many cases where tickets or coupons are taken up, as evidence of the payment of fare or the passenger's right to transportation or to stop over and resume his passage within a certain time.⁷ But it has been held that a conductor's check authorizing the passenger to stop over for a specified time must be presented at or before the expiration of such time,⁸ and that a check in the ordinary form is a mere receipt or certificate of the payment of fare for a continuous trip or the surrender of the regular ticket, and will not authorize the passenger to stop over unless it contains a clause to that effect.⁹ It has also been held in New Hampshire that a passenger may refuse to surrender his ticket while other stations have to be passed before reaching his destination, unless he is given a check or other evidence of his right to passage,¹⁰ but this has been denied in Illinois.¹¹ If a check has been given by one conductor to a passenger upon the surrender of his ticket,

⁶ *Northern Cent. R. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. 422.

⁷ Such a custom or regulation is reasonable. *Northern R. Co. v. Page*, 22 Barb. (N. Y.) 130; *Loring v. Aborn*, 4 Cush. (Mass.) 608.

⁸ *Churchill v. Chicago &c. R. Co.*, 67 Ill. 390.

⁹ *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 25 N. W. 349, 22 Am. & Eng. R. Cas. 402, 404; *McClure v. Philadelphia &c. R. Co.*, 34 Md. 532, 6 Am. Rep. 345; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671, 673. See also *Stone v. Chicago &c. R. Co.*, 47 Iowa 82, 29 Am. Rep. 458; *Cheney v. Boston &c. R. Co.*, 52 Mass. 121,

45 Am. Dec. 190; *Breen v. Texas &c. R. Co.*, 50 Tex. 43; 3 *Thomp. Neg.* (2d ed.) §§ 2596-2598. But see *Wilsey v. Railroad Co.*, 83 Ky. 511.

¹⁰ *State v. Thompson*, 20 N. H. 250.

¹¹ *Chicago &c. R. Co. v. Griffin*, 68 Ill. 499. See also *Illinois &c. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Vedder v. Fellows*, 20 N. Y. 126; *Heap v. Day*, 34 W. R. 637, 51 J. P. 213. A regulation requiring surrender of ticket in proper cases, as in exchange for for a check, is valid. *Havens v. Railroad*, 28 Conn. 69; *White v. Evansville &c. R. Co.*, 133 Ind. 480, 33 N. E. 273.

and this is the only evidence of his right to passage, and he fails to produce it upon the proper demand of another conductor and refuses to pay his fare, he may be ejected.¹² It has been held in some cases that, although the first conductor makes a mistake and gives the wrong check, or none at all, the passenger can not recover for an expulsion by another conductor, as the check takes the place of the ticket and is the only evidence, as between such conductor and the passenger, of the latter's right to passage.¹³ But if the passenger is, in fact, entitled to such passage, he can doubtless recover from the company in a proper action, and some of the courts permit a recovery upon the theory of a wrongful expulsion by the second conductor,¹⁴ although it seems to us that the wrong consists in the act of the first conductor and the failure to transport the passenger.¹⁵ Somewhat similar to conductors' checks on rail-

¹² *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125. See also *Price v. Chesapeake &c. R. Co.*, 46 W. Va. 538, 33 S. E. 255.

¹³ *Townsend v. New York Cent. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Dunphy v. Erie &c. R. Co.*, 42 N. Y. Sup. Ct. 128; *Yorton v. Milwaukee &c. R. Co.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481.

¹⁴ *Pittsburg &c. R. Co. v. Hennigh*, 39 Ind. 509; *Palmer v. Railroad Co.*, 3 S. Car. 580, 16 Am. Rep. 750; *Burnham v. Grand Trunk R. Co.*, 63 Maine 298, 18 Am. Rep. 220; *Toledo &c. R. Co. v. McDonough*, 53 Ind. 289. See also *East Tennessee R. Co. v. King*, 88 Ga. 443, 14 S. E. 708; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Morrill v. Minneapolis St. Ry. Co.*, 103 Minn. 362, 115 N. W. 395, 123 Am. St. 341. And see for liability generally, where

an agent of the company misdirects the passenger, or the like, *Atkinson v. Southern R. Co.*, 114 Ga. 146, 39 S. E. 888, 55 L. R. A. 223; *Kansas City &c. R. Co. v. Little*, 66 Kans. 378, 71 Pac. 820, 61 L. R. A. 122, 97 Am. St. 376; *Louisville &c. Ry. Co. v. Spurling*, 160 Ky. 819, 170 S. W. 192, Ann. Cas. 1916A, 487; *Hayes v. Wabash Ry. Co.*, 163 Mich. 174, 128 N. W. 217, 31 L. R. A. (N. S.) 229n; *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. 469; *McDonald v. Central R. Co.*, 72 N. J. L. 280, 62 Atl. 405, 2 L. R. A. (N. S.) 505, and note, 111 Am. St. 672; *St. Louis &c. R. Co. v. White*, 99 Tex. 359, 89 S. W. 746, 2 L. R. A. (N. S.) 110, and note, 122 Am. St. 631.

¹⁵ *Yorton v. Milwaukee &c. R. Co.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23; *Townsend v. New York Cent. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Shelton v. Lake*

roads are transfer tickets or checks given upon street cars. A regulation requiring a transfer check where the fare is paid upon one line and a transfer is permitted to another line for the one fare is reasonable and valid in the absence of any charter or statutory provision to the contrary, and the company is not liable for the ejection of a traveler who has entered a car on the second line, at a point or a time different from the reasonable time and place specified in his transfer check, and refuses to pay his fare.¹⁶ So, as a general rule, it is the duty of a passenger who desires to avail himself of transfer privileges to obtain a proper transfer check, and, according to some of the authorities at least, the fact that the first conductor has given him the wrong check, or told him that he does not need any, will not necessarily entitle him to recover for an ejection by the conductor on the second line.¹⁷ But it has been said that

Shore &c. R. Co., 29 Ohio St. 214. See ante, §§ 2417, 2418, for authorities and consideration of the general question. See also *Louisville R. Co. v. Conrad*, 4 Ind. App. 83, 30 N. E. 406.

¹⁶ *Percy v. Metropolitan St. R. Co.*, 58 Mo. App. 75. See also *Hefron v. Detroit City R. Co.*, 92 Mich. 406, 52 N. W. 802, 16 L. R. A. 345, 31 Am. St. 601; *People v. Detroit United Ry. Co.*, 154 Mich. 514, 118 N. W. 9; *Jones v. Omaha &c. R. Co.*, 95 Nebr. 798, 146 N. W. 959; *Taylor v. Spartanburg R. &c. Co.*, 98 S. Car. 206, 82 S. E. 404, 52 L. R. A. (N. S.) 908n.

¹⁷ *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481 and note. See also *Norton v. Consol. R. Co.*, 79 Conn. 109, 63 Atl. 1087, 118 Am. St. 132, 6 Ann. Cas. 943; *De Lucas v. New Orleans &c. R. Co.*, 38 La. Ann. 930; *Daniel v. Brooklyn Heights R. Co.*, 67 Misc. 78, 121

N. Y. S. 577; *Elder v. International R. Co.*, 68 Misc. 22, 122 N. Y. S. 880. But compare *Carpenter v. Washington &c. R. Co.*, 121 U. S. 474, 7 Sup. Ct. 1002, 30 L. ed. 1015; *Birmingham R. Co. v. Turner*, 154 Ala. 542, 45 So. 671; *Montgomery Trac. Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851; *Little Rock &c. R. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97n, 10 Ann. Cas. 273; *Georgia R. &c. Co. v. Baker*, 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. 246, 5 Ann. Cas. 484; *Indianapolis St. R. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261, and authorities on both sides, cited in principal and dissenting opinions; *Morrill v. Minneapolis St. Ry. Co.*, 103 Minn. 362, 115 N. W. 395, 123 Am. St. 341 (with which compare *Willard v. St. Paul City R. Co.*, 116 Minn. 183, 133 N. W. 465); also ante, §§ 2417, 2418.

where a passenger makes a timely request for a transfer check and it is not given to him until just as he is leaving the car he is not bound by a condition therein making it his duty to examine it and see that it is correct.¹⁸ So, it has been held that notice must be given of a change in a well-established method of transfer.¹⁹

§ 2430 (1603). Fare paid on train.—It is well settled, as we have elsewhere shown,²⁰ that a railroad company may enact and enforce a rule or regulation requiring a reasonably higher rate of fare to be paid upon the train than the ticket rate, provided it affords the passenger a reasonable opportunity to purchase a ticket. But it can not be fixed at such a sum that the fare collected on the train will exceed the maximum rate allowed by law.²¹ So, in order to lawfully enforce such a rule or regulation, the railroad company must afford the passenger reason-

¹⁸ *Laird v. Pittsburg &c. R. Co.*, 166 Pa. St. 4, 31 Atl. 51. This decision is probably correct, but the soundness of the dictum referred to in the text is not beyond question.

¹⁹ *Consolidated Traction Co. v. Taborn*, 58 N. J. L. 1, 32 Atl. 685. See also *McGowan v. New York City R. Co.*, 99 N. Y. S. 835; *Sheets v. Ohio River R. Co.*, 39 W. Va. 475, 20 S. E. 566, 2 Am. & Eng. R. Cas. (N. S.) 129.

²⁰ Ante, Vol. I, § 229. In addition to authorities there cited, see *McGowen v. Morgan's &c. R. Co.*, 41 La. Ann. 732, 6 So. 606, 5 L. R. A. 817, 17 Am. St. 415, and note; *Coyle v. Southern R. Co.*, 112 Ga. 121, 37 S. E. 163; *Southern R. Co. v. Jones*, 8 Ga. App. 225, 68 S. E. 1011; *Sage v. Evansville R. Co.*, 134 Ind. 100, 33 N. E. 771; *Snellbaker v. Paducah &c. R. Co.*, 94 Ky. 597, 23 S. W. 509; *Ammons v. Southern R. Co.*, 138 N. Car. 555,

51 S. E. 127; note to *Phettiplace v. Northern Pac. R. Co.*, 20 L. R. A. 483, 485; note to *Root v. Long Island R. Co.*, 11 Am. St. 643, 650; note to *Commonwealth v. Power*, 41 Am. Dec. 465, 473 et seq. An extra charge of as much as twenty-five cents has been held reasonable, and a regulation may even require passengers to procure tickets as a condition to their right to ride on any terms. *McGowen v. Morgan's &c. R. Co.*, 41 La. Ann. 732, 6 So. 606, 5 L. R. A. 817, 17 Am. St. 415; *Poole v. Northern Pac. R. Co.*, 16 Ore. 261, 19 Pac. 107, 8 Am. St. 289; *Finch v. Northern Pac. R. Co.*, 47 Minn. 36, 49 N. W. 329; *Pittsburgh &c. R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68. But see contra *Weber v. Southern R. Co.*, 65 S. Car. 356, 43 S. E. 888.

²¹ *Atchinson &c. R. Co. v. Dickerson*, 4 Kans. App. 345, 45 Pac. 975; *Zagelmeyer v. Cincinnati &c. R. Co.*, 102 Mich. 214, 60 N. W. 436,

able facilities for purchasing a ticket.²² As a general rule, it should keep its ticket office open, with a competent person in attendance ready to sell tickets, a reasonable time before the departure of each train according to the schedule,²³ but not necessarily up to the very instant the train moves,²⁴ or the time

47 Am. St. 514; *Chase v. New York &c. R. Co.*, 26 N. Y. 523; *Railroad Co. v. Skillman*, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31; *Lane v. East Tennessee &c. R. Co.*, 5 Lea (Tenn.) 124, 2 Am. & Eng. R. Cas. 278; *Louisville &c. R. Co. v. Guinan*, 11 Lea (Tenn.) 98, 47 Am. Rep. 279; *Fulmer v. Southern R. Co.*, 67 S. Car. 262, 45 S. E. 196. But where a rebate check is given for the extra amount such extra sum, it has been held, is not part of the fare or charge for transportation within the meaning of a statute fixing the maximum rate. *Reese v. Pennsylvania R. Co.*, 131 Pa. St. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. 818.

²² *Louisville &c. R. Co. v. Harper*, 203 Ala. 398, 83 So. 142; *Central R. &c. Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352; *Chicago &c. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438, 92 Am. Dec. 81; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Indianapolis &c. R. Co. v. Rinard*, 46 Ind. 293; *Chicago &c. R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. 256 (right to pay excursion rate on train where no opportunity to get a ticket); *Cleveland &c. R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. 429; *Wilsey v. Louisville &c. R. Co.*, 83 Ky. 511, 26 Am. & Eng. R. Cas. 258; *Forsee v. Alabama &c.*

R. Co., 63 Miss. 66; 56 Am. Rep. 801; *Harkless v. Chicago &c. R. Co.*, 151 Mo. App. 463, 132 S. W. 29; *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505; *Hall v. South Carolina R. Co.*, 28 S. Car. 261, 5 S. E. 623; *Gulf &c. R. Co. v. Fox* (Tex.), 6 S. W. 569, 33 Am. & Eng. R. Cas. 543. See also *St. Louis &c. Ry. Co. v. Green*, 110 Ark. 232, 161 S. W. 148; *Kennedy v. Birmingham R. &c. Co.*, 138 Ala. 225, 35 So. 108. Contra, *Crocker v. New London &c. R. Co.*, 24 Conn. 249; *Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.) 579; *Mills v. Missouri R. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497. And compare *Monnier v. New York &c. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. 619.

²³ *Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *St. Louis &c. R. Co. v. Myrtle*, 51 Ind. 566; *State v. Hungerford*, 39 Minn. 6, 38 N. W. 628; *Poole v. Northern Pac. R. Co.*, 16 Ore. 261, 19 Pac. 107, 8 Am. St. 289; *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657; *Phettiplace v. Northern Pac. R. Co.*, 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483, and note.

²⁴ *Everett v. Chicago &c. R. Co.*, 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207, 27 Am. & Eng. R. Cas. 98; *State v. Hungerford*, 39 Minn. 6, 38 N. W. 628, 34 Am. & Eng.

of actual departure where it is late.²⁵ A traveler does not, however, make a sufficient effort to obtain a ticket if he merely goes to the window of the ticket office in ample time, and, not seeing the agent there, immediately enters the car without making any effort to see if the agent was in the office or to attract his attention.²⁶ So, if he arrives too late to buy a ticket before the train starts, or if, for any reason, it is his own fault, and not the fault of the company, that he fails to get a ticket, he can not complain if he is expelled upon his refusal to pay the extra fare.²⁷ Nor does the mere fact that the conductor at first accepts a tender of the ticket rate through mistake, but, within a reasonable time, demands the extra sum required of those who pay on the train, operate as a waiver of the rule or entitle the traveler to passage at the ticket rate.²⁸ In such a

R. Cas. 265. See also *Central R. &c. Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352; *Talbert v. Charleston &c. R. Co.*, 72 S. Car. 137, 51 S. E. 564.

²⁵ *St. Louis &c. R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103; *Swan v. Manchester &c. R. Co.*, 132 Mass. 116, 42 Am. Rep. 432, 6 Am. & Eng. R. Cas. 327. But a statutory provision requiring the office to be kept open for a certain time prior to the departure of each train means the actual departure. *Porter v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 353; *Atchison &c. R. Co. v. Dwelle*, 44 Kans. 394, 34 Pac. 500, 44 Am. & Eng. R. Cas. 402; *Missouri Pac. R. Co. v. McClanahan*, 66 Tex. 530, 1 S. W. 576, 27 Am. & Eng. R. Cas. 82.

²⁶ *Indianapolis &c. R. Co. v. Kennedy*, 77 Ind. 507, 3 Am. & Eng. R. Cas. 467. But compare *Central R. &c. Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352 (question for jury).

²⁷ *Lake Erie &c. R. Co. v. Mays*, 4 Ind. App. 413, 30 N. E. 1106; *Louisville &c. R. Co. v. Wright*, 18 Ind. App. 125, 47 N. E. 491. See also *Union Pac. R. Co. v. Wolf*, 54 Kans. 592, 38 Pac. 786; *Hoffbauer v. Davenport &c. R. Co.*, 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278; *Chicago &c. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Swan v. Manchester &c. R. Co.*, 132 Mass. 116, 42 Am. Rep. 432; *Phillips v. Southern R. Co.*, 114 Ga. 284, 40 S. E. 268.

²⁸ *Lake Erie &c. R. Co. v. Mays*, 4 Ind. App. 413, 30 N. E. 1106; *Wardwell v. Chicago &c. R. Co.*, 46 Minn. 514, 49 N. W. 206, 13 L. R. A. 396, 24 Am. St. 246, 47 Am. & Eng. R. Cas. 482, modifying *Du Laurans v. First Division St. Paul &c. R. Co.*, 15 Minn. 49, 2 Am. Rep. 102. See also *McCarthy v. Chicago &c. R. Co.*, 41 Iowa 432; *Louisville Railway Co. v. Joplin*, 21 Ky. L. 1380, 55 S. W. 206.

case it has been held that if the traveler refuses to pay the extra sum, the conductor may retain the fare for the distance already traveled but must give him back the residue before expelling him.²⁹ When travelers are afforded proper facilities for purchasing tickets, a rule that no fare shall be received upon the train unless the exact amount is tendered would doubtless be reasonable, and we suppose that, even in the absence of a specific regulation upon the subject, the tender of an unreasonably large bill, which the conductor could not be expected to change, would be insufficient in such a case.³⁰ A carrier has no lien on the person of a passenger for the fare. The price of transportation is a debt, and the carrier can not detain or imprison a passenger, after the transit is completed, for his failure to produce a ticket or pay his fare.³¹

§ 2431 (1604). When person riding on a pass is a passenger and when not.—The general rule is that a person riding on a railway train on a free pass, the possession of which was lawfully

²⁹ *Wardwell v. Chicago &c. R. Co.*, 46 Minn. 514, 49 N. W. 206, 13 L. R. A. 396, 24 Am. St. 246. See also *Bland v. Southern Pac. R. Co.*, 55 Cal. 570, 36 Am. Rep. 50; note to *Toledo &c. R. Co. v. Wright*, 34 Am. Rep. 277, 284.

³⁰ *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428. See also *Burge v. Georgia R. &c. Co.*, 133 Ga. 423, 65 S. E. 879, 18 Ann. Cas. 42; *Barker v. Central Park &c. R. Co.*, 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. 626; *Funderburg v. Augusta &c. R. Co.*, 81 S. Car. 141, 61 S. E. 1075, 21 L. R. A. (N. S.) 868n; *Knoxville Trac. Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A. (N. S.) 579, 10 Ann. Cas. 641. But the conductor must be prepared to furnish change to a reasonable amount.

Barrett v. Market St. R. Co., 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336, 15 Am. St. 61. And the passenger must be given a reasonable time in which to pay. *Clark v. Wilmington &c. R. Co.*, 91 N. Car. 506, 49 Am. Rep. 647. If he pays in counterfeit money, and on discovery of the counterfeit refuses to pay in good money, he may be expelled. *Memphis &c. R. Co. v. Chastine*, 54 Miss. 503. See also ante, § 1553, and *North Hudson R. Co. v. Anderson*, 61 N. J. L. 248, 39 Atl. 905, 40 L. R. A. 410, 68 Am. St. 703.

³¹ *Lynch v. Metropolitan &c. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141. See also *Chilton v. London &c. R. Co.*, 16 M. & W. 212. But see *Standish v. Narragansett &c. Co.*, 111 Mass. 512, 15 Am. Rep. 66.

and rightfully obtained, is a passenger.³² The possession of the pass must be lawful for if it was obtained by fraud or the wrong of the person attempting to use it he is not a passenger and the carrier owes him no duty as such.³³ Where an employe of the carrier is riding on a pass, his rights depend very largely upon the capacity in which he is riding. If he is riding on the pass in the performance of his duties as the employe of the company he is not a passenger and the care due to passengers

³² Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. ed. 502; Railroad Company v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Ohio &c. R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336; Louisville &c. R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Doyle v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335; Missouri &c. R. Co. v. Ivy, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. 758; Gulf &c. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345. See also McNeill v. Durham &c. R. Co., 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227, 243 (citing text); Dow v. Syracuse &c. R. Co., 81 App. Div. 362, 80 N. Y. S. 941. And it has recently been held by the Supreme Court of the United States that even though it was unlawful to give a pass to the plaintiff and for him to use it under the Hepburn Act, yet the carrier was liable to him as a passenger under the local law and the penalty prescribed by the Hepburn Act did not include any forfeiture of his right to protection as a passenger. Southern Pac. Co. v. Schuyler, 227 U. S. 601, 33 Sup. Ct. 277, 57 L. ed. 662, 43 L. R. A. (N. S.) 901.

³³ The rule is thus expressed in the case of Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120: "We accept as good law the doctrine of the decided cases, that one who fraudulently attempts to ride on a non-transferable pass issued to another person is not a passenger to whom the carrier owes a duty to carry safely. A person who enters a train on a pass, to which he has no right, cannot, therefore, maintain an action for injuries caused by the carrier's negligence. Chicago &c. R. Co. v. Michie, 83 Ill. 427; Toledo &c. R. Co. v. Brooks, 81 Ill. 245; Toledo &c. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Brown v. Missouri &c. R. Co., 64 Mo. 536. This rule is founded on sound principle, since it is a fundamental doctrine of the law, that one who is guilty of a fraud cannot enforce any rights arising out of his own wrong. It is also in close agreement with the rule that a carrier owes no duty to an intruder. Nave v. Flack, 90 Ind. 205, 46 Am. Rep. 205." See also to same effect Denny v. Chicago &c. R. Co., 150 Iowa 460, 130 N. W. 363; Fitzmaurice v. New York &c. R. Co., 192 Mass. 159, 78 N. E.

is not due to him.³⁴ But where the employe is rightfully using a pass for his own personal convenience or for his own pleasure or business he is in most jurisdictions, regarded as a passenger and entitled to the care owing to passengers.³⁵ So, a drover accompanying his stock has been held to be a passenger notwithstanding a provision in his pass that he should be regarded as an employe.³⁶ Postal clerks or mail agents,³⁷ sleeping car

418, 6 L. R. A. (N. S.) 1146n, 116 Am. St. 236, 7 Ann. Cas. 586. But see, as to acceptance of free transportation, which the company was forbidden by statute to give, not being such a fraud, *McNeill v. Durham &c. R. Co.*, 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227, and as to the carrier being liable to him as a passenger where it accepts him as such notwithstanding such a statute, *John v. Northern Pac. R. Co.*, 42 Mont. 18, 111 Pac. 632, 32 L. R. A. (N. S.) 85; *Gabbert v. Hackett*, 135 Wis. 86, 115 N. W. 345, 14 L. R. A. (N. S.) 1070; and last case cited in preceding note, affirming *Schuyler v. Northern Pac. R. Co.*, 37 Utah 581, 612, 109 Pac. 458, 1025.

³⁴ See ante, § 2387; *Birmingham R. &c. Co. v. Sawyer*, 156 Ala. 199, 47 So. 67, 19 L. R. A. (N. S.) 717n; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335. The company may, of course, owe him some duty; it is not, however, the duty which a carrier owes to a passenger, but is the duty which an employer owes to an employe. *Texas &c. R. Co. v. Smith*, 67 Fed. 524, 31 L. R. A. 321, and note.

³⁵ *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335. See also *Ohio &c. R. Co. v. Muhling*, 31 Ill. 9,

81 Am. Dec. 336; *Whitney v. Railroad Co.*, 102 Fed. 850, 50 L. R. A. 615; *Carswell v. Macon &c. R. Co.*, 118 Ga. 826, 45 S. E. 695; *Louisville R. Co. v. Scott*, 108 Ky. 392, 56 S. W. 674, 50 L. R. A. 381, 55 Am. St. 417; *Rosenbaum v. St. Paul &c. R. Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. 653; *Pembroke v. Hannibal &c. R. Co.*, 32 Mo. App. 61; *McNulty v. Pennsylvania R. Co.*, 182 Pa. St. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. 721; *Washburn v. Nashville &c. R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 184; ante, § 2388. But compare *Pierson v. Interborough Rapid Transit Co.*, 102 Misc. 130, 168 N. Y. S. 425.

³⁶ *Missouri &c. R. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500; post, § 2432. See also *Illinois Cent. R. Co. v. Jennings*, 217 Ill. 140, 75 N. E. 457; *Lake Shore &c. R. Co. v. Teeters*, 166 Ind. 325, 77 N. E. 599, 5 L. R. A. (N. S.) 425n; *Chicago &c. R. Co. v. Troyer*, 70 Nebr. 287, 97 N. H. 308; *Cleveland &c. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 263; *St. Louis R. Co. v. Nelson* (Tex.), 44 S. W. 179. But compare *Chicago &c. R. Co. v. Hostetter*, 171 Ind. 465, 84 N. E. 534; *Riley v. Chicago &c. R. Co.*, 78 Nebr. 748, 111 N. W. 847.

³⁷ *Lindsey v. Pennsylvania R. Co.*, 26 App. D. C. 503; *Yarrington*

porters³⁸ and express messengers,³⁹ although riding on passes, have also been held to be passengers, so far as the duty to carry safely and the liability of the carrier for injuries to them is

v. Delaware &c. Co., 143 Fed. 565; *Southern R. Co. v. Harrington*, 166 Ala. 630, 52 So. 57, 139 Am. St. 59; *Barker v. Chicago &c. R. Co.*, 243 Ill. 482, 90 N. E. 1057, 26 L. R. A. (N. S.) 1058, 134 Am. St. 382; *Cleveland &c. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. 550; *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 14 S. W. 758, 16 S. W. 849, 10 L. R. A. 36; *Cox v. High Point &c. R. Co.*, 147 N. Car. 353, 61 S. E. 183; *Lusk v. Wilkes (Okla.)*, 172 Pac. 929; *Gulf &c. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345. In *Norfolk &c. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811, it was said: "It is established by the evidence that the plaintiff was an employe of the federal government, and was on the passenger train in the legitimate discharge of his duty as mail agent and postal clerk, under some contract between the government and the defendant company as to carrying the United States mail. The relation the plaintiff bore to the railroad company, as a common carrier, imposed upon the defendant company the same degree of care for the plaintiff that it was bound to exercise towards every passenger upon its train; the plaintiff was in no sense an employe of the defendant company, and can only be treated as a passenger." See ante, § 2388.

³⁸ *Jones v. St. Louis &c. R. Co.*, 125 Mo. 666, 28 S. W. 883, 26 L. R.

A. 718, 46 Am. St. 514. But we very much doubt whether sleeping car company porters can be regarded as passengers. As elsewhere shown, the railroad company is held liable for the assaults of such employes upon passengers on the ground that they are to be regarded as employes of such company, and it seems inconsistent to hold that they are also passengers. It is probably true that where the sleeping car employes travel for their own convenience, or business, they are passengers, but we doubt whether they can be so regarded when traveling in discharge of the duties of their service. See ante, § 2388. See also *Denver &c. R. Co. v. Whan*, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432n, 12 Ann. Cas. 732; *Russell v. Pittsburgh &c. R. Co.*, 157 Ind. 305, 61 N. E. 678, 87 Am. St. 214; *Chicago &c. R. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705. The relation of the pullman porter to the railroad company may depend largely upon the contract or arrangement between the two companies. *Robinson v. Baltimore &c. R. Co.*, 40 App. D. C. 169, L. R. A. 1915D, 510, affd. in 237 U. S. 84, 35 Sup. Ct. 491, 59 L. ed. 849; *Oliver v. Northern Pac. Ry. Co.*, 196 Fed. 432; *Martin v. New York &c. R. Co.*, 241 Fed. 696.

³⁹ *Brewer v. New York &c. R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. 647; *Kenney v. New York Cent. &c. R.*

concerned. It is held in a recent case that a street railroad company carrying a police officer free of charge as required by municipal ordinance was liable for injuries to him by the negligence of its motorman, although the ordinance was void as in conflict with a provision of the constitution prohibiting the granting of passes to officers.⁴⁰

§ 2432 (1605). **Drovers riding on passes.**—It is the almost universal custom of railway companies to issue to persons accompanying shipments of live stock what are known as drovers' passes, entitling them to ride to the point of shipment and return. The rule is that a person rightfully riding on a drover's pass is a passenger, and, while there is some slight conflict of authority, the weight of authority is to the effect that such a person is a passenger for hire.⁴¹ And it is so held under the In-

Co., 125 N. Y. 422, 26 N. E. 626; Southern R. Co. v. Harrington, 166 Ala. 630, 52 So. 57, 139 Am. St. 59; Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; Davis v. Chesapeake &c. R. Co., 122 Ky. 528, 92 S. W. 339, 5 L. R. A. (N. S.) 458n, 121 Am. St. 481. See also Higgins v. Erie R. Co., 89 N. J. L. 629, 99 Atl. 98; Missouri &c. R. Co. v. Blalack, 105 Tex. 296, 147 S. W. 559; ante, § 2387, post, § 2435. But compare Perry v. Philadelphia &c. R. Co., 24 Del. 399, 77 Atl. 725; Piper v. Boston &c. R. Co., 75 N. H. 228, 72 Atl. 1024.

⁴⁰ Bradburn v. Whatcom &c. R. &c. Co., 45 Wash. 582, 88 Pac. 1020, 14 L. R. A. (N. S.) 526n. And to the same effect is Gabbert v. Hackett, 135 Wis. 86, 115 N. W. 345, 14 L. R. A. (N. S.) 1070.

⁴¹ Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Railway Co. v. Stevens, 95 U. S. 655, 24 L. ed. 535; Norfolk So. R. Co. v. Chatman, 244 U. S. 276, 37

Sup. Ct. 499, 61 L. ed. 1131, L. R. A. 1917F, 1128; Delaware &c. R. Co. v. Ashley, 67 Fed. 209; Texas &c. R. Co. v. White, 101 Fed. 928, 62 L. R. A. 90, 108 Fed. 990; Little Rock &c. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. R. Cas. 10; Griswold v. New York &c. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Ohio &c. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Ohio &c. R. Co. v. Nickless, 71 Ind. 271; Lake Shore &c. R. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599; Pittsburgh &c. R. Co. v. Brown, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; Southern R. Co. v. Roach, 38 Ind. App. 211, 77 N. E. 606, 78 N. E. 201; Evansville &c. R. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 608; Union &c. R. Co. v. Shacklet, 119 Ill. 232, 10 N. E. 896; New York &c. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Illinois Cent. R. Co. v. Jennings, 217 Ill. 140, 75 N. E. 457; Solan v. Chicago &c. R. Co., 95 Iowa 260, 63

terstate Commerce Act and amendments.^{41*} Those authorities which hold that he is a passenger for hire rest on the theory that the charge paid for the transportation of the live stock which the holder of the pass accompanies covers also the transportation of such person and that the pass therefore is not a mere gratuity but a thing for which a valuable consideration was paid. Some of the authorities hold that he is a mere gratuitous passenger,⁴² but we are inclined to the opinion that the authorities which hold that he is a passenger for hire rest upon the better reason. The relation of passenger and carrier between a drover and a railway company can not be changed to that of employe and employer by a provision in the pass to the effect that while accompanying his stock the drover shall be regarded as an employe of the road and the company shall be liable to him only in the capacity of employer.⁴³ While a drover riding on a

N. W. 692, 28 L. R. A. 718, 58 Am. St. 430; Louisville R. Co. v. Bell, 100 Ky. 203, 38 S. W. 3; Railway Co. v. Posten, 59 Kans. 449, 53 Pac. 465; Quimby v. Boston &c. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, 40 Am. & Eng. R. Cas. 693; Weaver v. Ann Arbor R. Co., 139 Mich. 590, 102 N. W. 1037; Carroll v. Missouri &c. R. Co., 88 Mo. 239, 57 Am. Rep. 382; Cleveland &c. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Rowdin v. Railroad Co., 208 Pa. St. 623, 57 Atl. 1125; Missouri Pac. R. Co. v. Ivy, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500; Saunders v. Southern Pac. R. Co., 3 Utah 275, 44 Pac. 932; Sprigg v. Rutland R. Co., 77 Vt. 347, 60 Atl. 143; Virginia &c. R. Co. v. Sayers, 26 Grat. (Va.) 328; Maslin v. Baltimore &c. R. Co., 14 W. Va. 180, 35 Am. Rep. 748; Davis v. Chicago R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. 935; Szezepanski v.

Chicago &c. R. Co., 147 Wis. 180, 132 N. W. 989. A shipper accompanying live stock with a return ticket received under the shipping contract is a passenger for hire. Gruhl v. Northern Pac. Ry. Co., 140 Minn. 353, 168 N. W. 127.

^{41*} Norfolk Southern R. Co. v. Chatman, 244 U. S. 276, 61 L. ed. 1131, 27 Sup. Ct. 499, L. R. A. 1917F, 1128; Gooch v. Oregon Short Line R. Co., 264 Fed. 664.

⁴² Poucher v. New York &c. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Bissell v. New York &c. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; McCawley v. Furness R. Co., L. R. 8 Q. B. 57; Gallin v. London &c. R. Co., L. R. 10 Q. B. 212. See Smith v. New York &c. R. Co., 24 N. Y. 222. See where plaintiff was riding without pass or agreement, Chicago &c. R. Co. v. Hostetter, 171 Ind. 465, 84 N. E. 534.

⁴³ Missouri Pac. R. Co. v. Ivy, 71 Tex. 409, 9 S. W. 346, 1 L. R.

pass is regarded as a passenger he is not to be regarded as a passenger to the extent of being entitled to all the privileges and conveniences to which a passenger riding on a first-class ticket is entitled. His rights must necessarily be and are limited on account of the inconveniences attending the running of the class of trains upon which live stock are carried, and for that reason it is held that he is not entitled to all the rights and privileges of passengers for hire riding upon passenger trains.⁴⁴

§ 2433 (1606). Duty to person riding on pass.—The measure of duty owing from the carrier to a person riding on a pass depends upon the relation existing between the carrier and the person using the pass. The relation is the test for determining the measure of duty. Thus where a person is riding on a pass as an employe of the carrier and in the performance of some service of the carrier only the duties due from a master to a servant are due to such person.⁴⁵ But where the person riding on a pass is regarded as a passenger the carrier usually owes to him the same degree of care that it owes to a passenger paying full fare.⁴⁶ In some of the states, however, as we shall here-

A. 500, 10 Am. St. 758. See also *Lake Shore &c. R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599.

⁴⁴ *Omaha &c. R. Co. v. Crow*, 47 Nebr. 84, 66 N. W. 21. In that case the court said: "In our view it was not proper to confer upon Mr. Crow the unlimited rights and privileges of ordinary passengers for hire. While he was, for certain purposes, a passenger, he was not such in the usual, unrestricted sense of that term. His contractual right was to proceed upon the freight train upon which his cattle were shipped, from Ord to South Omaha; his duty was to care for his stock in transit, and his rights and privileges as a passenger were limited by the necessity of traveling on the aforesaid

freight train, and by the requirement that he should care for his stock." But see *Evansville &c. R. Co. v. Mills*, 37 Ind. App. 598, 77 N. E. 608; *Illinois Cent. R. Co. v. Beabe*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. 253; *Southern R. Co. v. Cullen*, 122 Ill. App. 293.

⁴⁵ Ante, § 2387; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335.

⁴⁶ *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. ed. 502; *Railroad Company v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. ed. 627; *Indianapolis &c. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Grand Trunk &c. R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Chicago*

after show, it is held that a person riding on a free pass in which there is a stipulation against liability of the carrier for negligence is bound by the stipulation.⁴⁷ Where the possession of the pass on which the person is riding has been obtained by fraud he is not a passenger but a trespasser or intruder and the carrier owes no duty to protect him from its mere negligence,⁴⁸ for as a rule the carrier is only liable in such cases for wanton or willful wrongs. Where a drover is riding on a pass in a freight train the carrier is not bound to the same absolute or extraordinary care as to his safety as it is to a passenger for hire riding pursuant to a ticket on regular passenger trains, for it is impossible for the company to care as well for a person riding on an ordinary freight train as it is for one riding on a

&c. R. Co. v. Carpenter, 56 Fed. 451; Little Rock &c. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; New York &c. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Ohio &c. R. Co. v. Nichless, 71 Ind. 271; Louisville &c. R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Rose v. Des Moines Valley R. Co., 39 Iowa 246; Abell v. Western &c. R. Co., 63 Md. 433, 21 Am. & Eng. R. Cas. 503; Todd v. Old Colony &c. R. Co., 85 Mass. 18, 80 Am. Dec. 49; Doyle v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335; Jacobus v. St. Paul &c. R. Co., 20 Minn. 125, 18 Am. Rep. 360; Gulf &c. R. Co. v. McGowan, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274; Sanders v. Southern Pac. R. Co., 13 Utah 273, 44 Pac. 932; Norfolk &c. R. Co. v. Tanner, 100 Va. 379, 41 S. E. 721; articles in 56 Cent. L. J. 204, and 57 Cent. L. J. 83.

⁴⁷ Post, § 2435. There is much strength in the reasoning of the cases referred to, for it seems un-

just to hold a railroad carrier to the same extraordinary measure of duty in a case where a pass is issued as a pure matter of grace, benevolence or charity, as that to which it is held in a case where it receives a consideration for the carriage.

⁴⁸ Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Toledo &c. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Brown v. Missouri &c. R. Co., 64 Mo. 536. See also Neyman v. Ala. &c. R. Co., 172 Ala. 606, 55 So. 509, Ann. Cas. 1913E, 232; Broyles v. Central &c. R. Co., 166 Ala. 616, 52 So. 81, 139 Am. St. 50; Denny v. Chicago &c. R. Co., 150 Iowa 460, 130 N. W. 363. But see where pass is issued in violation of law, but the holder is not in *pari delicto*; McNeill v. Durham &c. R. Co., 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227; Buffalo &c. R. Co. v. O'Hara, 3 Penny. (Pa.) 190, 9 Am. & Eng. R. Cas. 317.

regular passenger train.⁴⁹ The same degree of care is due to a minor riding on a stock pass as to an adult.⁵⁰

§ 2434 (1607). Conditions in passes.—Conditions are sometimes incorporated in or annexed to passes which require the person to whom the pass is issued to do some specified thing before he is entitled to ride on the pass or to conduct himself in a particular manner while being carried on the pass. These conditions, so long as they do not contravene any statute or principle of public policy, are held valid, and the holder of the pass is bound to comply with them. Thus, where there was a condition in a pass that the holder should sign the same, it was held that the provision was valid and that a holder who refused to comply with the condition was rightfully ejected from the train.⁵¹ A condition in a drover's pass to the effect that he should "remain in the caboose car attached to the train while the same was in motion," is a valid and binding condition and does not contravene any law or a sound public policy.⁵² A person who receives and uses a free pass is deemed to have consented to the conditions therein the same as if he had signed them,⁵³ and this has been held to be true whether he read the

⁴⁹ *Omaha &c. R. Co. v. Crow*, 47 Nebr. 84, 66 N. W. 21; *Western Md. R. Co. v. State*, 95 Md. 637, 53 Atl. 969, 973 (quoting text); *Chicago R. Co. v. Troyee*, 70 Nebr. 293, 103 N. W. 680. See *Lake Shore &c. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. 510; *Burns v. Chicago &c. R. Co.*, 104 Wis. 646, 80 N. W. 927. Perhaps it is not strictly correct to say that the carrier is not bound to the same degree of care, but it is obvious that the risks are greater in the one case than the other, and that the same precaution, in the way of appliances and the running of the trains, cannot be taken. In *Chicago &c. R. Co. v. Meurer*, 187 Ind. 405, 119 N. E. 714, it is held

that a caretaker of stock riding as a passenger has a right to remain on the car until it has arrived at the place where the stock is to be unloaded.

⁵⁰ *Texas &c. R. Co. v. Garcia*, 62 Tex. 285.

⁵¹ *Elliott v. Western &c. R. Co.*, 58 Ga. 454.

⁵² *Ft. Scott &c. R. Co. v. Sparks*, 55 Kans. 288, 39 Pac. 1032.

⁵³ *Gulf &c. R. Co. v. McGowan*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274; *Quimby v. Boston &c. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846. See also *Chicago &c. R. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674n, 106 Am. St. 187.

pass or not.⁵⁴ But the matter is sometimes regulated by statute and in Indiana a condition against liability printed in smaller type than that required by the statute has been held ineffective.⁵⁵

§ 2435 (1608). Validity of stipulation exempting carrier from liability for negligence.—Passes usually contain a stipulation which in terms exempts the carrier from liability for negligence. As to the validity of such stipulations the authorities are not agreed, some holding that they are valid and binding upon the person using the pass, others that they are not. In many of the states the courts hold that such a stipulation is void and not binding upon the person using the pass,⁵⁶ and that the carrier is liable for

⁵⁴ *Boering v. Chesapeake &c. R. Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. ed. 742; *Rogers v. Kennebec Steamboat Co.*, 86 Maine 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby v. Boston &c. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Muldoon v. Seattle &c. R. Co.*, 10 Wash. 311, 38 Pac. 995, 996, 45 Am. St. 787.

⁵⁵ *Clark v. Southern Ry. Co.* (Ind. App.), 119 N. E. 539.

⁵⁶ *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. ed. 627; *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Delaware &c. R. Co. v. Ashley*, 67 Fed. 209; *Mobile &c. R. Co. v. Hopkins*, 41 Ala. 486, 94 Dec. 607; *Solan v. Chicago &c. R. Co.*, 95 Iowa 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. 430; *Rose v. Des Moines &c. R. Co.*, 39 Iowa 246; *Sewell v. Atchison &c. R. Co.*, 78 Kans. 1, 96 Pac. 1007; *Atchison &c. R. Co. v. Derrick*, 78 Kans. 884, 96 Pac. 1018; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335; *Jacobus v. St.*

Paul &c. R. Co., 20 Minn. 125, 18 Am. Rep. 360; *Starr v. Great Northern R. Co.*, 67 Minn. 18, 69 N. W. 632; *Carroll v. Missouri R. Co.*, 88 Mo. 239, 57 Am. Rep. 382; *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228; *Cleveland &c. R. Co. v. Curran*, 19 Ohio St. 1; *Buffalo &c. R. Co. v. O'Hara*, 3 Penny. (Pa.) 190, 9 Am. & Eng. R. Cas. 317; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Coleman v. Penna. R. Co.*, 242 Pa. St. 304, 89 Atl. 87, 50 L. R. A. (N. S.) 432n, Ann. Cas. 1915B, 529; *Gulf &c. R. Co. v. McGowan*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274; *Ft. Worth &c. R. Co. v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. 366; *White v. St. Louis &c. R. Co.* (Tex.), 86 S. W. 962. But several of these cases are based, at least in part, upon a statute. See also *Norfolk &c. R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721; *Yazoo &c. Co. v. Grant*, 86 Miss. 565, 38 So. 502, 109 Am. St. 723. See *Thompson v. Yazoo &c. R. Co.*, 47 La. Ann. 1107, 17 So. 503; *McNeill v. Durham &c.*

injuries negligently inflicted upon a person using a pass containing such a stipulation. But in the state of New York,⁵⁷ Washington,⁵⁸ and a number of other states,⁵⁹ such stipulations are held valid, at least where the pass is gratuitous, and the carrier exempted from liability from acts of negligence resulting in injury to the person using the pass. The rule in England is also to the effect that the carrier may make a valid contract exempting itself from liability for injuries negligently inflicted upon a person rid-

R. Co., 135 N. Car. 682, 47 S. E. 758, 67 L. R. A. 227, 243 (quoting text); St. Louis &c. R. Co. v. Pitcock, 82 Ark. 441, 101 S. W. 725, 118 Am. St. 84, 12 Ann. Cas. 582.

⁵⁷ Wells v. New York &c. R. Co., 24 N. Y. 181; Poucher v. New York &c. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Perkins v. New York &c. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Kenney v. New York &c. R. Co., 125 N. Y. 422, 26 N. E. 626; Hodge v. Rutland R. Co., 112 App. Div. 142, 115 App. Div. 881, 97 N. Y. S. 1107, 100 N. Y. S. 764, *affd.* without opinion in 194 N. Y. 570, 88 N. E. 1121. Ulrich v. New York &c. R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. 369. In the case last cited it was held that the fact that a person riding on a free pass purchases a seat in a drawing-room car in which he rides, does not make him a passenger for hire so as to render the condition in his pass inoperative. See also Wagner v. Brooklyn Heights R. Co., 69 App. Div. 349, 74 N. Y. S. 809, 174 N. Y. 520, 66 N. E. 1117; Anderson v. Erie R. Co., 223 N. Y. 277, 119 N. E. 557.

⁵⁸ Muldoon v. Seattle &c. R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. 901.

⁵⁹ Griswold v. New York &c. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Western &c. R. Co. v. Bishop, 50 Ga. 465; Holly v. Railway Co., 119 Ga. 767, 47 S. E. 188; Illinois Central R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 24, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. 253; Rogers v. Kennebec Steamboat Co., 86 Maine 261, 29 Atl. 1069, 25 L. R. A. 491; Quimby v. Boston &c. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Hosmer v. Old Colony R. Co., 156 Mass. 506, 31 N. E. 652; Kinney v. Central R. Co., 32 N. J. L. 407; Annas v. Milwaukee &c. R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848; *post*, § 2498. See also Boering v. Chesapeake &c. R. Co., 20 App. D. C. 500, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. ed. 742; Northern Pac. R. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. ed. 513; Charleston &c. R. Co. v. Thompson, 234 U. S. 576, 34 Sup. Ct. 964, 58 L. ed. 1476; Duncan v. Maine Cent. R. Co., 113 Fed. 508; Payne v. Terre Haute &c. R. Co., 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; articles in 56 Cent. L. J. 204, and 57 Cent. L. J. 83.

ing on a free pass.⁶⁰ The authorities which hold that such stipulations are invalid rest upon the doctrine that it is against public policy for one to contract exempting himself from liability for his future negligence.⁶¹ The authorities which hold the stipulations valid and binding upon the person using the pass usually rest upon the theory that the carrier when it issues a mere gratuitous pass, and does a thing which the law does not require it to do, has a right to stipulate against liability, and that by so doing no principle of public policy is contravened.⁶² Where this is really the case we think the weight of authority and the better reason both support the rule that at common law such a

⁶⁰ *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Gallin v. London &c. R. Co.*, L. R. 10 Q. B. 212; *Alexander v. Toronto &c. R. Co.*, 33 U. C. Q. B. 474; *Hall v. North-eastern R. Co.*, L. R. 10 Q. B. 437; *Duff v. Great Northern R. Co.*, L. R. 4 Ir. 178; *Railway Co. v. Franchere (Can.)*, 35 S. C. R. 68; *Stella, The*, L. R. (1900) P. 161, 81 L. T. (N. S.) 235, 69 L. J. P. 70.

⁶¹ *Mobile &c. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Flinn v. Philadelphia &c. R. Co.*, 1 Houst. (Del.) 469; *Ohio &c. R. Co. v. Nickless*, 71 Ind. 271; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Carroll v. Missouri R. Co.*, 88 Mo. 239, 57 Am. Rep. 382; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Gulf &c. R. Co. v. McGowan*, 65 Tex. 640; *Missouri &c. R. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. 758, 37 Am. & Eng. R. Cas. 46; *Saunders v. Southern Pac. R. Co.*, 13 Utah 275, 44 Pac. 932. The rule is thus stated in the case of *Louisville &c. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869: "A stipulation that the carrier shall not be bound

to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with the passenger, that the latter should take the risk of the negligence of the carrier or his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void."

⁶² *Quimby v. Boston &c. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Rogers v. Kennebec Steamboat Co.*, 86 Maine 261, 29 Atl. 1069, 25 L. R. A. 491. In the case of *Muldoon v. Seattle &c. R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. 901, it was said: "There can be no question as to the propriety of that rule

stipulation may be valid.⁶³ In such a case since the person who receives the pass gets something which he is not entitled to demand it seems but just that the carrier may rightfully limit its liability, and that the person who receives the gratuity should

of law which prohibits a common carrier from forcing upon any person who deals with it in its public capacity a condition against liability arising from its own negligence. The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carriers owes to the public and to the individual is to perform the service safely, without any limiting conditions; and, therefore such conditions, when the imposition of them is attempted, violate an implied duty, and are justly held void. But when the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz.: to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in, and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant causes unintentional injury to a passenger." See also *Duncan v. Maine Cent. R. Co.*, 113 Fed. 508; *Marshall v. Nashville R. &c. Co.*, 118

Tenn. 254, 101 S. W. 419, 9 L. R. A. (N. S.) 1246, 12 Ann. Cas. 675.

⁶³ In addition to authorities cited in last preceding notes, see also to this effect: *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 18 L. ed. 513, 24 Sup. Ct. 408; *Shelton v. Canadian Northern R. Co.*, 189 Fed. 153; *Griswold v. New York &c. R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Payne v. Terre Haute &c. R. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; *Buckley v. Bangor &c. R. Co.*, 113 Maine 164, 93 Atl. 65, L. R. A. 1916A, 617n (stating this to be the rule in Maine and also to be the prevailing rule elsewhere, but holding the pass in question not gratuitous); *Kinney v. Central R. Co.*, 34 N. J. L. 513, 3 Am. Rep. 265. And to the same general effect see *Baltimore &c. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; *Charleston &c. W. C. R. Co. v. Thompson*, 234 U. S. 576, 34 Sup. Ct. 964, 58 L. ed. 1476; *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; *Cleveland &c. R. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710; *Pittsburgh &c. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. 503. Compare also *Robinson v. Baltimore &c. R. Co.*, 237 U. S. 84, 35 Sup. Ct. 491, 59 L. ed. 849; *McKay v. Louisville &c. R. Co.*, 133 Tenn. 590, 182 S. W. 874.

assume the risk accompanying it. In some of the cases usually cited as opposed to this doctrine the pass was not in fact gratuitous, but for it some consideration, although indirect, was yielded, and it is evident that such cases are essentially different from cases in which a pass is issued as a mere gift, or donation. In most of the states it is held that if the pass is not a pure gratuity, but is one for which some consideration has been paid, then a stipulation against liability is void. Such is the rule, as we have seen, where passes have been issued to drovers or persons accompanying shipments to care for the same during transit.⁶⁴ In such cases the pass is not a mere gratuity but one for which some consideration has been paid and hence the person using the pass may be justly regarded as a passenger for hire.⁶⁵ In some of the courts a distinction is made between the different degrees of negligence, the stipulation creating the

⁶⁴ *Norfolk So. R. Co. v. Chatman*, 244 U. S. 276, 37 Sup. Ct. 499, 61 L. ed. 1131, L. R. A. 1917F, 1128.

⁶⁵ *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. ed. 627; *Waterbury v. New York &c. R. Co.*, 17 Fed. 671; *Chicago &c. R. Co. v. Carpenter*, 56 Fed. 451; *Kirkendall v. Union Pac. R. Co.*, 200 Fed. 197; *Delaware &c. R. Co. v. Ashley*, 67 Fed. 209; *Little Rock &c. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. 253; *Pittsburgh &c. R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625; *Buckley v. Bangor &c. R. Co.*, 113 Maine 164, 93 Atl. 65, L. R. A. 1916A, 617 and note; *Eberts v. Detroit &c. R. Co.*, 151 Mich. 260, 115 N. W. 43; *Baker v. Boston &c. R. Co.*, 74 N. H. 100, 65 Atl. 386, 12 Ann. Cas. 1972, 124 Am. St. 937; *Cleveland &c. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am.

Rep. 362; *Saunders v. Southern Pac. R. Co.*, 13 Utah 275, 44 Pac. 932; *Maslin v. Baltimore &c. R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; *Lawson v. Chicago &c. R. Co.*, 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634. See also 5 R. C. L. 12, § 667; *Louisville &c. R. Co. v. Bell*, 100 Ky. 203, 38 S. E. 3; *Weaver v. Ann Arbor R. Co.*, 139 Mich. 590, 102 N. W. 1037, 5 Ann. Cas. 764; *Sprigg v. Rutland R. Co.*, 77 Vt. 347, 60 Atl. 143. In the state of New York it is held that a stipulation in a drover's pass exempting the company from liability is binding upon the holder and that the company is not liable for injuries negligently inflicted upon a person riding on such a pass. *Poucher v. New York &c. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364. See *Gardner v. New Haven &c. R. Co.*, 51 Conn. 143, 50 Am. Rep. 12.

exemption being held valid as to ordinary negligence but not as to gross negligence.⁶⁶

§ 2436 (1609). Injury to person riding on pass.—It is obvious that the right to recover in an action for injuries received by a person traveling on a pass is not the same in all jurisdictions, for, as we have seen, in some jurisdictions the validity of stipulations exempting the carrier from liability is affirmed and in other denied.⁶⁷ The relation which the person using the pass bears to the railroad company is also an important element in determining the liability. If he is regarded as a passenger, then the company is bound to use “the highest practical degree of care,” and, for a failure to use such care, it will be liable for all injuries proximately caused thereby.⁶⁸ But where the person using

⁶⁶ *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260. (But see *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13, 24, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. 253); *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526; *Arnold v. Illinois Cent. R. Co.*, 83 Ill. 273, 25 Am. Rep. 383. See also *Annas v. Milwaukee &c. R. Co.*, 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848, 27 Am. & Eng. R. Cas. 102. This distinction mentioned in the text was made in *Indiana &c. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339, but in the later case of *Ohio &c. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719, the doctrine of the earlier case was denied, and it was held that there are no degrees of negligence, citing *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. ed. 627; *Beal v. South Devon &c. R. Co.*, 3 H. & C. 337; *Hinton v. Dibbin*, 2 Q. B. 646. In *Walthers v. Southern Pac. R. Co.*, 159 Cal. 769, 116 Pac. 51, 37 L. R. A. (N. S.) 235n, the stat-

ute provided that a common carrier could not be exonerated by any agreement from liability for gross negligence and the court held that this applied to a stipulation in a gratuitous pass as well as in any other. As to what law governs the construction and effect of passes, see *Burnett v. Pennsylvania &c.*, 176 Pa. St. 45, 34 Atl. 972; *Camden &c. Co. v. Bausch*, 4 Sad. (Pa.) 518, 7 Atl. 731, 28 Am. & Eng. R. Cas. 142; *Lake Shore &c. R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599. And see where federal court followed state decision in holding stipulation in pass invalid under statute. *Weir v. Rountree*, 173 Fed. 776, 19 Ann. Cas. 1204. As to limitation not being binding on child where parent procures transportation see *Chicago &c. R. Co. v. Lee*, 92 Fed. 318; *Flower v. Railway Co.*, (1894) 2 Q. B. 65, 63 L. J. Q. B. 547.

⁶⁷ Ante, § 2435.

⁶⁸ *Ohio &c. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Doyle*

the pass is an employe and not a passenger, then the carrier will only be liable for such injuries as result from negligence in failing to perform the duties owing to employes.⁶⁹ Where the person using the pass has obtained possession thereof fraudulently he is a mere trespasser, and the carrier will only be liable, ordinarily, for wanton or willful wrongs.⁷⁰ A violation of the express provisions of the pass will often relieve the carrier from responsibility. Thus, where a drover's pass provides that the person using it shall ride in a particular part of the train such person will be guilty of contributory negligence if he violates his contract and occupies a position of greater danger and receives injury by reason of such violation.⁷¹ The general rule is that where the holder of the pass is to be regarded as a passenger any act of negligence constituting a proximate cause may give a right of action. Thus, where a passenger riding on a pass was injured by a jerk of the bell cord the company was held liable.⁷² So, too, the kind of train on which the pass entitles the holder to travel is sometimes a matter of importance, for, as we have shown, one who is entitled to ride only on freight trains assumes some risks that passengers on regular passenger trains do not assume.

v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335; Louisville &c. R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869. Assuming, of course, that the person injured is not guilty of contributory negligence.

⁶⁹ Ante, § 2387; Doyle v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. 335.

⁷⁰ Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120. See also Toledo &c. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Fitzmaurice v. New York &c. R. Co., 192 Mass. 159, 78 N. E. 418, 6 L. R. A. (N. S.) 1146, and note, 116 Am. St. 236, 7 Ann. Cas. 586.

⁷¹ Richmond &c. R. Co. v. Pick-

leseimer, 85 Va. 798, 89 Va. 389; Chicago &c. R. Co. v. Hawk, 36 Ill. App. 327; McCorkle v. Chicago &c. R. Co., 61 Iowa 555, 16 N. W. 714; Tuley v. Chicago &c. R. Co., 41 Mo. App. 432; Atchison &c. R. Co. v. Lindley, 42 Kans. 714, 22 Pac. 703, 6 L. R. A. 646.

⁷² Thompson v. Yazoo &c. R. Co., 47 La. Ann. 1107, 17 So. 503. The party using the pass in this case was held not to have been guilty of contributory negligence because he saw the bell cord jerking some few minutes before he was injured and did not move away from it. See also McNeill v. Durham &c. R. Co., 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227 (quoting text).

§ 2437 (1610). **Person other than the one entitled to use a pass riding thereon—Fraud.**—Passes are usually issued to a person named therein and entitle that person, and no other, to be carried thereon.⁷³ It sometimes happens that passes are presented for transportation by persons other than the person to whom they are issued. Where a pass is presented by a person other than the person to whom it was issued the rule is that the person presenting it is not entitled to any rights under it, and if he refuses to pay his fare he may be rightfully ejected from the train. Attempting to ride on a pass which has been issued to another person is a fraud upon the company, and the company ordinarily owes no further duty to such person than to refrain from willfully injuring him.⁷⁴ The fact that there is a slight error in the name contained in the pass is not conclusive evidence that there is fraud on the part of the person presenting the pass,⁷⁵ nor that he is not entitled to travel thereon. If a person having no right to a pass presents it and refuses to pay fare the company may eject him from the train. Thus, where a newspaper publisher represented to a railway company that a certain person was in his employ, when in fact he was not, and the com-

⁷³ The grant of a "free pass" to a person specifically designated therein is really the grant of a personal privilege, and a pass designating the person to whom it is issued, cannot, as we believe, be considered as assignable, although there is no express stipulation forbidding its transfer.

⁷⁴ *Louisville &c. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120, and cases cited. In *Toledo &c. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613, where a person was injured while riding on a pass issued to another person, it was said: "But the most interesting and important question remains. Was defendant in error a passenger on

this train, in the true sense of the term? He was traveling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances the company could only be held liable for gross negligence, which would amount to wilful injury." See also *Harmon v. Jensen*, 176 Fed. 521, 20 Ann. Cas. 1224; *Condran v. Chicago &c. R. Co.*, 67 Fed. 522, 28 L. R. A. 749; *Beard v. International &c. Ry. Co.* (Tex. Civ. App.), 171 S. W. 552; ante, §§ 2392, 2431.

⁷⁵ *Rice v. Illinois &c. R. Co.*, 22 Ill. App. 643.

pany issued a thousand-mile book to such person entitling him to be carried for that distance free of charge, it was held that such transportation was secured by fraud and that the person presenting the mileage book might rightfully be ejected.⁷⁶ It was also held that the ejection was rightful, notwithstanding the fact that the person expelled from the train had made several trips on the mileage book before any question of fraud was made by the company.

§ 2438 (1611). Contract to give passes.—Railway companies often make contracts to give some particular person or persons passes over their line for a specified time. In many instances railroad companies have agreed with land-owners that, as consideration for the grant of the right of way, they will issue passes to them. It is obvious that such agreements have all the elements of a contract, and they have been upheld in a great number of cases.⁷⁷ Contracts are often made to issue passes over

⁷⁶ *Moore v. Ohio River R. Co.*, 41 W. Va. 160, 23 S. E. 539; *Brown v. Missouri &c. R. Co.*, 64 Mo. 536. See also ante § 2431. Where a person who was injured was a reporter on a newspaper, and was riding on a non-transferable pass issued to another employe of the same paper, it was held proper to submit evidence to the jury that the railroad company was accustomed to carry other reporters of the same paper on a pass issued to one reporter. *Great Northern R. Co. v. Harrison*, 10 Exch. 376, 26 Eng. L. & Eq. 443. See generally *Odell v. New York &c. R. Co.*, 18 App. Div. 12, 162 N. Y. 625, 57 N. E. 1119, 45 N. Y. S. 464; *Pfaffenback v. Railway Co.*, 142 Ind. 246, 41 N. E. 530; *Johnson v. Railway Co.*, 94 Fed. 473; *Austin v. St. Paul &c. R.*, L. R. 2 Q. B. 442; *McVeety v. Railway Co.*, 45 Minn. 268, 47 N. W. 809, 11 L. R. A. 174,

22 Am. St. 728; *Way v. Chicago &c. R. Co.*, 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431.

⁷⁷ *Western Maryland R. Co. v. Lynch*, 82 Md. 233, 34 Atl. 40; *Dodge v. Boston &c. R. Co.*, 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318; *Grimes v. Minneapolis &c. R. Co.*, 37 Minn. 66, 33 N. W. 33, 31 Am. & Eng. R. Cas. 123; *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570; *Dickey v. Kansas City &c. R. Co.*, 122 Mo. 223, 26 S. W. 685; *Helton v. St. Louis &c. R. Co.*, 25 Mo. App. 322; *Martin v. New York &c. R. Co.*, 36 N. J. Eq. 109, 12 Am. & Eng. R. Cas. 448; *Erie &c. R. Co. v. Douthet*, 88 Pa. St. 243, 32 Am. Rep. 451; *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. 562; *Weatherford &c. R. Co. v. Wood*, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526; *Cook v. Milwaukee &c. R. Co.*, 36 Wis. 45; ante, § 1168. But, as here-

the line of road, the building of which is contemplated at the time, or over a line which has been previously built, and, as a rule, the contract will not be construed to extend to roads which may thereafter be leased or otherwise acquired, and hence the person entitled to such a pass has no right to one over after-acquired roads.⁷⁸ Where the pass is granted to a person and his family, it means the members of his immediate family, those living in his house and under his control; it does not extend to the person's grand-child, who does not live with him.⁷⁹ A very important question in regard to contracts to give passes in consideration of the conveyance of a right of way or the like, is whether or not the obligation to give the pass is such a one as runs with the land so as to bind the successors of the railway company making the contract. Where the contract is a mere verbal contract, the rule is that the obligation to furnish a pass is not binding upon the contracting railway company's successor.⁸⁰ So, even where the contract is in writing and is made a part of the instrument by which the right of way which forms the consideration for the contract is conferred upon the company, it has been held that the obligation to furnish a pass does not run with the land and will not become binding upon a succeeding company unless there is some condition in the contract providing for forfeiture or the like.⁸¹ A covenant in such a contract to

after shown, the giving of passes is prohibited by statute in some states, and by the interstate commerce law, in some instances. It is prohibited in Indiana under the Act of 1905. *Evansville &c. R. Co. v. Vanada*, 57 Ind. App. 415, 106 N. E. 388.

⁷⁸ *Western Maryland R. Co. v. Lynch*, 82 Md. 233, 34 Atl. 40. See also *Wallace v. Ann Arbor R. Co.*, 121 Mich. 588, 80 N. W. 572.

⁷⁹ *Dodge v. Boston &c. R. Co.*, 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318. See also *Mitchell v. Cincinnati &c. R. Co.*, 5 Ohio Dec.

488, 2 Weekly L. Bull. 240. And see as to pass, to a firm, *Knopf v. Richmond &c. R. Co.*, 85 Va. 769, 8 S. E. 787, 37 Am. & Eng. R. Cas. 140.

⁸⁰ *Martin v. New York &c. R. Co.*, 36 N. J. Eq. 109, 12 Am. & Eng. R. Cas. 448; *Dallas &c. R. Co. v. Maddox (Tex.)*, 31 S. W. 702.

⁸¹ *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. 562; *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 570, 57 Am. & Eng. R. Cas. 290. But see *Helton v. St. Louis &c. R. Co.*, 25 Mo. App.

give a pass is held not to be a covenant to do something in reference to the land and therefore is not binding upon subsequent grantees,⁸² but it has been held that such grantees take with notice of conditions which may be expressed in instruments on record and are therefore bound by them.⁸³ What we have said would, of course, not be applicable where the grantee assumed to perform the contract made by its grantor. Where the obligation does not become binding upon the grantee the ordinary remedy is an action for damages against the company with whom the contract was made.⁸⁴ It has been held, however, that the plaintiff may invoke specific performance of a contract to issue him a pass.⁸⁵ It has also been held that a contract to give a pass for a certain number of years, or for life, is not such a contract as falls within the class of contracts not to be performed within a year, so as to bring it within the statute of frauds. The contract, being a personal one, may be terminated in less than a year by the death of the parties entitled to the pass.⁸⁶ Receivers can not, by verbal contract, agree to give a

322, in which it was held that where a landowner conveyed a right of way in consideration of a free pass for life and the road was sold under a mortgage the lien for the pass still continued.

⁸² In *Dickey v. Kansas City &c. R. Co.*, 122 Mo. 223, 26 S. W. 685, it was said: "Moreover, the covenant to furnish plaintiff and his family perpetual passes over the line of the railroad does not run with the land, because foreign to it, and in no manner connected with the land."

⁸³ *Ruddick v. St. Louis &c. R. Co.*, 116 Mo. 25, 22 S. W. 499, 38 Am. St. 370.

⁸⁴ *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. 562. As to the measure of damages for breach of a contract to furnish a pass for life, see *Erie &c. R. Co. v. Douthit*,

88 Pa. St. 243, 32 Am. Rep. 451, and for contract to give annual pass, see *Kansas &c. R. Co. v. Curry*, 6 Kans. App. 561, 51 Pac. 576; *Curry v. Kansas &c. R. Co.*, 58 Kans. 6, 48 Pac. 579.

⁸⁵ *Bettridge v. Great Western R. Co.*, 3 Grant Err. & App. (U. C.) 58. But see *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671.

⁸⁶ *Weatherford &c. R. Co. v. Wood*, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526. And a pass without consideration may be revoked. *Turner v. Richmond &c. R. Co.*, 70 N. Car. 1. But see as to estoppel of carrier after transportation had began, *St. Louis &c. R. Co. v. Tucker*, 3 Tex. App. Civ. Cas., § 322.

person a pass for life and make such contract binding beyond the term of the receivership.⁸⁷ And under the Interstate Commerce Law a contract to issue a pass for interstate transportation in consideration of a right of way or services or the like is illegal and can not be enforced;⁸⁸ and this is true as to intra-state transportation under some of the state statutes.⁸⁹

§ 2439 (1612). Interstate commerce law.—The interstate commerce law prohibits those carriers of passengers which fall within its provisions from issuing free passes except to a few particular classes of persons, and the recent act of congress of 1906, known as the Hepburn Act, and the amendments of 1908 and 1910 thereto are in some respects still more stringent. The law, of course, is not applicable to carriers which operate roads wholly within one state or issue passes to be used within the limits of a single state. This provision of the law in reference to passes has been strictly construed wherever it has been before the courts.⁹⁰ Thus, it was held before the later amendments that the provision which permits the issuing of passes to officers and employes does not apply to their families and that the issuing of passes to the families of employes or officers is a violation of the law.⁹¹ Before the passage of the interstate commerce

⁸⁷ *Martin v. New York &c. R. Co.*, 36 N. J. Eq. 109, 12 Am. & Eng. R. Cas. 448.

⁸⁸ *New York &c. R. Co. v. Gray*, 239 U. S. 583, 36 Sup. Ct. 176, 60 L. ed. 451; *Charleston &c. R. Co. v. Thompson*, 234 U. S. 576, 34 Sup. Ct. 964, 58 L. ed. 1476; *Louisville &c. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848n; *Illinois Cent. R. Co. v. Holman*, 106 Miss. 449, 64 So. 7; *Southern Ry. Co. v. Lineas*, 138 Tenn. 543, 198 S. W. 887, L. R. A. 1918B, 1114; *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559n.

⁸⁹ *Evansville &c. R. Co. v. Vanada*, 57 Ind. App. 415, 106 N. E. 388;

Kentucky Trac. &c. Term. Co. v. Murray, 176 Ky. 593, 195 S. W. 1119; *Perkins v. Public Service R. Co.*, 87 N. J. Eq. 134, 99 Atl. 387.

⁹⁰ See *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; *United States v. Hocking Val. R. Co.*, 194 Fed. 234; *New York &c. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 515; *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681; *Evansville R. Co. v. Vanada*, 57 Ind. App. 415, 420, 106 N. E. 388 (citing text).

⁹¹ *Kohler, Ex parte*, 31 Fed. 315, 1 Int. Com. 317, 29 Am. & Eng. R. Cas. 44. See also *American Exp.*

law passes were frequently sought by and issued to persons who occupied some official position or had high social standing and influence. The issuing of passes to the class of persons named above is prohibited by the interstate commerce law.⁹² And, as shown in the last preceding section, contracts for interstate transportation based on other alleged consideration than regular cash fare have often been held illegal.⁹³ It is held to be a violation of the law to issue a free pass to a person who is not an employe but requests a pass as compensation "for throwing business to the carrier."⁹⁴ A railway official who issues a pass to any person not within the exceptions of that law is guilty

Co. v. United States, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. ed. 635.

⁹² Boston &c. R. Co., In re, 5 Int. Com. 69; Harvey v. Louisville &c. R. Co., 5 Int. Com. 153; Boston &c. R. Co., In re, 3 Int. Com. 717. See Tuttle v. Northern Pac. R. Co., 1 Int. Com. 483, 588; Harvey v. Louisville &c. R. Co., 5 Int. Com. 153; Raleigh &c. R. Co. v. Swanson, 102 Ga. 754, 22 S. E. 601, 39 L. R. A. 275. The interstate commerce commission will not adjudicate upon the question of issuing passes to a particular class of persons in the absence of an actual case. United States Commission, In re, 1 Int. Com. 606.

⁹³ But an exception to the prohibition of free passes is made by the Interstate Commerce Act as to caretakers of live stock, poultry and fruit. Norfolk So. R. Co. v. Chatman, 244 U. S. 276, 37 Sup. Ct. 499, 61 L. ed. 1131, L. R. A. 1917F, 1128.

⁹⁴ Slater v. Northern Pac. R. Co., 2 Int. Com. 243. In this case it was said: "Carriers can reward persons not in their stated and regular employment for occasional

services, or for benefits indirectly received, in other and better ways than by furnishing them with free transportation. Some of the evils which resulted from former methods were referred to in the first annual report of this commission (see 1 Int. St. Com. 654) and others might be named. It may be said that a pass costs the carrier little or nothing, and that when the good will and occasional words of a person who is able to influence the direction of traffic can be obtained so cheaply it is a hardship to prevent the carrier from making use of the opportunity; but the evils in the unrestricted employment of free passes by common carriers had grown so great and had become so apparent, both to the public and to the carriers themselves, that it was deemed by congress to be absolutely necessary to eradicate the whole system from interstate commerce in order to put an end to the abuses which had grown beyond the limits of any other regulation or control. The law was framed accordingly, prohibiting the giving of

of violation thereof and may be punished.⁹⁵ But where passes were issued to a discharged employe who never used them and they expired by limitation while in his hands it was held that since no transportation of any one had ever taken place on the passes there was no unjust discrimination.⁹⁶

§ 2440 (1613). Statutes prohibiting the granting of passes.—In addition to the interstate commerce law prohibiting the granting of free passes to be used for transportation between different states some of the states have passed statutes or have constitutional provisions prohibiting the issuing of passes to certain persons to be used within the limits of such states. Such a provision is found in the constitution of Washington. There the constitution prohibits carriers from issuing passes to public officers. But where an officer voluntarily accepts and uses a free pass he will be estopped to question the validity of the conditions therein, for that would be to permit him to take advantage of his own wrong.⁹⁷ In the state of New York there is a constitutional provision prohibiting the issuing of free passes to public officers. The provision just referred to applies to a notary public who is appointed by the governor of the

free transportation to passengers carried under substantially similar circumstances and conditions, as an unjust discrimination, under the general terms employed, with only the exceptions made in section 22, that: 'Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers or employes or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes.' If any person who is in a position to render a common carrier a service or a favor by kind words or by useful paragraphs can be properly considered to be an

'employe' the exception may easily become broader than the rule; that word is evidently here employed in its ordinary signification." See also *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671.

⁹⁵ Charge to Grand Jury, In re, 66 Fed. 146; *United States v. Cleveland &c. R. Co.*, 3 Int. Com. 290.

⁹⁶ *Griffie v. Burlington &c. R. Co.*, 2 Int. Com. 194.

⁹⁷ *Muldoon v. Seattle &c. R. Co.*, 10 Wash. 311, 38 Pac. 995, 22 L. R. A. 794, 45 Am. St. 787. But see *McNeill v. Durham &c. R. Co.*, 135 N. Car. 682, 47 S. E. 765, 67 L. R. A. 227.

state, but whose term of office and duties are fixed by law.⁹⁸ It has also been held that an officer who received a free pass before the constitutional provision went into effect is prohibited from thereafter using it, but as elsewhere shown, the cases are in conflict upon this point.⁹⁹ An interesting case arose under the New York constitution as to whether or not a railroad policeman was entitled to a free pass. The plaintiff had entered into a contract with the defendant railway company to act as a railroad policeman for it and the contract provided that he was to receive a free pass over the lines of the railway company. The contract having been made before the provision of the constitution prohibiting the granting of passes to public officers was adopted, on the adoption of the provision the railway company refused to give the plaintiff a free pass on the ground that he was a public officer. Suit was brought to compel the issuing of a pass, and it was held that, although the plaintiff was a public officer, he was entitled to a pass under his contract.¹ The court held that the pass issued to him was not a free pass and that he was entitled to it as part of the consideration agreed to be paid him for his services.

§ 2441 (1613a). Effect of subsequent statute rendering performance of contract in regard to pass impossible.—There are also other state statutes either expressly or impliedly forbidding the issuance of free passes. Most of such statutes are similar to the interstate commerce law, and it is generally held under them, as under the Hepburn Act and amendments, that cash rather than other property or services must be paid for a passenger's transportation in order to meet the statutory requirements.²

⁹⁸ *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384. See as to railroad commissioners, *Matter of Railroad Comrs.*, 11 Misc. 103, 32 N. Y. S. 1115.

⁹⁹ *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384. See also *St. Louis &c. R. Co. v. Mitchell-Crittenden Tie Co.* (Tex. Civ. App.), 148 S. W. 1191; and

notes in 41 L. R. A. (N. S.) 559, and 49 L. R. A. (N. S.) 848, and next following section.

¹ *Dempsey v. New York &c. R. Co.*, 146 N. Y. 290, 40 N. E. 867. Compare also *Oklahoma City v. Oklahoma R. Co.*, 20 Okla. 1, 93 Pac. 48, 16 L. R. A. (N. S.) 651n.

² *Evansville &c. Ry. v. Vanada*, 57 Ind. App. 415, 106 N. E. 388;

The question has arisen in a number of cases as to the effect of a statute passed after a contract was made to give an annual pass or free transportation for life for a valuable consideration, such as the conveyance of a right of way or the like, and as to the rights and remedies of the parties in such cases. Some statutes have been held prospective and not intended to invalidate or effect such prior contracts.³ But the Supreme Court of the United States has held in a recent and leading case upon the subject that the interstate commerce law prohibits the issuance of a pass except for money and renders unenforceable a prior contract by an interstate carrier to issue an annual pass for life in consideration of the release of a claim for damages.⁴ And this is the view generally taken under state statutes.⁵ This may operate as a great hardship upon the party who has paid his consideration and lost the value of his contract, but it is well settled that such consequential injury resulting from a

State v. Union Pac. R. Co., 87 Nebr. 29, 126 N. W. 859, 31 L. R. A. (N. S.) 657n; *State v. Martyn*, 82 Nebr. 225, 117 N. W. 719, 23 L. R. A. (N. S.) 217n. See also *Hicks Pub. Co. v. Wisconsin &c. R. Co.*, 138 Wis. 584, 120 N. W. 512; *Chicago &c. R. Co. v. United States*, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. ed. 305. But compare *Curry v. Kansas &c. R. Co.*, 58 Kans. 6, 48 Pac. 579; *Re Contract for Free Transportation*, 16 Int. Com. 246; *Re Railroad Tel. Cos.*, 12 Int. Com. 10.

³ *Emerson v. Boston &c. R. Co.*, 75 N. H. 427, 75 Atl. 529, 27 L. R. A. (N. S.) 331; *Texas &c. R. Co. v. Wells-Fargo Exp. Co.*, 101 Tex. 564, 110 S. W. 38; *St. Louis &c. R. Co. v. Mitchell-Crittenden Tie Co.* (Tex. Civ. App.), 148 S. W. 1191.

⁴ *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671. See also

Louisville &c. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848n; *Gill v. Erie R. Co.*, 151 App. Div. 131, 135 N. Y. S. 355; *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559n.

⁵ *Evansville &c. Ry. Co. v. Vanda*, 57 Ind. App. 415, 106 N. E. 388. See also *Louisville &c. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848n; *Seaman v. Minneapolis &c. R. Co.*, 127 Minn. 180, 149 N. W. 134; *Schafer v. Cleveland &c. R. Co.*, 265 Pa. 109, 108 Atl. 407; *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559n. But compare *Curry v. Kansas &c. R. Co.*, 58 Kans. 6, 48 Pac. 579; and see *Scheller Piano Co. v. Illinois &c. Utilities Co.*, 288 Ill. 580, 123 N. E. 631, distinguishing *Hite v. Cincinnati &c. R. Co.*, 284 Ill. 297, 119 N. E. 904.

lawful exercise of power does not make the law invalid, and it seems to be the only rule that will prevent the evasion of the law or statute. There is much reason for asserting, however, that there ought to be some remedy to relieve such hardship and at least one court has held that where the contract is invalidated by statute, after the railroad company has taken possession of the right of way constituting the consideration for annual passes, the company is bound to compensate the grantor in cash for the value of the property taken less the value of the passes already received by him.⁶ But another court has held that the conveyance will not be rescinded by a court of equity and that the company is not liable in damages for the amount which the grantor would be obliged to expend for transportation on trips which he would have taken if the agreed transportation had been furnished to him.⁷

§ 2442 (1614). **Rights of persons holding passes to be carried in sleeping and parlor cars.**—So far as we have been able to discover there is no case or authority which precisely defines the right of a person holding a free railroad pass to be carried in sleeping and parlor cars. The right of a person to be carried in such cars may, perhaps, depend upon the terms of the contract contained in the pass, or to some extent by the contract or arrangement between the railroad company and the sleeping car company or their rules, so that it is difficult to state a general rule. If the pass provided that the holder should have no right to be carried in a sleeping or parlor car we believe that such a provision would be valid, for a railway company certainly has the right to give to a person who paid full and regular compensation, the benefit of first choice of sleeping and parlor cars, to the exclusion of those to whom it grants a privilege.⁸

⁶ *Louisville &c. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848n.

⁷ *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559n. There is also much reason for this view that the company should not be mulcted

in damages merely because it obeyed the law making further performance impossible. But, perhaps this does not go to the bottom of the question.

⁸ See *Muldoon v. Seattle &c. R. Co.*, 10 Wash. 311, 38 Pac. 995, 45 Am. St. 787; *Lawrence v. Pullman*

Where a pass is silent on the subject, and there is no rule or regulation to the contrary, there is more difficulty, but we are inclined to the opinion that a person traveling on a pass would have a right to be carried in parlor and sleeping cars on paying the compensation for carriage in those cars.⁹

§ 2443 (1615). Baggage of person riding on pass.—It has been held that unless there be some stipulation or condition in a pass in reference to the baggage of a person riding thereon such person is a passenger and entitled to the rights of a passenger and has a right to have his baggage carried by the carrier on the same terms upon which the baggage of passengers for hire is carried. But it is within the power of the carrier to make a contract governing the carriage of the baggage of persons riding on passes and where such stipulations are incorporated in a pass they are valid and binding upon the person using the pass, and, as we believe, the right of a holder of a free pass to have baggage carried may be limited by rules or regulations.¹⁰

&c. Co., 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58. Compare also *Lemon v. Pullman Palace Car Co.*, 52 Fed. 262; *Pullman Palace Car Co. v. Lee*, 49 Ill. App. 75; *Doherty v. Northern Pac. R. Co.*, 43 Mont. 294, 115 Pac. 401, 36 L. R. A. (N. S.) 1139n.

⁹ We suppose that a railroad company may make reasonable rules and regulations on the subject, and that a person accepting a pass would be bound to conform to them. See cases cited in last preceding note. Also post, § 2464. As to whether or when there is a duty to furnish sleeping car service and accommodation generally, see notes in 5 L. R. A. (N. S.) 1012, 38 L. R. A. (N. S.) 258; L. R. A. 1915B, 1202; L. R. A. 1918A, 46, 51.

¹⁰ *Muldoon v. Seattle &c. R. Co.*, 10 Wash. 311, 38 Pac. 995, 22 L. R. A. 794, 45 Am. St. 787. See also *Holly v. Southern R. Co.*, 119 Ga. 767, 47 S. E. 188. But compare *Mobile &c. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607. The liability of the company as to baggage so carried is held to be merely that of a gratuitous bailee. *Rice v. Illinois Cent. R. Co.*, 22 Ill. App. 643; *Flint &c. R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499 (distinguished in *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773, 1 L. R. A. (N. S.) 352n, 113 Am. St. 533, 7 Ann. Cas. 57, where father paid fare and company was held liable for loss of his child's wearing apparel). See also *Holly v. Southern Ry. Co.*, 119 Ga. 767, 47 S. E. 188; *Denver*

It seems clear, it may be said generally, that a person who accepts a gratuitous pass must take it on the terms and conditions on which the donor chooses to bestow it, unless such terms or conditions violate some rule of law or public policy.

&c. R. Co. v. Johnson, 50 Colo. 627; White v. St. Louis &c. R. Co. 187, 114 Pac. 650, Ann. Cas. 1912C, (Tex.), 86 S. W. 962.

CHAPTER LXXVII.

SLEEPING CAR COMPANIES.

Sec.		Sec.	
2450.	General nature of sleeping car companies.	2458.	Duty as to property of passengers.
2451.	Duty to furnish accommodations.	2459.	Baggage of passengers—Loss of—Negligence.
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2455.	Tickets—Berths.	2463.	Railroad companies may require compensation for sleeping car accommodations.
2456.	Duties of sleeping car companies to passengers—Illustrative instances.	2464.	Extra fares for riding in parlor cars.
2457.	Duty to furnish means of getting in and out of berths and to keep aisles free from obstructions.	2465.	Limiting liability—Contract—Notice.

§ 2450 (1616). General nature of sleeping car companies.—It is affirmed by the authorities that a sleeping car company is neither a common carrier nor an innkeeper,¹ but precisely what its char-

¹ Post, §§ 2453, 2458. "Liability of Sleeping Car Companies for the Property of Passengers," 1 Am. & Eng. R. Cas. (N. S.) xxxviii; Legal Status of Sleeping Car Companies, 19 Am. L. Rev. 204; "The Liability

of Sleeping Car and Palace Car Companies for Injuries to Passengers," 3 Colum. L. T. 93; "Sleeping Cars," 22 Cent. L. J. 52; *Myers v. Pullman Co.*, 149 Ky. 776, 149 S. W. 1002, in 41 L. R. A. (N. S.)

acter is has not been very satisfactorily explained or described. The rules as to the rights, duties and liabilities of such companies have not as yet been very fully declared by the courts nor the doctrines which govern such organizations very fully developed;² but the law upon the subject is becoming better understood, and, in most respects, is comparatively well settled by recent authorities. Sleeping car companies do not undertake to carry passengers, but they do assume a duty of a special nature to the persons to whom they agree to furnish "additional accommodations." Public carriers are not bound to furnish places to sleep nor luxurious seats or the like, for their duty as carriers is to furnish, on trains provided for the carriage of

799n; Pullman &c. R. Co. v. Gaylord, 9 Ky. L. 58, 26 Am. L. Reg. 512; Lewis v. New York Central &c. Co., 26 Am. L. Reg. 359; Whitney v. Pullman Palace Car Co., 26 Am. L. Reg. 366; notes to Pullman &c. Co. v. Lowe, 29 Am. L. Reg. 251; notes to Mann &c. Co. v. Dupre, 21 L. R. A. 289; notes to Pullman &c. Co. v. Lowe, 30 Cent. L. J. 245; 3 Thomp. Neg. (2d ed.) § 3605; 22 Am. & Eng. Ency. of L. 3. See also Pullman P. C. Co. v. Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. 53; Blum v. Southern Pullman P. C. Co., 1 Flip. (U. S.) 500; Calhoun v. Pullman P. C. Co., 149 Fed. 546; Pullman Co. v. Linke, 203 Fed. 1017; Pullman P. C. Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578; Pullman P. C. Co. v. Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. 293; Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407 and note; Dawley v. Wagner P. C. Co., 169 Mass. 315, 47 N. E. 1024; Morrow v. Pullman Palace Car Co., 98 Mo. App.

351, 73 S. W. 281; Dings v. Pullman Co., 171 Mo. App. 683, 154 S. W. 446; Goldstein v. Pullman Co., 161 App. Div. 756, 147 N. Y. S. 133; Pullman P. C. Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. 902. But the Interstate Commerce Law now provides that sleeping car companies are common carriers as the term is there used. So does the Mississippi Constitution declare them common carriers. Pullman Co. v. Kelly, 86 Miss. 87, 38 So. 317. See also Voss v. Wagner Palace-Car Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010; Pullman Palace Car Co. v. Lowe, 28 Nebr. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. 325 (both seeming to hold that it may be liable as an innkeeper or carrier at least under some circumstances). Where a sleeping car company without authority leases its property it may recover it back, as there is no moral wrong in the transaction. Pullman &c. Co. v. Central &c. Co., 65 Fed. 158.

² See post, § 2453.

passengers, reasonable accommodations for the comfort and convenience of those they undertake to carry. The additional accommodations are furnished by sleeping car companies or parlor car companies, and for those accommodations compensation is paid such companies. Such companies do not undertake to furnish tracks, locomotives or the like, nor do they undertake to govern or control the movement of trains or any matters connected with the operation of the road, so that it can not be justly said that as to any of such matters they owe a duty to their patrons.³ But while the duty of such companies to their patrons is neither that of an innkeeper nor that of a public carrier there is, nevertheless, some special duty (not as yet very clearly defined by the decisions) insomuch as they exact and receive a compensation for furnishing travelers with what are commonly called "additional accommodations," and correspondent to this duty there must, upon well-settled principles, be some liability for a breach of duty to the persons to whom that duty is owing, and who are injured in person or property by a wrongful violation of such duty.

§ 2451 (1617). **Duty to furnish accommodations.**—The courts must, as we suppose, take judicial notice that sleeping car companies do not undertake to furnish accommodations to all persons who desire them in the broad sense that public carriers undertake to carry all persons who properly offer themselves for transportation.⁴ Sleeping car companies have not the same control of facilities for transportation as railroad companies have, and they do not hold themselves out as undertaking to accommodate all who desire accommodations such as they assume to

³ See *Simms v. Pullman &c. Co.*, 105 Am. St. 947; *Lockyer v. Sleeping Car Co.*, (1892) 61 L. J. Q. B. 501.
Fed. Cas. No. 12869a; *Calhoun v. Pullman Co.*, 159 Fed. 387, 16 L. R. A. (N. S.) 575; *Pullman &c. Co. v. Lee*, 49 Ill. App. 75; *Lawrence v. Pullman &c. Co.*, 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58; *Pfaetzer v. Pullman &c. Co.*, 4 W. N. C. (Pa.) 240; *Nashville &c. R. Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055

105 Am. St. 947; *Lockyer v. Sleeping Car Co.*, (1892) 61 L. J. Q. B. 501.

⁴ See *Calhoun v. Palace Car Co.*, 149 Fed. 546; *Pullman Palace-Car Co. v. King*, 99 Fed. 380, 385. As to the right of the holder of a gratuitous pass to demand a berth in a sleeping car, see ante, § 2442.

furnish, and it can not be justly held that their duty is as broad as that of railroad carriers. It is difficult to say what is the scope and extent of their duty to furnish accommodations to those who demand them, but we think it safe to say that as they are, to some extent, at least, "affected with a public interest," they are under a duty to serve the public impartially and to exercise reasonable care to furnish the required service. There must be some public duty otherwise such public carriers as railroad companies would have no right to haul the cars of sleeping car companies as parts of regular railway passenger trains. But while there seems to be a duty on the part of a sleeping car company to treat all persons impartially who desire accommodation and to exercise reasonable care to provide such accommodations we do not think that the duty is so broad or so closely analogous to that of a railroad company as the expressions of some of the courts seem to indicate.⁵ A sleeping car company can not, however, arbitrarily and without cause refuse to receive a passenger who properly offers himself and requests accommodations,⁶ but it may, of course, refuse to receive an unfit person or may for other sufficient reasons decline to receive a passenger into its coaches.⁷ Where, however, the company elects to rescind a

⁵ *Nevin v. Pullman &c. Co.*, 106 Ill. 222, 46 Am. R. 688, 11 Am. & Eng. R. Cas. 92. They are, however, as we have already said, "affected with a public interest," and are held to be public service corporations in *Pullman Co. v. Riley*, 5 Ala. App. 561, 59 So. 761; *Pullman Co. v. Lutz*, 154 Ala. 517, 45 So. 675, 14 L. R. A. (N. S.) 907n, 129 Am. St. 67. See as to statute requiring upper berths to be closed when unoccupied, at the option of the occupant of the lower berth held invalid. *State v. Redmon*, 134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. 1003, 15 Ann. Cas. 408; *Chicago &c. Ry. Co. v. State of Wisconsin*, 238 U.

S. 491, 35 Sup. Ct. 869, 59 L. ed. 1423, L. R. A. 1916A, 1133n. And see as to how far public service commission or the like may compel furnishing of adequate facilities and when the order is unreasonable and invalid, *Atchison &c. R. Co. v. State (Okla.)*, 176 Pac. 393, 11 L. R. A. 992, and note.

⁶ *Searles v. Mann &c. Co.*, 45 Fed. 330; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688.

⁷ *Pullman Co. v. Krauss*, 145 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218 (rule excluding insane persons and persons afflicted with infectious diseases).

contract for a berth on the ground that the person is unfit, as, for instance, that he has a contagious disease, it is bound as a condition to such rescission to return the purchase price of the ticket.⁸ The sleeping car company will be liable in damages for the breach of its contract with a purchaser of a ticket for a berth.⁹

§ 2452 (1617a). **Liability for representations of agents as to operation of trains.**—The railroad company and not the sleeping car company is responsible for the operation of the train. Thus, it has been held that the agent of a sleeping car company had no authority to inform a prospective passenger that his railroad ticket entitled him to ride without having the same countersigned and validated at an intermediate point as required by its conditions.¹⁰ And in an English case it was held that the statement in the official guide of a sleeping car company that certain trains connect with others at specified times was not a warranty of punctuality, but a mere representation that the times mentioned were the scheduled times for the arrival and departure of trains at the connecting points and imposed no duty on the sleeping car company to see that the trains arrived on time.¹¹

⁸ Pullman Co. v. Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218.

⁹ Pullman Co. v. Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624; Pullman Co. v. Booth (Tex. Civ. App.), 28 S. W. 719; Braun v. Webb, 65 N. Y. S. 668; Pullman Co. v. King, 99 Fed. 380; Pullman Co. v. Willett, 27 Ohio Cir. Ct. 649. See also Pullman Palace Car Co. v. Taylor, 65 Ind. 153, 32 Am. Rep. 57; Smith v. Pullman Co., 138 Mo. App. 238, 119 S. W. 1072; Pullman Co. v. Pennock, 118 Tenn. 565, 102 S. W. 736. But compare Pullman Co. v. Riley, 5 Ala. App. 561, 59 So. 761; Louisville &c. R. Co. v. Fisher, 155 Fed. 68, 11 L. R. A. (N. S.) 926n. And see as to freedom from liabil-

ity where passenger voluntarily abandons the contract. Pullman Palace Car Co. v. Marsh, 24 Ind. App. 129, 53 N. E. 782; Pullman Palace Car Co. v. Hocker, 41 Tex. Civ. App. 607, 93 S. W. 1009.

¹⁰ Calhoun v. Pullman Palace Car Co., 149 Fed. 546. But see as to where agent is deemed to have authority to bind sleeping car company. Pullman Co. v. Willett, 27 Ohio C. C. 649; Smith v. Pullman Co., 138 Mo. App. 238, 119 S. W. 1072; Morrow v. Pullman Co., 98 Mo. App. 351, 73 S. W. 281.

¹¹ Lockyer v. International Sleeping Car Co., (1892) 61 L. J. Q. B. 501. See generally post, §§ 2456, 2462.

§ 2453 (1618). **Duties and liabilities of sleeping car and parlor car companies—Generally.**—The acceptance of compensation for accommodations in a sleeping car or parlor car, as we have said, creates contractual relations between the company and its patron, and out of this relation a duty arises. The nature of the service rendered by sleeping car companies is public, and they are in some measure instrumentalities of interstate commerce,¹² and hence considerations of public policy have weight in determining what their obligations are and the general character of their duties. We think that principle requires the conclusion that in all matters peculiar to sleeping cars and their appurtenances, a sleeping car company owes to those with whom it contracts a special and distinct duty. If, for example, the sleeping car company should negligently place a traveler in a berth previously occupied by one suffering from a contagious disease the sleeping car company and not the railroad company, unless guilty of concurrent negligence, is responsible to the traveler injured by such negligence, for it can not be justly said that as to things peculiarly and exclusively pertaining to sleeping car accommodations the railroad company owes the traveler a duty. It is probably true that the decisions, or, more accurately speaking, the dicta contained in many of them, oppose our conclusion, but, for all that, we believe that as to exclusively “additional accommodations” that is accommodations especially furnished by the sleeping car company and in no way connected with the carriage of the passenger, the special duty is owing to the traveler by the sleeping car company. We do not doubt that the weight of authority is that a railroad company, as well as the sleeping car company, is liable for assaults committed by sleeping car conductors and porters

¹² They are regarded for the purposes of taxation as instrumentalities of commerce. *Pullman &c. Co. v. Board*, 55 Fed. 206; *Board v. Pullman &c. Co.*, 60 Fed. 37. So, the Act of Congress of June 29, 1906, provides that the term “common carrier” as used therein shall

include express companies and sleeping car companies. So, a sleeping car company is declared a common carrier in Mississippi by the constitution. *Pullman P. C. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

upon passengers,¹³ nor do we say that the decisions so declaring are not well founded, but we do venture to say that they can only be sustained upon the ground that the duty of furnishing fit and competent servants and of requiring of them a proper service is a matter connected with the carriage of passengers and not a matter exclusively pertaining to the undertaking to furnish "additional accommodations" in the form of places for sleeping or the like. Nor do we controvert the soundness of the doctrine declared by the cases which hold that a railroad company is liable for injuries caused by defects in sleeping cars,¹⁴ for it is the duty of the railroad company as a public carrier to exercise the highest practicable degree of care to procure safe cars and equipments and to keep them in a safe condition for use. While we readily agree to the doctrine of the cases referred to, we, nevertheless, think that a sleeping car company may also be liable for negligently furnishing and using an unsafe or defective car,¹⁵ for we can see no reason for exonerating a natural person or a corporation who undertakes for a consideration to

¹³ *Dwinelle v. New York &c. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. 611; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Williams v. Pullman &c. Co.*, 40 La. Ann. 417, 4 So. 85, 8 Am. St. 538, 33 Am. & Eng. R. Cas. 414; *Heenrich v. Pullman &c. Co.*, 20 Fed. 100; *Thorpe v. New York &c. Co.*, 76 N. Y. 402, 32 Am. Rep. 325. See also *Louisville &c. R. Co. v. Church*, 155 Ala. 329, 46 So. 457, 130 Am. St. 29; *Denver &c. R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 27 L. R. A. (N. S.) 761; *St. Louis &c. R. Co. v. Hatch*, 116 Tenn. 580, 94 S. W. 671; *Pullman &c. Co. v. Bales*, 80 Tex. 211, 14 S. W. 855, 15 S. W. 785.

¹⁴ *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Dwinelle v. New York &c. Co.*,

120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. 611; *Thorpe v. New York &c. Co.*, 76 N. Y. 406; *Kinsley v. Lake Shore &c. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200. See also *Robinson v. Chicago &c. R. Co.*, 135 Mich. 254, 97 N. W. 689; *Louisville &c. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Blake v. Kansas City &c. R. Co.*, 38 Tex. Civ. App. 337, 85 S. W. 430; *Pullman P. C. Co. v. Norton (Tex.)*, 91 S. W. 841.

¹⁵ *Williams v. Pullman &c. Co.*, 40 La. Ann. 417, 4 So. 85, 8 Am. St. 538, 33 Am. & Eng. R. Cas. 414; *Taber v. Seaboard &c. R. Co.*, 81 S. Car. 317, 62 S. E. 311; *Pullman Co. v. Norton (Tex.)*, 91 S. W. 841, *affd.* without opinion, in 101 Tex. 653.

furnish a traveler with sleeping accommodations from responsibility for negligence, although it may be true that the negligence of some one else concurs in causing the injury. Although a railroad company may be liable for assaults committed upon passengers by the employes of a sleeping car company the injured person has a right of action against the sleeping car company.¹⁶

§ 2454 (1619). Refusal to furnish berth—Right of railroad company to determine on what trains or tickets sleeping car berths shall be furnished.—The general principle discussed in a former chapter that railroad companies may determine on what trains passengers shall be carried authorizes the conclusion that a railroad company may classify its trains and determine on what trains sleeping car accommodations shall be furnished.¹⁷ There is no duty to furnish such accommodations on all trains, so that it must ordinarily be within the power of the railroad company to determine on what trains sleeping cars shall be handled. A passenger can not maintain an action for refusal to furnish a sleeping car berth on trains on which such accommodations are not furnished, nor can a passenger not entitled to such accommodations because not holding such a ticket as entitles him to such accommodations maintain an action for a refusal to furnish

¹⁶ *Campbell v. Pullman &c. Co.*, 42 Fed. 484; *Pullman P. C. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Mann &c. Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289. See also *Hill v. Pullman Co.*, 188 Fed. 497 (company liable for injuries to passengers by robber); *Pullman Palace Car Co. v. Hocker*, 41 Tex. Civ. App. 607, 93 S. W. 1009. But a passenger of an ordinary car of a railroad company who enters a lavatory in a sleeping car for the mere purpose of temporary use, with the conductor's consent, is not a passenger of the sleeping car

company and it is not liable to such person for insulting language of its porter. *Payne v. Scherer*, 270 Fed. 573. See also *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 3 So. 631, 8 Am. St. 512.

¹⁷ *In State v. Missouri &c. R. Co.*, 55 Kans. 708, 41 Pac. 964, 29 L. R. A. 444, 49 Am. St. 278, will be found an instructive discussion of the general discretionary power of railroad companies. See also *State v. Kansas &c. R. Co.*, 47 Kans. 497, 28 Pac. 208; *Lemon v. Pullman P. C. Co.*, 52 Fed. 262.

him a berth.¹⁸ It is held that the agent of a railroad company who is also employed to sell tickets for a sleeping car company acts as the agent of the railroad company in selling such tickets in cases where the railroad company determines what persons shall occupy the sleeping car and that no recovery can be had against the sleeping car company for the wrongful refusal of such agent to sell an intending passenger a berth.¹⁹

§ 2455 (1620). Tickets—Berths.—The rule that a ticket does not fully express the contract, and is in the nature of “a voucher” or “token,” is applied to “berth tickets” issued by sleeping car companies.²⁰ In one of the reported cases it was held competent for the sleeping car company to contradict by parol the terms of a ticket as to the berth bought by the passenger,²¹ but this seems to us an erroneous ruling for we believe that the statements of the ticket as to the particular berth purchased can not be contradicted for the reason that as to that fact the ticket expresses the agreement of the parties, even though it may not express the entire contract. If the rule asserted in the case referred to is the correct one then a traveler who undertakes a night ride upon a ticket sold him by the agent of the company may be induced to enter upon a journey that may result in injury to him although his ticket by its terms assures him that he will receive such accommodations and that he has a right to a particular berth. In another case it was held that a person who buys a ticket entitling him to a designated berth has a

¹⁸ *Lawrence v. Pullman &c. Co.*, 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58, 28 Am. & Eng. R. 151; *Pullman &c. Co. v. Lee*, 49 Ill. App. 75.

¹⁹ *Lemon v. Pullman &c. R. Co.*, 52 Fed. 262. In *Nashville &c. R. Co. v. Price*, 125 Tenn. 646, 148 S. W. 219, a railroad company was held liable where, as agent for the sleeping car company, it sold a berth in a sleeper not going over the route of the railroad ticket

and the purchaser was ejected from the sleeper.

²⁰ Ante, § 2415; *Lewis v. New York &c. Co.*, 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; *Mann &c. Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289.

²¹ *Mann &c. Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289, citing *New York &c. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. ed. 71.

right to that berth or to a similar berth in another car and that for a failure to furnish such a berth an action will lie.²² So, it is held by other courts that a demand for a berth and a promise to furnish it constitute a contract between the sleeping car company and the passenger by whom the berth is engaged for a breach of which the sleeping car company is liable in damages.²³ A sleeping car company has a right to sell an entire section to one passenger and no action will lie against it because of the refusal of its employes to permit another traveler to take an unoccupied berth therein.²⁴ A passenger who purchases a ticket for a berth really buys a right to a designated place in the car and can not justly claim a right to any other, hence it is correctly held that he has no right to occupy any other berth except the one he purchases.²⁵ Where a passenger accepts a free pass from a railroad company, the purchase by him of a ticket for a seat in a drawing-room car does not make him a passenger of the railroad company for hire.²⁶ It has been held that a passenger who buys a ticket from the agent of a sleeping car company which is subsequently lost, and, after its loss, receives from the agent of the company a written statement reciting that he holds a seat in a designated train and car, and indicating that the ticket has been lost is entitled to damages for being compelled to travel in an ordinary car attached to the same train.²⁷ In an-

²² Pullman &c. Co. v. Taylor, 65 Ind. 153, 32 Am. Rep. 57; Pullman Co. v. Willett, 27 Ohio C. C. 649. Compare Pullman P. C. Co. v. Marsh, 24 Ind. App. 129, 53 N. E. 782; Braun v. Webb, 32 Misc. 243, 65 N. Y. S. 668.

²³ Pullman &c. Co. v. Booth (Tex.), 28 S. W. 719, citing Nevin v. Pullman Car. Co., 106 Ill. 222, 46 Am. Rep. 688; Missouri &c. R. Co. v. Evans, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 478. In Speaks v. Southern R. Co., 90 S. Car. 358, 73 S. E. 625, 38 L. R. A. (N. S.) 258n, a railroad company was held liable for failure to furnish sleeping car

accommodations which it had agreed by telegraph to do upon the purchase of transportation tickets.

²⁴ Searles v. Mann &c. Co., 45 Fed. 330.

²⁵ Pullman &c. Co. v. Bales, 80 Tex. 211, 14 S. W. 855; Searles v. Mann &c. Co., 45 Fed. 330. See also Pullman P. C. Co. v. Marsh, 24 Ind. App. 129, 53 N. E. 782.

²⁶ Ulrich v. New York &c. R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. 369.

²⁷ Buck v. Webb, 58 Hun 185, 11 N. Y. S. 617. We are inclined to think that the decision in the

other case the question as to the rights of a passenger who had lost his ticket for a berth came under consideration, and it was held that the company was liable for the expulsion of a passenger who had lost his ticket but had received a written statement from the agent of the company showing that he had bought a ticket for a designated berth.²⁸

§ 2456 (1621). Duties of sleeping car companies to passengers—Illustrative instances.—A sleeping car company owes a duty to its patrons to make reasonable provision for their convenience and comfort, but a patron can not successfully insist that his comfort or convenience shall be paramount to the reasonable rules of the company nor to the rights of other passengers.²⁹ It is held that a railroad conductor is not bound to arouse a passenger from sleep although the conductor knows that such passenger is to leave the train at a designated station,³⁰ but that it is the duty of the employes of a sleeping car company to

case referred to is erroneous, for as it seems to us, a passenger must know that the ticket which the company authorizes its agent to sell is the evidence to the conductor of the sleeping or parlor car of the right of the passenger to a particular seat or berth. If the agent should give such a statement to a person not entitled to the berth or seat, although he should act in entire good faith and with all possible care, it would certainly not avail the company in an action by the holder of the ticket in the event that it should turn out that the agent was mistaken, and the person to whom the statement was given had not bought a ticket. See *Armstrong v. Pullman Co.*, 108 Miss. 25, 66 So. 283, L. R. A. 1915A, 1202. But compare *Pullman &c. Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232.

²⁸ *Pullman &c. Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232 (distinguished in *Armstrong v. Pullman Co.*, 108 Miss. 25, 66 So. 283, L. R. A. 1915A, 1202).

²⁹ *Pullman &c. v. Ehrman*, 65 Miss. 383, 4 So. 113. See also *Pullman P. C. Co. v. Krauss*, 145 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 103; *Pullman P. C. Co. v. Bales* (Tex.), 14 S. W. 855. As to damages recoverable for breach of contract to furnish accommodations, see also *Ingraham v. Pullman Co.*, 190 Mass. 33, 76 N. E. 237, 2 L. R. A. (N. S.) 1087n; *Smith v. Pullman Co.*, 138 Mo. App. 238, 119 S. W. 1072; *Pullman &c. Co. v. Hocker*, 41 Tex. Civ. App. 607, 93 S. W. 1009.

³⁰ *Seaboard Air Line R. Co. v. Rainey*, 122 Ga. 307, 50 S. E. 88, 106 Am. St. 134, 2 Ann. Cas. 675; *Nichols v. Chicago &c. R. Co.*, 90

awaken a passenger in time to get off the train at the place where it is known he desires to stop.³¹ There seems to be good reason for making a distinction between the classes of cases referred to, but whether the railroad company is liable or not, the sleeping car company ought to be held liable in a proper case, for the particular duty to awaken a sleeping passenger is clearly implied in the general duty to provide him with sleeping accommodations to a designated station. We think that a sleeping car company would be also liable to a passenger injured through the negligence of its employes in the management of the heating apparatus of its car.³² In a case where a passenger was wrongfully expelled from a sleeping car because of a fear

Mich. 203, 51 N. W. 364; *Missouri &c. R. Co. v. Kendrick* (Tex.), 32 S. W. 42; *Sevier v. Vicksburg &c. R. Co.*, 61 Miss. 8, 48 Am. Rep. 74; *Nunn v. Georgia R. Co.*, 71 Ga. 710, 51 Am. Rep. 284. But compare *Pullman Co. v. Lutz*, 154 Ala. 517, 45 So. 675, 14 L. R. A. (N. S.) 907n, 129 Am. St. 67; *Georgia Southern &c. Ry. Co. v. Corry*, 149 Ga. 295, 99 S. E. 881, affirming 96 S. E. 335; *Campbell v. Seaboard &c. R. Co.*, 83 S. Car. 448, 65 S. E. 628, 23 L. R. A. (N. S.) 1056n, 137 Am. St. 824; *Gilkerson v. Atlantic &c. R. Co.*, 99 S. Car. 426, 83 S. E. 592, L. R. A. 1915C, 664n, Ann. Cas. 1916B, 248. And see where passenger is sick and the station agent had agreed to look after him, *Weightman v. Louisville &c. R. Co.*, 70 Miss. 563, 12 So. 586, 19 L. R. A. 671, 35 Am. St. 660.

³¹ *Pullman Co. v. Lutz*, 154 Ala. 517, 45 So. 675, 14 L. R. A. (N. S.) 907n, 129 Am. St. 67; *Pullman &c. Co. v. Smith*, 79 Tex. 468, 14 S. W. 993, 13 L. R. A. 215, 23 Am. St. 356, citing *Pullman &c. Co. v. Pollock*,

69 Tex. 120, 5 S. W. 814, 5 Am. St. 31; *Pullman &c. Co. v. Mathews*, 74 Tex. 654, 12 S. W. 744, 15 Am. St. 873. See also *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 534, 115 S. W. 315. The case first cited recognizes the difference between the duty of a railroad company and the duty of a sleeping-car company. See also *Airey v. Pullman P. C. Co.*, 50 La. Ann. 648, 23 So. 512.

³² *Pullman &c. Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89. The decision in the case referred to is erroneous so far as regards the measure of damages, and some of the statements as to the general liability of a sleeping company are probably too strong. See, as to heating and ventilation, *Hughes v. Pullman P. C. Co.*, 74 Fed. 499; *Edmunson v. Pullman P. C. Co.*, 92 Fed. 824; *Pullman Co. v. Cox* (Tex. Civ. App.), 220 S. W. 599 (company liable where changed from warm drawing room to cold berth).

that he was suffering from smallpox, the court held that if the removal was by the employees of the railway company that company was liable, but that if the ejection was by the employees of the sleeping car company then that company was liable,⁸³ but, while there is good reason for the conclusion asserted in the case referred to, it seems to be opposed to the weight of authority, for the weight of authority asserts a rule that would hold the railway company liable, although the passenger was ejected by the employees of the sleeping car company. The theory of the cases which hold that the railroad company is liable for assaults committed by employees of sleeping car companies seems to be that the passenger has a right to assume that the train is all under one management and that it is the duty of the railroad company to procure fit and competent servants and to see that they do no injury to passengers no matter whether the passengers travel in sleeping coaches or in other cars attached to the train. We suppose it clear, however, that a railroad company would not be liable for an assault committed by an employe of a sleeping car company if such employe was at the time acting in some matter wholly outside of any duty connected with the management of the train. As a sleeping car company does not undertake to carry passengers it is not, ordinarily, liable where the failure to transport the car in which a passenger secured a berth to its destination is caused by an act of the railway company.⁸⁴ Where a person admitted to a

⁸³ *Paddock v. Atchinson &c. R. Co.*, 37 Fed. 841, 4 L. R. A. 231. See also as to where sleeping car company is liable, *Nevin v. Pullman &c. Co.*, 106 Ill. 222, 46 Am. Rep. 688; *Taylor v. Wabash R. Co.*, 130 Mo. App. 582, 109 S. W. 1059; *Nashville &c. R. Co. v. Price*, 125 Tenn. 646, 148 S. W. 219; *Pullman &c. Co. v. Hocker*, 41 Tex. Civ. App. 607, 93 S. W. 1009.

⁸⁴ *Duval v. Pullman &c. R. Co.*, 62 Fed. 265, 33 L. R. A. 715; *Louisville &c. R. Co. v. Fisher* 155 Fed.

68, 11 L. R. A. (N. S.) 926n. But it may be liable in some cases. See *Pullman P. C. Co. v. Hocker*, 41 Tex. Civ. App. 607, 93 S. W. 1009; *Pullman P. C. Co. v. King*, 99 Fed. 380. In the Texas case cited in this note it is held that, where a sleeping-car company operating its cars under a contract with a railroad company, contracted to furnish sleeping-car accommodations to a passenger from one place to another specified place, but "breached its con-

sleeping car is known to the employes of the sleeping car company to be violently insane it is culpable negligence on the part of the employes to permit him to remain and thus endanger the safety of others, and the company is liable for injuries to a passenger inflicted by such an insane person.⁸⁵ In the case referred to it was held that the duty to remove the insane person rested upon the sleeping car company and that the trial court erred in not instructing the jury that the company had "the right, if need arose," to restrain or eject from the car the insane person.⁸⁶

§ 2457 (1621a). **Duty to furnish means of getting in and out of berths and to keep aisles free from obstructions.**—It would be anomalous if a sleeping car company were required to furnish berths without making them accessible. The means of getting in and out should be reasonably safe, and it seems that steps, such as are usually furnished, or the like, should be provided for getting in and out of upper berths, and aid should be given by the porter or other proper employe when necessary.⁸⁷ So, care should be taken to keep obstructions out of the aisle when likely to cause injury, and it has been held that if a valise is knowingly allowed to remain in the aisle of a dimly lighted car, and a passenger, without fault on his part, stumbles over it and is injured, the company is liable.⁸⁸

tract" before the latter point was reached, it was not absolved from liability by reason of the railroad company's failure to haul the sleeper further, such condition not being expressed in the contract of transportation with plaintiff, who had no knowledge of the contract between the railroad company and defendant; and that the sleeper, being cut out of the train, and plaintiff being compelled to ride in a chair car for the ballance of the distance, the sleeping-car company's employes aiding the train employes in forc-

ing plaintiff to leave the sleeper, both companies were liable.

⁸⁵ *Meyer v. St. Louis &c. Co.*, 54 Fed. 116, citing *Putnam v. Broadway &c. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190; *Pearson v. Duane*, 4 Wall (U. S.) 605, 18 L. ed. 447.

⁸⁶ Ante, § 2384.

⁸⁷ *Pullman P. C. Co. v. Fielding*, 62 Ill. App. 577.

⁸⁸ *Levien v. Webb*, 61 N. Y. S. 1113. In *Rogers v. Philadelphia &c. Ry. Co.*, 260 Pa. St. 430, 103 Atl. 873, the railroad company was held liable for the negligence of a

§ 2458 (1622). **Duty as to property of passengers.**—There is a slight conflict of authority as to the duty of a sleeping car company to protect the property of passengers who occupy berths in one of its cars. Some of the courts hold that the duty is substantially that of an innkeeper and therefore absolute,³⁹ but the very decided weight of authority is that such companies are liable only where the loss is attributable to the negligence of their employees.⁴⁰ The failure of the employees of a sleeping car company to exercise ordinary and reasonable care constitutes negligence and fastens a liability upon the

Pullman porter in not properly placing a step for a passenger to alight from the train.

³⁹ Pullman &c. v. Lowe, 28 Nebr. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. 325, 40 Am. & Eng. R. Cas. 637; Louisville &c. R. Co. v. Katzenberger, 84 Tenn. 380, 1 S. W. 44, 57 Am. Rep. 232.

⁴⁰ Blum v. Southern Pullman &c. R. Co., 1 Flip. (U. S. C. C.) 500; Barrott v. Pullman &c. Co., 51 Fed. 796; Lemon v. Pullman &c. Co., 52 Fed. 262; Mann &c. Co. v. Dupre, 54 Fed. 646, 21 L. R. A. 289, notes; Pullman &c. Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578, 58 Am. & Eng. R. Cas. 589; Kates v. Pullman &c. Co., 95 Ga. 810, 23 S. E. 186; Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407n; Pullman Co. v. Green, 128 Ga. 142, 57 S. E. 233, 119 Am. St. 373; Pullman &c. Co. v. Smith, 73 Ill. 360; Pullman &c. Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601; Woodruff &c. Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102, 9 Am. & Eng. R. Cas. 294; Hillis v. Chicago &c. Co., 72 Iowa 228, 33 N. W. 643, 31 Am. & Eng. R. Cas. 108; Whitney

v. Pullman &c. Co., 143 Mass. 243, 9 N. E. 619; Illinois &c. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Scaling v. Pullman &c. Co., 24 Mo. App. 29; Bevis v. Baltimore &c. Co., 26 Mo. App. 19; Root v. New York &c. Co., 28 Mo. App. 199; Tracy v. Pullman &c., 67 How. Pr. (N. Y.) 154; Carpenter v. New York &c. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 24 Am. St. 644; Pfaelzer v. Pullman &c. Co., 4 Week. No. Cas. 240; Pullman &c. Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. 902; Pullman &c. Co. v. Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. 31; Pullman &c. Co. v. Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. 873; Dugan v. Pullman &c. Co., 2 Tex. App. (Civ. Cas.), 607, 26 Am. & Eng. R. Cas. 149; Stearn v. Pullman &c. Co., 8 Ontario, 171, 21 Am. & Eng. R. Cas. 443; Keith v. Pullman Palace Car Co., 17 Chic. Leg. N., 196; Welch v. Pullman &c. Co., 16 Abb. Pr. (N. S.) 352; Palmeter v. Wagner &c. Co., 11 Alb. L. J. 149, note; Pullman &c. Co. v. Gaylord, 23 Am. L. Reg. (N. S.) 788; 13 Alb. L. J. 221, note; 3 Cent. L. J. 591.

company, unless the negligence of the passenger contributed to the loss.⁴¹ The sleeping car company must, as we have said, exercise reasonable care to protect the property of its patrons, and reasonable care requires that it should exercise care and diligence to employ a reasonable number of trustworthy servants to give reasonable care to the protection of the property, and also to see that such servants exercise ordinary care and diligence in the performance of their duties.⁴² There is a differ-

⁴¹ *Robinson v. Southern R. Co.*, 40 App. D. C. 549, L. R. A. 1915B, 621n, Ann. Cas. 1914C, 939; *Woodruff &c. Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102, 9 Am. & Eng. R. Cas. 294; *Pullman Palace Car Co. v. Gaylord*, 9 Ky. L. 58, 23 Am. L. Reg. (N. S.) 788; *Lewis v. New York &c. R. Co.*, 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; 28 Am. & Eng. R. Cas. 148, (quoting with approval, and followed in *Pullman P. C. Co. v. Adams*, 120 Ala. 581, 24 So. 921, 74 Am. St. 53); *Pullman &c. R. Co. v. Gardner*, 3 *Pennypacker* (Pa.) 78, 16 Am. & Eng. R. Cas. 324, 18 Cent. L. J. 14; *Stevenson v. Pullman Co.*, (Tex.) 26 S. W. 112, 32 S. W. 335. In *Kates v. Pullman Palace Car Co.*, 95 Ga. 810, 23 S. E. 186, it is held to be the duty of a sleeping-car company to exercise ordinary care to discover and restore to the passenger property left by him in the car. In the case referred to the wrong of the company prevented the passenger from giving due care and attention to his property, so that it cannot be said that the decision denies the applicability or effect of the doctrine of contributory negligence.

⁴² *Blum v. Southern &c. Co.*, 1

Flip. (U. S.) 500; *Pullman Palace Car Co. v. Martin*, 92 Ga. 161, 18 S. E. 364, 58 Am. & Eng. R. Cas. 583; *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Woodruff &c. Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102; *Lewis v. New York &c. Co.*, 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; *Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29; *Root v. New York &c. Co.*, 28 Mo. App. 199; *Wilson v. Baltimore &c. Co.*, 32 Mo. App. 682; *Carpenter v. New York &c. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. 644, 47 Am. & Eng. R. Cas. 421; *Palmer v. Wagoner &c. Co.*, 11 Alb. L. J. 149, note. See generally *Barrott v. Pullman &c. Co.*, 51 Fed. 796, 52 Am. & Eng. R. Cas. 498; *Pullman Palace Car Co. v. Gaylord*, 9 Ky. L. 58, 23 Am. L. Reg. (N. S.) 788; *Illinois &c. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Root v. New York &c. Co.*, 28 Mo. App. 199; *Crozier v. Boston &c. Co.*, 43 How. Pr. (N. Y.) 466; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814, 5 Am. St. 31; *Pullman &c. Co. v. Matthews*, 74 Tex. 654, 12 S. W. 744, 15 Am. St. 873; *Welch v. Pullman &c. Co.*, 16 Alb. Pr. (N. S.) 352, 13 Alb. L. J. 221.

ence of opinion, however, as to just what this requires. The weight of authority, probably, where the question has directly arisen and been considered, is to the effect that it is the duty of the company to keep a constant and active watch in the aisles of its cars during the hours when the passengers are asleep, and that for a failure to do so, resulting in the theft of property from a passenger's berth, the company is liable.⁴³ But, as shown in the authorities cited in the preceding note, the rule is usually stated in general terms as requiring merely reasonable care. There is not necessarily any conflict, however, between these statements as reasonable care, means reasonable care under the circumstances and must ordinarily be in proportion to the danger to be anticipated. As it is the duty of a sleeping car company to employ competent and trustworthy servants it necessarily follows that the company is liable to a passenger for the loss of money or property stolen by one of its employees.⁴⁴ The decisions go so far, indeed, as to hold the company liable where the theft is by a fellow passenger or by

⁴³ *Hill v. Pullman Co.*, 188 Fed. 497; *Robinson v. Southern R. Co.*, 40 App. D. C. 549, L. R. A. 1915B, 621n, Ann. Cas. 1914C, 959; *Pullman &c. Co. v. Adams*, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. 53; *Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407n. See also *Scaling v. Pullman &c. Co.*, 26 Mo. App. 19. (But compare *Dings v. Pullman Co.*, 171 Mo. App. 643, 154 S. W. 446; *Woodruff Sleeping &c. Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102; *Calder v. Southern R. Co.*, 89 S. Car. 287, 71 S. E. 841, Ann. Cas. 1913A, 894. In the second and last cases cited (from District of Columbia and South Carolina) it was held that both sleeping car company and railroad company were liable).

⁴⁴ *Pullman &c. Co. v. Martin*, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498; *Root v. New York &c. Co.*, 28 Mo. App. 199; *Morrow v. Pullman &c. Co.*, 98 Mo. App. 351, 73 S. W. 281; *Pullman &c. Co. v. Woods*, 76 Nebr. 694, 107 N. W. 858; *Carpenter v. New York &c. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. 644; *Pullman &c. Co. v. Gavin*, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. 902; *Hatch v. Pullman Palace Car Co. (Tex.)*, 84 S. W. 246; *Pullman Co. v. Vanderhoeven*, 48 Tex. Civ. App. 414, 107 S. W. 147. See also authorities cited in preceding notes. It was so held where the article was lost or stolen by a sleeping-car porter whom a lady passenger had requested to assist her in carrying the baggage from

an intruder,⁴⁵ but we suppose that where the theft is by a fellow passenger or an intruder there is no liability unless the employes of the company were guilty of negligence. The modern doctrine that a principal is liable for the willful acts of the agent or employe requires the conclusion that a sleeping car company is liable for the torts of its employes, although committed in disobedience of instructions. A sleeping car company is responsible for baggage or property lost through its negligence or by theft of one of its employes where the property or baggage is carried by, or is directly in charge of one of the members of a family in cases where the family is traveling together.⁴⁶ It can not be justly affirmed that a sleeping car company is liable for all money or property which a passenger may choose to take into the car with him, for there must be, as there is even in the case of a public carrier of passengers, a limit to the liability of such a company. We think that a sleeping car company may be liable for such an amount of money as a passenger may take into the car with him for the

the car. *Voss v. Wagner P. C. Co.*, 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010. See also *Irving v. Pullman P. C. Co.*, 84 N. Y. S. 248; *Hasbrouck v. New York &c. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D, 1150. But compare *Union Pac. R. Co. v. Grace*, 22 Wyo. 452, 143 Pac. 353, L. R. A. 1915B, 608n. In *Bacon v. Pullman Co.*, 159 Fed. 1, 16 L. R. A. (N. S.) 578, 14 Ann. Cas. 516, the sleeping car company was liable for physical suffering and mental distress caused by the porter wrongfully taking the receptacle in which the passenger had medicines and stimulants for use on the journey, but not for jewelry carried merely for transportation and not for use.

⁴⁵ *Pullman &c. Co. v. Gavin*, 93 Tenn. 53, 23 S. W. 70, 11 L. R. A. 298, 42 Am. St. 902; *Carpenter v. New York &c. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. 644; *Mann &c. Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289; *Pullman &c. Co. v. Matthews*, 74 Tex. 654, 12 S. W. 744. See also *Pullman &c. Co. v. Martin*, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498. But it is not liable in the absence of negligence. *Pullman &c. Co. v. Harvey*, 101 Ga. 733, 28 S. E. 989; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846.

⁴⁶ *Pullman &c. Co. v. Gavin*, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298; *Dexter v. Syracuse &c. R. Co.*, 42 N. Y. 326, 1 Am. Rep. 527; *Curtis v. Delaware &c. Co.*, 74 N. Y. 116, 30 Am. Rep. 271.

purpose of defraying all the expenses incident to his journey, but not for money carried for purposes wholly disconnected with his journey or its incidents.⁴⁷ It has been held that "the personal effects which a passenger may carry on his journey so as to render a sleeping car company liable for their loss through its negligence may include jewelry, and if a piece of jewelry becomes injured during his travels so that he can not use it in the ordinary way, it does not lose its character as an article which may be properly carried on the person, so as to relieve the carrier of the duty of reasonable diligence in protecting the passenger in its possession."⁴⁸ But it is held otherwise as to jewelry or other articles carried merely for transportation and not for use on the journey.⁴⁹ Generally, the right of action for the loss of property through the torts of the employes of a sleeping car company is in the person to whom a berth is sold, and it has even been held that such a person may maintain an action for money stolen from him by an employe of the sleeping car company, although the money belonged to another and was entrusted to the passenger by the owner.⁵⁰ It has been held that the foregoing rules make no distinction between a passenger occupying a berth in the main body of the sleeper and a passenger permitted by the porter to occupy a bed in the smoking compartment.⁵¹

⁴⁷ *Blum v. Southern &c. Co.*, 3 Cent. L. J. 591. See also *Pullman P. C. Co. v. Adams*, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. 53 (not liable for theft of diamond ring where it was not set so that it could be worn); and see *Levins v. New York &c. R. Co.*, 183 Mass. 175, 66 N. E. 803, 97 Am. St. 434; *Pullman P. C. Co. v. Pollock*, 69 Tex. 120, 5 Am. St. 31, and note; *Morrow v. Pullman P. C. Co.*, 98 Mo. App. 351, 73 S. W. 281; *Cooney v. Pullman P. C. Co.*, 121 Ala. 368, 25 So. 712, 53 L. R. A. 690.

⁴⁸ *Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S. E. 933.

⁴⁹ *Bacon v. Pullman Co.*, 159 Fed. 1, 16 L. R. A. (N. S.) 578.

⁵⁰ *Pullman &c. Co. v. Gavin*, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. 902. We venture to suggest that it seems doubtful whether a sleeping-car company owes a duty to any person except the one with whom it contracts, and that it can hardly be said to be responsible for the property of a stranger although in the custody of the person with whom it has contracted.

⁵¹ *Morrow v. Pullman Co.*, 98 Mo. App. 351, 73 S. W. 281.

§ 2459 (1623). **Baggage of passengers—Loss of—Negligence.**—The settled rule is that where a passenger actually entrusts his baggage to the custody of the railroad company and does not himself retain the possession or care of it, the railroad company receives it as a common carrier and is liable for its loss irrespective of the question of negligence, but where the passenger himself retains possession of his baggage the railroad company is not liable unless it was guilty of negligence. This general rule it is evident can not fully apply to a sleeping car company for the reason that it is neither a common carrier nor an inn-keeper, but we think that the rule in so far as it relates to the possession of the baggage by the passenger himself does exert an important influence upon the question of the liability of a sleeping or parlor car company.⁵² Our conclusion is that where the passenger takes his baggage into the coach with him and does not place it in charge of the railroad company or of the sleeping car company that neither company is liable unless the loss of the baggage was caused by the negligence of one of the companies.⁵³ We concur in the opinion of a writer who says: "A sleeping car company invites passengers to bring with them such baggage as is necessary for their personal comfort and impliedly contracts to use reasonable care in the protection of such baggage as in the protection of passengers but not further."⁵⁴ There is some diversity of opinion as to where

⁵² *Welch v. Pullman &c. Co.*, 1 *Sheld.* (N. Y.) 457, 16 *Abb. Pr. N. S.* 352.

⁵³ *Blum v. Southern &c. R. Co.*, 1 *Flip.* (U. S.) 500, 3 *Cent. L. J.* 591; *Pullman &c. R. Co. v. Smith*, 73 *Ill.* 360, 24 *Am. Rep.* 258; *Pullman &c. R. Co. v. Freudenstein*, 3 *Colo. App.* 540, 34 *Pac.* 578, 58 *Am. & Eng. R. Cas.* 589; *Hillis v. Chicago &c. R. Co.*, 72 *Iowa* 228, 33 *N. W.* 643, 31 *Am. & Eng. R. Cas.* 108; *Pullman P. C. Co. v. Hall*, 106 *Ga.* 765, 32 *S. E.* 923, 925, 44 *L. R. A.* 790, 71 *Am. St.* 293 (quoting text).

⁵⁴ *Liability of Sleeping Car Companies for Property of Passengers*, *Emlin McClain*, 1 *Am. & Eng. R. Cas.* (N. S.) xxxviii, citing *Blum v. Southern &c. R. Co.*, 1 *Flip.* (U. S.) 500, 3 *Cent. L. J.* 591; *Woodruff &c. Co. v. Diehl*, 84 *Ind.* 474, 43 *Am. Rep.* 102; *Lewis v. New York &c. R. Co.*, 143 *Mass.* 267, 9 *N. E.* 615, 58 *Am. Rep.* 155; *Root v. New York &c. R. Co.*, 28 *Mo. App.* 199; *Wilson v. Baltimore &c. R. Co.*, 32 *Mo. App.* 682; *Barrott v. Pullman &c. R. Co.*, 51 *Fed.* 796, 52 *Am. & Eng. R. Cas.* 498.

the burden of proof rests in cases in which the loss of the baggage is proved, some of the cases holding that the burden is on the sleeping car company,⁵⁵ and others that it is on the passenger.⁵⁶ It seems to us that the true rule is that where the passenger, although he takes his luggage into the car with him, actually places it in charge of the employes of the sleeping car company, the burden is on the company to exonerate itself from the imputation of negligence and that proof of loss, after such delivery, makes a *prima facie* case, but that where the passenger retains charge or custody of the luggage the burden is on him, and he can not recover unless he proves that there was negligence on the part of the employes of the sleeping car company.⁵⁷ Where the passenger retains custody of his baggage he has peculiar knowledge of the facts, and, according to decisions in analogous cases, ought to make proof

⁵⁵ *Voss v. Cleveland &c. R. Co.*, 16 Ind. App. 271, 43 N. E. 20; *Kates v. Pullman &c. Co.*, 95 Ga. 810, 23 S. E. 186. See *Robinson v. Southern Ry. Co.*, 40 App. D. C. 549, L. R. A. 1915B, 621n, Ann. Cas. 1914C, 959; *Lewis v. New York &c. R. Co.*, 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; *Pullman &c. R. Co. v. Freudenstein*, 3 Colo. App. 540, 34 Pac. 578, 58 Am. & Eng. R. Cas. 589; *Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407n; *Pullman P. C. Co. v. Adams*, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. 53. In most of these cases, however, the facts were not within the knowledge of the passenger but rather were, or should have been, peculiarly within the knowledge of the company, and the fact that the passenger was asleep and other circumstances raised a presumption against the carrier and made a *prima facie* case. It may well

be that, after such a showing, the burden is upon the carrier in the sense of producing evidence to meet it. See *Robinson v. Southern R. Co.*, 40 App. D. C. 549, L. R. A. 1915B, 621, 625, Ann. Cas. 1914C, 959.

⁵⁶ *Carpenter v. New York &c. R. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. 644, 47 Am. & Eng. R. Cas. 421; *Sterns v. Pullman Car Co.*, 8 Ont. 171; *Dargan v. Pullman &c. Co.*, 2 Tex. App. (Civ. Cas.) 607, § 691. See also *Pullman P. C. Co. v. Arents*, 28 Tex. Civ. App. 71, 66 S. W. 329; *Whitney v. Pullman Car Co.*, 143 Mass. 243; *Tracy v. Pullman P. C. Co.*, 67 How. Pr. (N. Y.) 154; *Whicher v. Boston &c. R. Co.*, 176 Mass. 275, 57 N. E. 601.

⁵⁷ But see *Pullman P. C. Co. v. Hall*, 106 Ga. 765, 32 S. E. 923, 71 Am. St. 293. It is still bound to exercise care not to expose the property to theft, and the ques-

of negligence. The principle which places the burden of proof upon a shipper where he has charge of live stock is closely analogous to that which governs the subject under immediate discussion, and requires the conclusion we have affirmed.

§ 2460 (1624). **Contributory negligence—Loss of baggage or property.**—A passenger who takes baggage or property into a sleeping or parlor coach with him is bound to exercise reasonable diligence and care to prevent its loss. If the loss is caused by the negligence of the passenger an action will not lie against the company,⁵⁸ unless, perhaps, where the theft is by the employe of the company.⁵⁹ Where, however, the passenger rightfully places his property or baggage in the charge and custody of the employes of the sleeping car company the passenger is not, as we believe, bound to exercise active diligence to protect his property; but in order to relieve himself of the duty to use care and diligence he must in some way place his

tions of negligence and contributory negligence are generally for the jury. *Dawley v. Wagner P. C. Co.*, 169 Mass. 315, 47 N. E. 1024. Where the property is in the hands of a trainman, it is held that the burden is on the carrier to show that it was stolen from him, and if he stole it this would be no defense, *Hasbrouck v. New York &c. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, 542, Ann. Cas. 1915D, 1150 (citing text).

⁵⁸ *Henderson v. Louisville &c. R. Co.*, 123 U. S. 61, 8 Sup. Ct. 60, 31 L. ed. 92; *Henderson v. Louisville &c. R. Co.*, 20 Fed. 430; *Whitney v. Pullman &c. Co.*, 143 Mass. 243, 9 N. E. 619; *Illinois &c. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Root v. New York &c. R. Co.*, 28 Mo. App. 199; *Chamberlain v. Pullman &c. Co.*, 55 Mo. App. 474; *Efron v. Wagner &c. Co.*, 59 Mo.

App. 641; *Pullman &c. Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814, 5 Am. St. 31; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44; *Watkins v. Rymill*, L. R. 10 Q. B. D. 178. See generally *Burke v. Southeastern &c. Co.*, L. R. 5 C. P. Div. 1; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Myers v. Pullman Co.*, 149 Ky. 776, 149 S. W. 1002, 41 L. R. A. (N. S.) 799n; *Whicher v. Boston &c. R. Co.*, 176 Mass. 275, 57 N. E. 601, 79 Am. St. 314; *Levins v. Railroad Co.*, 183 Mass. 175, 66 N. E. 803, 97 Am. St. 434.

⁵⁹ *Morrow v. Pullman &c. Co.*, 98 Mo. App. 351, 73 S. W. 281. See also *Hasbrouck v. New York &c. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, 542, Ann. Cas. 1912D, 1150; *Pullman &c. Co. v. Matthews*, 74 Tex. 654, 12 S. W. 744, 15 Am. St. 873.

property in the charge and custody of the employes of the company.

§ 2461 (1625). **Relation of railroad companies to passengers traveling in sleeping car or parlor car company coaches.**—In general, sleeping car or parlor car companies are distinct organizations from railroad companies, and the coaches of the former are simply hauled as a part of the train by the latter,⁶⁰ and the former ordinarily furnish the coaches, equipments and servants, having direct and full control of the employment and discharge of employes as well as of their conduct and duty. It would seem, therefore, that there is reason for affirming that a railroad company is not always liable for the misconduct or negligence of a sleeping car company or its employes, insomuch as it is an elementary principle of the law of agency that the rule of respondeat superior does not apply where the person sought to be held responsible does not control those who are alleged to be agents or servants. But the relation between a railroad company and a sleeping car company is a peculiar one for the reason that the one company undertakes to carry the passengers and receives the compensation for carriage, while the other company simply undertakes to furnish additional accommodations and only receives compensation for such additional accommodations. There is, therefore, reason for holding that so far as concerns the duty of carriage the railroad company alone undertakes it and is responsible for a breach of that duty. But to go further and hold that the railroad company is responsible for any and all wrongs, misconduct or negligence of the sleeping car company or its servants is to carry the doctrine beyond the line marked out by fundamental principles.⁶¹ While we think it clear that so far as the obliga-

⁶⁰ A railroad company may, however, itself furnish "additional accommodations." Post. § 2463.

⁶¹ See *Ozame v. Illinois Cent. R. Co.*, 151 Fed. 900; *St. Louis &c. R. Co. v. Hatch*, 116 Tenn. 580, 94 S. W. 671; *Blake v. Kansas City &c. R. Co.*, 38 Tex. Civ. App. 337,

85 S. W. 430. It seems to us, notwithstanding the trend of authority, that some of the decisions violate the rules in reference to independent contractors, and also trench upon the principle outlined in the maxim respondeat superior.

tions arising out of the duty of carriage are concerned the railroad company is responsible for injuries caused by the negligence of its own employes as well as those of the sleeping car company we think, nevertheless, that there may be negligence of the sleeping car company for which the railroad company can not be justly held responsible.⁶² So far as concerns the duty of carriage a railroad company can not relieve itself from responsibility by employing or contracting with other companies, but, on the contrary, as that duty is imposed upon it by law it is answerable to a passenger who sustains an injury as a proximate consequence of its breach.⁶³ The principle, discussed in another connection, that common carriers can not escape liability by contracting with fast freight lines, despatch companies or the like,⁶⁴ applies to contracts with sleeping or parlor car companies and on that principle it is rightly adjudged

⁶² Ante, §§ 2453, 2456. *Voss v. Cleveland &c. R. Co.*, 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010. And a sleeping car company has been held liable over the railroad company under contracts even where as to passengers such contracts did not relieve the railroad company. *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 534, 115 S. W. 315, 319; *Pullman Co. v. Norton*, (Tex.) 91 S. W. 841.

⁶³ *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Louisville &c. R. Co. v. Church*, 155 Ala. 329, 46 So. 457, 130 Am. St. 29 and note; *Hillis v. Chicago &c. R. Co.*, 72 Iowa 228, 33 N. W. 643, 31 Am. & Eng. R. Cas. 108; *Kinsley v. Lake Shore &c. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200; *Bevis v. Baltimore &c. Co.*, 26 Mo. App. 19; *Thorpe v. New York &c. R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325; *Dwinelle v. New York &c. R. Co.*, 120 N. Y.

117, 24 N. E. 319, 17 Am. St. 611, 44 Am. & Eng. R. Cas. 384; *Pullman P. C. Co. v. Norton* (Tex.), 91 S. W. 841. See also *Campbell v. Seaboard &c. Ry.*, 83 S. Car. 448, 65 S. E. 628, 23 L. R. A. (N. S.) 1056n, 137 Am. St. 824; *Calder v. Southern R. Co.*, 89 S. Car. 287, 71 S. E. 841, Ann. Cas. 1913A, 894 and note. In a case in which a sleeping-car company agreed to furnish the plaintiff with sleeping-car accommodations to a certain point, but before arriving there the sleeper was cut out of the train, and plaintiff was compelled to ride in a chair car the rest of the way, the sleeping-car company's employes aiding the train employes in forcing plaintiff to leave the sleeper, both companies were held liable jointly. *Pullman Palace Car Co. v. Hocker*, 41 Tex. Civ. App. 607, 93 S. W. 1009.

⁶⁴ Ante, § 2200.

that although a person takes passage in a sleeping or parlor car or coach the relation of carrier and passenger exists between him and the railroad company. The general rule that for injuries to passengers resulting from negligence in the operation of the train or from defects in the road-bed or the like the railroad company is liable is, therefore, entrenched by sound principle.⁶⁵ Indeed, most of the authorities go even further and hold that the sleeping car company and its employes are in effect the agents of the railroad company, at least as to all matters incident to the carriage except such as relate peculiarly to the sleeping car company's contract with the passenger, and that either or both companies may be liable in a proper case for the negligence, or misfeasance of the sleeping car company's employes.⁶⁶

⁶⁵ *Pennsylvania &c. Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Williams v. Pullman &c. Co.*, 40 La. Ann. 417, 4 So. 85, 8 Am. St. 538, 33 Am. & Eng. R. Cas. 414; *Kinsley v. Lake Shore &c. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200; *Robinson v. Chicago &c. R. Co.*, 135 Mich. 254, 97 N. W. 689; *Cleveland &c. R. Co. v. Walrath*, 38 Ohio St. 461, 43 Am. Rep. 433, 8 Am. & Eng. R. Cas. 371; *Louisville &c. R. Co. v. Katzenberger*, 84 Tenn. 380, 1 S. W. 44, 57 Am. Rep. 232; *Texas &c. Co. v. Curry*, 64 Tex. 85, 21 Am. & Eng. R. Cas. 448. In *Norfolk &c. R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817, it was held that the railroad company was liable for cutting off the sleeper from the train and leaving it on a side-track late at night, without notice to the passengers, carrying off the baggage of a passenger, the train thus taking medicine and other articles needed for a sick child.

⁶⁶ *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Calhoun v. Pullman Co.*, 159 Fed. 387, 16 L. R. A. (N. S.) 575; *Robinson v. Southern R. Co.*, 40 App. D. C. 549, L. R. A. 1915B, 621n, Ann. Cas. 1914C, 959; *Louisville &c. R. Co. v. Church*, 155 Ala. 329, 46 So. 457, 130 Am. St. 29 and note; *Denver &c. R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 27 L. R. A. (N. S.) 761 (citing text); *Nelson v. Illinois Cent. R. Co.*, 98 Miss. 295, 53 So. 679, 31 L. R. A. (N. S.) 689; *Taylor v. Wabash &c. R. Co.*, 130 Mo. App. 582, 109 S. W. 1059; *Calder v. Southern R. Co.*, 89 S. Car. 287, 71 S. E. 841, Ann. Cas. 1913A, 894, and note; *Campbell v. Seaboard &c. Ry. Co.*, 83 S. Car. 448, 65 S. E. 628, 23 L. R. A. (N. S.) 1056, 137 Am. St. 824; *Nashville &c. R. Co. v. Price*, 125 Tenn. 646, 148 S. W. 219. But see *Taber v. Seaboard &c. Ry.*, 81 S. Car. 317, 62 S. E. 311.

§ 2462 (1625a). **Relation of railroad company to passenger in sleeper—Employee—Contract against liability.**—We have already had occasion in another connection to consider the rights, duties and liabilities of a railroad company which hauls circus cars or the like which it is not obliged to do as a common carrier, and the question of the right to contract against liability to employes of those for whom such a service is performed under a special contract has also been considered. Upon the same principle as in the class of cases just referred to it is held in a comparatively recent case that a railroad company is not a common carrier of sleeping cars of another, and may, therefore, impose terms and limit its liability. Applying this doctrine the court held that a conductor of a sleeping car hauled by a railroad company under a contract between the sleeping car company and the railroad company, who is on the car as an employe of the sleeping car company by virtue of such contract, is not a passenger, and contracts between the companies and between the sleeping car company and the employe, limiting the railroad company's liability for injuries to him, are not void as against public policy, nor as against a provision of the constitutions prohibiting a railroad company from making discriminations in facilities for transportation and making it unlawful to require an employe to discharge his employer from liability for injuries occasioned by negligence; and that the railroad company was entitled to the benefit of the provisions of the contract between the sleeping car company and the conductor to the effect that the railroad company should not be liable to him.⁶⁷

⁶⁷ *Baltimore &c. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; *Chicago &c. R. Co. v. Wallace*, 66 Fed. 506, 30 L. R. A. 161; *McDermon v. Southern Pac. R. Co.*, 122 Fed. 669; *New York &c. R. Co. v. Difendaffer*, 125 Fed. 893; *Kelly v. Malott*, 135 Fed. 74; *Denver &c. R. Co. v. Whan*, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 433, citing *Pullman Car Co. v.*

Missouri &c. R. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499; *Blank v. Illinois Cent. R. Co.*, 182 Ill. 332, 55 N. E. 332; *Blank v. Illinois Cent. R. Co.*, 80 Ill. App. 475; *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; *Pittsburgh &c. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. 503; *Bates*

§ 2463 (1626). **Railroad companies may require compensation for sleeping car accommodations.**—While it is at present true that, as a general rule, sleeping car,⁶⁸ parlor car or drawing-room car accommodations are furnished by independent companies, it does not follow by any means that a railroad company may not itself furnish such accommodations and make an additional charge therefor. As elsewhere said, a railroad carrier is bound to furnish those whom it accepts as passengers on its passenger trains with reasonable facilities for their comfort and convenience but it is not bound to furnish such additional accommodations as are usually supplied by sleeping car companies. It results from this principle that, although a railroad company may own and operate chair cars, parlor cars, or the like it is bound to admit only passengers who pay the charges for accommodations in such cars.⁶⁹ This is certainly true where the railroad company furnishes sufficient ordinary cars for the carriage of passengers, **but it is held that where such cars are**

v. Old Colony R. Co., 147 Mass. 255, 17 N. E. 633; Robertson v. Old Colony R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. 482; Coup v. Wabash &c. R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Peterson v. Chicago &c. R. Co., 119 Wis. 197, 96 N. W. 532, 100 Am. St. 879; Alexander v. Toronto &c. R. Co., 35 U. C. Q. B. 453. See also Russell v. Pittsburg &c. R. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. 214; Robinson v. Baltimore &c. R. Co., 237 U. S. 84, 35 Sup. Ct. 491 59 L. ed. 849; Lindsay v. Chicago &c. R. Co., 226 Fed. 23; Oliver v. Northern Pac. R. Co., 196 Fed. 432; note in L. R. A. 1917D, 648. As to stipulation on Pullman ticket that such company will not be liable for loss of baggage not relieving railroad company, see Illinois Cent. R. Co. v. Handy, 63 Miss.

609, 56 Am. Rep. 846; Louisville &c. R. Co. v. Katzenberger, 16 Lea (84 Tenn.) 380, 1 S. W. 44, 57 Am. Rep. 232. That sleeping car company can not thus evade duty to protect from thieves, see Stevenson v. Pullman &c. Co., (Tex.) 26 S. W. 112.

⁶⁸ We have, for the sake of brevity and convenience, employed the term "Sleeping Car Companies," as including "Palace Car Companies," "Boudoir Companies," and "Parlor Car Companies." There is really very little, if any, difference in the legal principles governing such companies.

⁶⁹ St. Louis &c. R. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711. Compare Wright v. California Cent. R. Co., 78 Cal. 360, 20 Pac. 740; Doherty v. Northern Pac. R. Co., 43 Mont. 294, 115 Pac. 401, 36 L. R. A. (N. S.) 1139n.

not furnished a passenger may ride in a parlor car without the payment of additional compensation.⁷⁰ The purchase of a ticket entitling a passenger to carriage does not, at least where the railroad company has provided ordinary and reasonable facilities for its passengers, entitle the passenger to travel in a sleeping car without paying additional compensation, although such passenger may not have notice of the rules of the company.⁷¹

§ 2464 (1626a). Extra fares for riding in parlor cars.—A railroad company which furnishes sufficient first class cars with the usual appliances, and upon the same train carries a chair car which furnishes extra service and accommodations, is entitled to charge for this accommodation and this charge is not to be regarded as a part of the price of first class passage within laws limiting the rates for such transportation.⁷² A passenger refusing to pay the extra charge can not recover damages because he was removed to a first class car if this was done without unnecessary force.⁷³ The case announcing this rule also holds that an advertisement by the railroad company that free reclining chairs will be run on its road to a named destination is not open to the construction that such cars are free to all passengers under all circumstances or that they are free to passengers traveling to points short of the advertised destination.⁷⁴

§ 2465 (1627). Limiting liability—Contract—Notice.—Very much the same principles must govern the right of sleeping car companies to limit their liability as those which govern the right of public carriers of passengers to limit their liability, for, as

⁷⁰ *Thorpe v. New York &c. R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325. But see where the train is composed wholly of sleepers. *Doherty v. Northern Pac. R. Co.*, 43 Mont. 294, 115 Pac. 401, 36 L. R. A. (N. S.) 1139n.

⁷¹ *Maroney v. Old Colony R. Co.*, 106 Mass. 153, 8 Am. Rep. 305.

See also *Doherty v. Northern Pac. R. Co.*, 43 Mont. 294, 115 Pac. 401, 36 L. R. A. (N. S.) 1139n.

⁷² *St. Louis &c. R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711.

⁷³ *St. Louis &c. R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711.

⁷⁴ *St. Louis &c. R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711.

we have shown, sleeping car companies are so far entrusted with duties of a public nature as to bring them within the general rules which apply to carriers, telegraph companies, telephone companies and the like. A public carrier of passengers may contract for exemption from liability, provided always that the stipulations of the contract do not contravene some statute, rule of law or public policy. It is well settled that a railroad carrier of passengers can not effectively contract for exemption from liability from its own negligence.⁷⁵ This general rule applies to sleeping car companies, but it does not preclude them from providing by contract or by reasonable rules and regulations brought to the notice of the passenger for the disposition of property and baggage brought into the car. If the stipulations of the contract or the rules and regulations made known to the passenger require passengers to put their baggage or property in designated places and such places are provided, it is incumbent on the passengers to put their property in the places designated, and a contract exempting the company from liability unless the property is so disposed of by the passenger would, as we believe, be valid. It is held, however, that a sleeping car company can not exoner-

⁷⁵ *Railroad Co. v. Lookwood*, 17 Wall. (U. S.) 357, 21 L. ed. 627; *Railroad Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Phoenix &c. Co. v. Erie &c. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176, 29 L. ed. 873; *Inman v. South Carolina R. Co.*, 129 U. S. 128, 9 Sup. Ct. 249, 32 L. ed. 612; *Brantford City, The*, 29 Fed. 373; *Hart v. Chicago &c. R. Co.*, 69 Iowa 485, 29 N. W. 597; *Coppock v. Long Island R. Co.*, 89 Hun 186, 34 N. Y. S. 1039; *Annas v. Milwaukee R. Co.*, 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848; *Davis v. Chicago &c. R. Co.*, 93 Wis. 470, 33 L. R. A. 654, 57 Am. St. 935, 67 N. W. 16. In New York a contract exempting from liabil-

ity for negligence of employes is held effective. *Nicholas v. New York &c. Co.*, 89 N. Y. 370. The English rule is different from the American. *McCance v. London &c. R. Co.*, 7 Hurl. & N. 477; *Hall v. Northeastern &c. Co.*, L. R. 10 Q. B. 437; *Glenister v. Great Western &c. R. Co.*, 29 L. T. N. S. 423; *Macawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Slims v. Great Northern &c. Co.*, 14 C. B. 647; *Carr v. Lancashire &c. R. Co.*, 7 Exch. 707; *York &c. R. Co. v. Crisp*, 14 C. B. 527; *Taubman v. Pacific &c. Co.*, 26 L. T. N. S. 704; *Austin v. Manchester &c. R. Co.*, 10 C. B. 454.

ate itself from liability by a notice posted in the car unless such notice is brought to the passenger's knowledge,⁷⁶ but if the passenger has actual knowledge of such notice he will be bound by it.⁷⁷ A sleeping car company can not, however, by contract or by rules and regulations, require passengers to discharge duties devolved by law upon the company, nor to perform unreasonable acts.⁷⁸

⁷⁶Lewis v. New York &c. Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Woodruff &c. Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Voss v. Wagner P. C. Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010. See also Stevenson v. Pullman P. C. Co. (Tex.), 26 S. W. 112.

⁷⁷Watkins v. Rymill, L. R. 10 Q. B. D. 178; Burke v. Southeastern &c. R. Co., L. R. 5 C. P. Div. 1; Pullman &c. Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Blum v. Southern &c. Co., 3 Cent. L. J. 591.

⁷⁸See Stevenson v. Pullman &c. Co. (Tex), 26 S. W. 112.

CHAPTER LXXVIII.

INJURIES TO PASSENGERS.

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| Sec. | Sec. |
| 2470. Liability for failure to stop at stations—Detention. | 2485. Sudden stopping of train in emergency. |
| 2471. Boarding and alighting from trains—Generally. | 2486. Ejection of passengers. |
| 2472. Boarding and alighting—Contributory negligence. | 2487. Care in ejecting. |
| 2473. Injuries received in boarding trains—Illustrative cases. | 2488. Ejection—Resistance by passenger. |
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| 2476. Injuries received on freight trains. | 2491. Injuries caused by third person—Missiles. |
| 2477. Injuries to passengers riding on platforms and steps. | 2492. Injuries received in sleeping cars. |
| 2478. Passenger on platform—When company liable. | 2493. Injuries received at stations. |
| 2479. Injuries to passengers riding in baggage car. | 2494. Injuries to health of inter-urban passengers from exposure to cold in stalled cars. |
| 2480. Injuries received by passengers riding in other dangerous and improper places. | 2495. Contributory negligence. |
| 2481. Injuries received by passenger occupying an improper position in car. | 2496. Contributory negligence—Illustrative cases. |
| 2482. Injuries caused by derailment. | 2497. Effect of directions by trainmen to occupy dangerous position. |
| 2483. Collisions. | 2498. Burden of proof. |
| 2484. Injuries from obstructions. | 2499. Contracts limiting liability. |
| | 2500. Miscellaneous. |

§ 2470 (1627a). **Liability for failure to stop at stations—Detention.**—We have elsewhere considered the general duties and liabilities of railroad companies to passengers,¹ and we shall in this

¹ Ante, chapter lxxv.

chapter consider the liabilities of such companies for injuries received by passengers under various particular circumstances, including the liability for failure to stop at stations and for detention of passengers. A railroad company is not obliged, where there is no statute requiring it and no custom or advertised schedule, or the like, to stop at every station,² and a state statute requiring it to stop its interstate mail trains at every county seat, or the like, where proper facilities are otherwise afforded by its other trains at such station, is unconstitutional.³ But it is usually bound to stop such passenger trains at regular stations as are advertised and scheduled to stop at such stations,⁴ and even at flag stations, upon proper signal, where it is its habit and custom to do so.⁵ It is also held in a very recent

² *Kyler v. Chicago &c. R. Co.*, 182 Fed. 613; *Hancock v. Louisville &c. R. Co.*, 27 Ky. L. 434, 85 S. W. 210; *Louisville &c. R. Co. v. Scott*, 141 Ky. 538, 133 S. W. 800, 34 L. R. A. (N. S.) 206, Ann. Cas. 1912C, 547, and note. See also *Sellers v. Cleveland &c. R. Co.*, 40 Ind. App. 319, 81 N. E. 1087; *Hutchison v. Southern Ry. Co.*, 109 S. Car. 90, 95 S. E. 181.

³ See *Illinois &c. R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. ed. 107; *Cleveland &c. R. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. ed. 868; *Mississippi Railroad Comrs. v. Illinois Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209; *Herndon v. Chicago &c. R. Co.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. ed. 970; *Chicago &c. R. Co. v. Railroad Comrs. of Wis.*, 237 U. S. 220, 35 Sup. Ct. 560, 59 L. ed. 926. But compare *Lake Shore &c. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702.

⁴ *Purcell v. Richmond R. Co.*, 108 N. Car. 414, 12 S. E. 954, 12 L.

R. A. 113n; *Owens v. Atlantic &c. R. Co.*, 147 N. Car. 357, 61 S. E. 198; *Palmer v. Willamette Valley &c. Ry. Co.*, 88 Ore. 322, 171 Pac. 1169, L. R. A. 1918 D, 1114; *Indianapolis &c. R. Co. v. Birney*, 71 Ill. 391.

⁵ *Delmonte v. Southern Pac. Co.*, 2 Cal. App. 211, 83 Pac. 269; *Railroad Co. v. Siddons*, 53 Ill. App. 607; *Freeman v. Detroit R. Co.*, 65 Mich. 577, 32 N. W. 833; *Thomas v. Southern R. Co.*, 122 N. Car. 1005, 30 S. E. 343; *San Antonio Railroad Co. v. Safford* (Tex. Civ. App.), 48 S. W. 1105; *Missouri &c. R. Co. v. Herring*, 61 Tex. Civ. App. 543, 127 S. W. 1155, 130 S. W. 1039. See also *Louisville &c. R. Co. v. Seale*, 160 Ala. 584, 49 So. 323; *Milhous v. Southern R.*, 72 S. Car. 442, 52 S. E. 41, 110 Am. St. 620 (statute requiring stops at stations held not to include flag station); *Fenlon v. Chicago &c. Ry. Co.*, 99 Wash. 289, 169 Pac. 863. In *International &c. R. Co. v. Addison* (Tex. Civ. App.), 93 S.

case that the general rule is that the ticket is notice to the conductor of the destination of the passenger, and that, in the absence of a rule of the carrier which is known or ought to be known to the passenger, requiring him to notify the conductor before arriving at such destination, even though only a flag station, no such notice need be given.^{5a} The stop must usually be made at the platform or place prepared for the use of passengers,⁶ but circumstances may justify or excuse a stop at some other place if proper care is exercised to see that it is safe and to warn or assist the passengers if necessary.⁷ A rail-

W. 1081, it was held that where the company had failed to stop its train at 1:45 a. m., on plaintiff's signal, to take him on, it was liable for the injuries received by him in taking cold while proceeding to his destination, which he reached about 8:00 a. m. by driving across country; that, where he procured a conveyance after the failure of a train to stop to permit him to board it, he did not, as a matter of law, assume the risk from injuries resulting from exposure to the weather while making the trip by means of the conveyance selected, and that the injury was the proximate cause of the failure to stop the train. But this case was reversed by the Supreme Court in 97 S. W. 1037. See as to liability for injury caused by cold depot, under Texas statute, *St. Louis &c. R. Co. v. Lowe* (Tex. Civ. App.), 97 S. W. 1087. In *Chicago &c. Ry. Co. v. Floyd*, 115 Ark. 607, 171 S. W. 913, a railroad company was held liable for sickness caused a passenger by being compelled to walk from a junction, when the station agent had informed him that connection was there made with a motor car,

which would take him to his destination, and the motor service had been discontinued. See also *Louisiana &c. R. Co. v. Rider*, 103 Ark. 558, 146 S. W. 849. And see generally as to liability under special contract to stop, *Dillman v. Chicago &c. R. Co.* (Ind. App.), 88 N. E. 873; *Olson v. Northern Pac. R. Co.*, 49 Wash. 626, 96 Pac. 150, 18 L. R. A. (N. S.) 209, and note.

^{5a} *Pittsburgh &c. R. Co. v. Boys* (Ind. App.), 123 N. E. 482. As to liability where there is misinformation as to stop, see and compare *Weeks v. Great Northern Ry. Co.* (N. Dak.), 175 N. W. 726, with *Gulf &c. R. Co. v. Sanders* (Tex. Civ. App.), 216 S. W. 286.

⁶ *White Water R. Co. v. Butler*, 112 Ind. 598, 14 N. E. 599; *Terre Haute &c. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Chicago R. Co. v. Martelle*, 65 Nebr. 540, 91 N. W. 364; *Caldwell v. Richmond R. Co.*, 89 Ga. 550, 15 S. E. 678; *Hoyt v. Cleveland R. Co.*, 112 Mich. 638, 71 N. W. 172. See also *Dudley v. Smith*, 1 Camp. 167; *Baltimore &c. R. Co. v. Morris*, 54 Ind. App. 479, 103 N. E. 35.

⁷ *Reed v. Duluth R. Co.*, 100 Mich. 507, 59 N. W. 144; *Baltimore*

road company is not an insurer that its trains will depart and arrive on schedule time,⁸ but due diligence must be used to conform to its published schedules and representations, and there are many cases in which such companies have been held liable for failure to do so, and especially for detention of passengers after the passage had commenced.⁹

§ 2471 (1628). **Boarding and alighting from trains—Generally.**—Railroad companies are bound, when they stop their trains at stations for the purpose of receiving and discharging passengers, to give them a reasonable opportunity to get on and off,¹⁰ and

&c. R. Co. v. Kane, 69 Md. 11, 13 Atl. 387, 9 Am. St. 387; Missouri Pac. R. Co. v. Watson, 72 Tex. 631, 10 S. W. 731; Western &c. R. Co. v. Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; St. Louis &c. R. Co. v. Finley, 79 Tex. 85, 15 S. W. 266. See also as to freight trains, Southern R. Co. v. Howard, 111 Ga. 842, 36 S. E. 213; Browne v. Raleigh &c. R. Co., 108 N. Car. 34, 12 S. E. 958.

⁸ Wilsey v. Railroad Co., 83 Ky. 511; Railway Co. v. Allender, 59 Ill. App. 620; McClary v. Sioux City R. Co., 3 Nebr. 44, 19 Am. Rep. 631; Gordon v. Manchester R. Co., 52 N. H. 596, 13 Am. Rep. 97; Gerardy v. Louisville &c. R. Co., 52 Misc. 466, 102 N. Y. S. 548; Cormack v. New York &c. R. Co., 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209n, 17 Ann. Cas. 994; Mulligan v. Southern R. Co., 84 S. Car. 171, 65 S. E. 1040. See Houston R. Co. v. Rogers, 16 Tex. Civ. App. 19, 40 S. W. 201. See also Central of Ga. Ry. Co. v. Wallace, 141 Ga. 51, 80 S. E. 282, 49 L. R. A. (N. S.) 429n, Ann. Cas. 1915A, 1076.

⁹ See Arkansas R. Co. v. Janson, 90 Ark. 494, 119 S. W. 648; Savan-

nah &c. R. Co. v. Bonand, 58 Ga. 180; Central of Ga. R. Co. v. Wallace, 141 Ga. 51, 80 S. E. 282, 49 L. R. A. (N. S.) 429n, Ann. Cas. 1915A, 1076; Heirn v. McCaughan, 32 Mass. 17, 66 Am. Dec. 588; Sears v. Railroad, 96 Mass. 433, 92 Am. Dec. 780; Van Camp v. Railway Co., 137 Mich. 467, 100 N. W. 771; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Coleman v. Southern R. Co., 138 N. Car. 351, 50 S. E. 690; Taber v. Seaboard Air Line R. Co., 81 S. Car. 317, 62 S. E. 311; International R. Co. v. Harder, 36 Tex. Civ. App. 151, 81 S. W. 356; Gulf &c. R. Co. v. Redeker, 45 Tex. Civ. App. 312, 100 S. W. 362; Denton v. Railway, 5 El. & Bl. 860; Le Blanche v. Railway Co., 1 C. P. Div. 286; Hawcroft v. Railway, 8 Eng. L. & Eq. 362 (extreme).

¹⁰ Barringer v. St. Louis &c. R. Co., 73 Ark. 548, 85 S. W. 94, 95 (citing text); St. Louis &c. R. Co. v. Trotter, 101 Ark. 183, 142 S. W. 189; Carr v. Eel River &c. R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354n, 2 Am. Neg. Cas. 207;

it has been held that the fact that the conductor is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage will not

Central R. Co. v. Whitehead, 74 Ga. 441; Wabash &c. R. Co. v. Rector, 104 Ill. 296, 9 Am. & Eng. R. Cas. 264, 2 Am. Neg. Cas. 648; Chicago &c. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578, 2 Am. Neg. Cas. 719; Chicago &c. R. Co. v. Drake, 33 Ill. App. 114, 2 Am. Neg. Cas. 509; Jeffersonville &c. R. Co. v. Parmalee, 51 Ind. 42; White Water Valley R. Co. v. Butler, 112 Ind. 598, 14 N. E. 599; Illinois Cent. R. Co. v. Cheek, 152 Ind. 663, 669, 670, 53 N. E. 641, 643 (citing text); Baltimore &c. R. Co. v. Morris, 54 Ind. App. 479, 103 N. E. 35; Keller v. Sioux City &c. R. Co., 27 Minn. 178, 6 N. E. 486; Alabama &c. R. Co. v. Dear, 87 Miss. 339, 39 So. 812; Hickman v. Missouri Pac. R. Co., 91 Mo. 433, 4 S. W. 127; Hall v. Northern Pac. R. Co., 16 N. Dak. 60, 111 N. W. 609, 14 Ann. Cas. 960 and note; Chicago &c. R. Co. v. Pitchford, 44 Okla. 197, 143 Pac. 1146, 1149, 1150 (citing text). See also Washington &c. R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. ed. 284; Elwood v. Connecticut &c. R. Co., 77 Conn. 145, 58 Atl. 751; Foley v. Detroit &c. Ry. Co., 179 Mich. 586, 146 N. W. 186; Norfolk &c. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. 718; Foster v. Seattle &c. Co., 35 Wash. 177, 76 Pac. 995; Chicago &c. R. Co. v. Lampman, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A. (N. S.) 217n, 1 Ann. Cas. 1912C, 788 and note. It has been held that

the court will take judicial notice that three minutes is usually a reasonable time. Louisville &c. R. Co. v. Costello, 9 Ind. App. 462, 36 N. E. 299, 3 Am. Neg. Cas. 44. See also Louisville &c. R. Co. v. Espenscheid, 17 Ind. App. 558, 47 N. E. 186. But what is a reasonable time may often depend upon circumstances. See Dilburn v. Louisville &c. R. Co., 156 Ala. 228, 47 So. 210; Baltimore &c. R. Co. v. Mullen, 217 Ill. 203, 75 N. E. 474, 2 L. R. A. (N. S.) 115n, 3 Ann. Cas. 1015; Chicago &c. Ry. Co. v. Lampman, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A. (N. S.) 217n, Ann. Cas. 1912C, 788 and note. As to the duty to assist passengers in getting on and off, and the liability of the company to those who assist them where its employes fail to do so, and it does not give such assistants a reasonable opportunity to get off, see Louisville &c. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443; Little Rock &c. R. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434 and note, 29 Am. St. 48; Stiles v. Atlanta &c. R. Co., 65 Ga. 370; Coleman v. Georgia &c. R. Co., 84 Ga. 1, 10 S. E. 498; Lucas v. New Bedford &c. R. Co., 72 Mass. 64, 66 Am. Dec. 406; O'Dea v. Michigan Cent. R. Co., 142 Mich. 265, 105 N. W. 746; Doss v. Missouri &c. R. Co., 59 Mo. 38, 21 Am. Rep. 371; Griswold v. Chicago &c. R. Co., 64 Wis. 652, 26 N. W. 101.

relieve the company from liability for injuries received by him without his fault, in consequence of the train being started without giving him a reasonable time to get on, if the conductor actually sees him attempting to get on when he gives the order to start, and that, even if the conductor does not see a passenger attempting to board the train, he is guilty of negligence for which the company is liable if he starts it without warning and without allowing a reasonable length of time for passengers to get on.¹¹ But a plaintiff can recover only according to the theory of his complaint, or, as it is sometimes said, *secundum allegata et probata*, and, where the complaint seeks to recover for negli-

¹¹ *Swigert v. Hannibal &c. R. Co.*, 75 Mo. 475, 9 Am. & Eng. R. Cas. 322; *Raben v. Central &c. R. Co.*, 73 Iowa 579, 35 N. W. 645, 5 Am. St. 708; *Texas &c. R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395 and note, 23 Am. St. 308; *Louisville &c. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Chicago &c. R. Co. v. Drake*, 33 Ill. App. 114, 2 Am. Neg. Cas. 509. It is also held that due notice of the approach of the train to stations should be given in order that passengers may prepare to alight. *Dawson v. Louisville &c. R. Co.*, 6 Ky. L. 668, 11 Am. & Eng. R. Cas. 134; *Louisville &c. R. Co. v. Mask*, 64 Miss. 738, 2 So. 360; *New York &c. R. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. 430; *Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68. And reasonable notice of the starting of trains should likewise be given. *Perry v. Central R. Co.*, 66 Ga. 746; *Central R. &c. Co. v. Perry*, 58 Ga. 461; *Milliman v. New York &c. R. Co.*, 66 N. Y. 642. But warning is not

always necessary. *Atlanta &c. R. Co. v. Dickerson*, 89 Ga. 455, 15 S. E. 534; *Gulf &c. R. Co. v. Booth* (Tex. Civ. App.), 97 S. W. 128. Nor is the conductor ordinarily required to do more than stop a reasonable time. *New Orleans &c. R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Imhoff v. Chicago R. Co.*, 20 Wis. 344; *McDonald v. Long Island R. Co.*, 116 N. Y. 546, 22 N. E. 1068, 15 Am. St. 437; *Gilbert v. West End St. R. Co.*, 160 Mass. 403, 36 N. E. 60; *Hurst v. St. Louis &c. R. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. 374. But there are cases in which he should assist sick and infirm persons. *Gulf &c. R. Co. v. Coopwood* (Tex.), 96 S. W. 102, and cases cited. See also upon the general subject, *McElvane v. Central of Ga. R. Co.*, 170 Ala. 525, 54 So. 489, 34 L. R. A. (N. S.) 715 and note; also notes to *Chicago &c. R. Co. v. Wimmer*, in 4 L. R. A. (N. S.) 140, and to *Walters v. Missouri Pac. R. Co.*, 82 Kans. 739, 109 Pac. 173, in 28 L. R. A. (N. S.) 1058.

gence in failing to stop long enough to enable the plaintiff to alight, there can be no recovery on proof that the plaintiff's injuries were caused by reason of the company's failure to keep the station platform lighted.¹² It is also the duty of railroad companies to provide and maintain a safe, or reasonably safe, way of reaching and departing from their cars at passenger stations,¹³ and, if the train stops short of the station or carries the passengers beyond it and the company obliges them to leave the cars at a distance from the platform, it must take proper precautions to protect them, especially where they have to cross other

¹² *Price v. St. Louis &c. R. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365. See also *Waldhier v. Hannibal &c. R. Co.*, 71 Mo. 514; *Birmingham R. &c. Co. v. Clay*, 108 Ala. 233, 19 So. 309; *Cleveland &c. R. Co. v. Wynant*, 100 Ind. 160; *Cincinnati &c. R. Co. v. McClain*, 148 Ind. 188, 44 N. E. 306; *Plummer v. Washington &c. R. Co.*, 124 Md. 200, 92 Atl. 536; *Ft. Worth &c. R. Co. v. Work* (Tex. Civ. App.), 100 S. W. 962; *Johnson v. Galveston &c. R. Co.*, 27 Tex. Civ. App. 616, 66 S. W. 906, 908, 909; 1 Elliott's Gen. Pr. § 87.

¹³ *Louisville &c. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968; *Kentucky &c. Co. v. McKinney*, 9 Ind. App. 213, 36 N. E. 448; *Louisville &c. R. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107; *McDonald v. Chicago &c. R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *Peniston v. Chicago &c. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444; *Reynolds v. Texas &c. R. Co.*, 37 La. Ann. 694; *Philadelphia &c. R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673n, 20 Am. St. 483; *Forsyth v. Boston &c. R. Co.*, 103 Mass.

510; *Bethmann v. Old Colony R. Co.*, 155 Mass. 352, 29 N. E. 587; *McKone v. Michigan &c. R. Co.*, 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596; *Buenemann v. St. Paul &c. R. Co.*, 32 Minn. 390, 20 N. W. 379, 18 Am. & Eng. R. Cas. 153; *Clussman v. Long Island R. Co.*, 73 N. Y. 606; *Heffron v. New York Cent. &c. R. Co.*, 223 N. Y. 473, 119 N. E. 1024; *Stewart v. International &c. R. Co.*, 53 Tex. 289, 37 Am. Dec. 753, 2 Am. & Eng. R. Cas. 497; *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368; *Cockle v. London &c. R. Co.*, 7 L. R. C. P. 321; *Nicholson v. Lancashire &c. R. Co.*, 3 H. & C. 534; *Gill v. Great Eastern R. Co.*, 26 L. T. N. S. 945; *Longmore v. Great Western R. Co.*, 19 C. B. (N. S.) 183; 3 Thomp. Neg. (2d ed.) § 2678 et seq. See also *St. Louis &c. R. Co. v. Briggs*, 87 Ark. 581, 113 S. W. 644; *Southern R. Co. v. Skinner*, 133 Ga. 33, 65 S. E. 134; *Cossitt v. St. Louis &c. R. Co.*, 224 Mo. 97, 123 S. W. 569; *Skow v. Green Bay &c. R. Co.*, 141 Wis. 21, 123 N. W. 138.

tracks, or it will be guilty of negligence.¹⁴ After the conductor has waited a reasonable length of time at a regular station for passengers to get on and off the train he may then give the proper signal and start it, unless he sees some one in the act of getting on or off, or otherwise in a perilous position,¹⁵ but it has been held that in the case of a street railway, where there is

¹⁴ *Columbus &c. R. Co. v. Farrell*, 31 Ind. 408; *Terre Haute &c. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Cincinnati &c. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. E. 122, 14 N. E. 352, 2 Am. St. 144; *Peniston v. Chicago &c. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444; *Philadelphia &c. R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673n, 20 Am. St. 438n; *Gaynor v. Old Colony &c. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96; *Mayo v. Boston &c. R. Co.*, 104 Mass. 137; *Sonier v. Boston &c. R. Co.*, 141 Mass. 10, 6 N. E. 84; *McGee v. Missouri &c. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. 706; *Delaware &c. R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, 7 L. R. A. 435; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. New York Cent. &c. R. Co.*, 84 N. Y. 241, 3 Am. & Eng. R. Cas. 380 and note; *Lewis v. President &c.*, 145 N. Y. 508, 40 N. E. 248; *Pennsylvania R. Co. v. White*, 88 Pa. St. 327; *Dela-matyr v. Milwaukee &c. R. Co.*, 24 Wis. 578; *Brown v. Chicago R. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Nicholson v. Lancashire &c. R. Co.*, 3 H. & C. 534; *Foy v. London &c. R. Co.*, 18 C. B. N. S. 225; *Robson v. North-eastern R. Co.*, L. R. 10 Q. B. 271. See also *Miller v. Pac. Elec. Ry. Co.*, 169 Cal. 107, 145 Pac.

1023; *Kentucky Ry. Co. v. Buckler*, 125 Ky. 24, 100 S. W. 328, 8 L. R. A. (N. S.) 555, 128 Am. St. 234; *Mensing v. Michigan Cent. R. Co.*, 117 Mich. 606, 76 N. W. 98; *Austin v. St. Louis &c. R. Co.*, 149 Mo. App. 397, 130 S. W. 385; *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016, 26 Am. St. 811; *Praeger v. Bristol &c. R. Co.*, 24 L. T. N. S. 105. In a recent case it is held that "The duty of a subway company to inform persons boarding its trains of the existence of a space, between the car platform and the platform of the station was fulfilled, and the company was guilty of no negligence where the guard on the train uttered the words, 'Watch the step!' in such a manner that a person paying ordinary attention to what was going on about him would naturally hear the warning." *Wertheimer v. Interborough Rapid Transit Co.*, 102 N. Y. S. 706.

¹⁵ *Raben v. Central R. Co.*, 73 Iowa 579, 35 N. W. 645, 5 Am. St. 708; *Chicago &c. R. Co. v. Scates*, 90 Ill. 586, 2 Am. Neg. Cas. 623; *Spannagle v. Chicago &c. R. Co.*, 31 Ill. App. 460, 2 Am. Neg. Cas. 506; *Gilbert v. West End St. R. Co.*, 160 Mass. 403, 36 N. E. 60; *Hurt v. St. Louis &c. R. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. 374;

no regular stopping place, he must not only stop a reasonable time but should also see that no passenger is in the act of alighting before giving the signal to start.¹⁶

§ 2472. **Boarding and alighting—Contributory negligence.**—Although the railroad company may be guilty of negligence a passenger can not recover if he is guilty of contributory negligence proximately causing his own injury. It is the duty of a passenger to exercise reasonable and ordinary care for his own safety in boarding or alighting from a train. As a general rule

Shealey v. South Carolina R. Co., 67 S. Car. 61, 45 S. E. 119; *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. 785; *Chicago &c. Ry. Co. v. Lampman*, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A. (N. S.) 217n, Ann. Cas. 1912C, 788 and note. Or unless he has reason to believe that a passenger is in the act of alighting. *Strauss v. Kansas City &c. R. Co.*, 86 Mo. 421. Compare also *Lake Erie &c. R. Co. v. Beals (Ind.)*, 98 N. E. 453. And if after ample time to board the train or alight from it and after warning being given, a passenger attempts to board the train or alight from it when moving he is guilty of contributory negligence. *McLaren v. Alabama &c. R. Co.*, 100 Ala. 506, 14 So. 405, 2 Am. Neg. Cas. 107. And warning is not always necessary. *Atlanta &c. R. Co. v. Dickerson*, 89 Ga. 455, 15 S. E. 534.

¹⁶ *Highland Avenue &c. R. Co. v. Burt*, 92 Ala. 291, 9 So. 410, 13 L. R. A. 95, 2 Am. Neg. Cas. 73; *Phoenix Ry. Co. v. Beals*, 20 Ariz. 386, 181 Pac. 379; *Anderson v. Citizens St. R. Co.*, 12 Ind. App. 194, 38 N. E. 1109. See also *Washington &c.*

R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. ed. 284; *Dudley v. Front Street &c. R. Co.*, 73 Fed. 128; *Indianapolis Trac. Co. v. Miller*, 43 Ind. App. 717, 88 N. E. 526. See on this general subject, ante, § 1550 and note to *Millmore v. Boston Elevator &c. Ry. Co.*, 194 Mass. 323, 80 N. E. 445, in 11 L. R. A. (N. S.) 140, reviewing cases on both sides of this question. See also *Barringer v. St. Louis &c. R. Co.*, 73 Ark. 548, 85 S. W. 94; *Chicago &c. R. Co. v. Wimmer*, 72 Kans. 566, 84 Pac. 378; *Keller v. Sioux City R. Co.*, 27 Minn. 178, 6 N. W. 486; *Walters v. Chicago R. Co.*, 113 Wis. 367, 89 N. W. 140. And a street railway company has been held liable for not warning an alighting passenger of the danger from a passing vehicle. *Wood v. North Carolina Pub. Serv. Corp.*, 174 N. Car. 697, 94 S. E. 459, 1 A. L. R. 942 and note. In this case the court also reviews authorities as to the duty of such a company and the difference between it and a railroad company having stations of its own.

it is negligence per se to get on or off a rapidly moving train.¹⁷ But if the train is moving very slowly it has been held by most

¹⁷ *Secor v. Toledo &c. R. Co.*, 10 Fed. 15; *Missouri Pac. R. Co. v. Texas &c. R. Co.*, 36 Fed. 879; *Alabama &c. R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *McSaren v. Railway*, 100 Ala. 506, 14 So. 405; *McDonald v. Montgomery &c. R. Co.*, 101 Ala. 161, 20 So. 317; *Hunter v. Louisville &c. R. Co.*, 150 Ala. 594, 43 So. 802, 9 L. R. A. (N. S.) 848; *Paterson v. Central &c. R. Co.*, 85 Ga. 653, 11 S. E. 872; *Barnett v. East Tennessee &c. R. Co.*, 87 Ga. 766, 13 S. E. 904; *Masterson v. Macon City &c. St. R. Co.*, 88 Ga. 436, 14 S. E. 591; *Meeks v. Atlantic R. Co.*, 122 Ga. 266, 50 S. E. 99; *Illinois &c. R. Co. v. Able*, 59 Ill. 131, 2 Am. Neg. Cas. 591; *Ohio &c. R. Co. v. Stratton*, 78 Ill. 88; *Jefferson R. Co. v. Hendricks*, 26 Ind. 228; *Reibel v. Cincinnati &c. R. Co.*, 114 Ind. 476, 17 N. E. 107; *Toledo &c. R. Co. v. Wingate*, 143 Ind. 125, 42 N. E. 447, 37 N. E. 274; *Newlin v. Iowa Central R. Co.*, 127 Iowa 654, 103 N. W. 999; *Hayden v. Chicago &c. R. Co.*, 160 Ky. 836, 170 S. W. 200. But where a mother sought to recover damages for nervous prostration resulting from fright because a train was negligently started while her little daughter was attempting to get on it, the doctrine that there can be no recovery for mere fright where there is no physical injury, was approved, and the court held that this was certainly true where, as in the case in question, the ap-

parent danger was to another and not to the plaintiff. *Cleveland &c. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917. *Knight v. Pontchartrain R. Co.*, 23 La. Ann. 462; *Walker v. Vicksburg &c. R. Co.*, 41 La. Ann. 795, 6 So. 916, 17 Am. St. 417; *Hickey v. Boston &c. R. Co.*, 14 Allen (Mass.) 429; *Gavett v. Manchester &c. R. Co.*, 82 Mass. 501, 77 Am. Dec. 422; *Harvey v. Eastern &c. R. Co.*, 116 Mass. 269; *Commonwealth v. Boston &c. R. Co.*, 129 Mass. 500, 37 Am. Rep. 382n; *Brown v. New York &c. R. Co.*, 181 Mass. 365, 63 N. E. 941; *Jacobs v. Flint &c. R. Co.*, 105 Mich. 450, 63 N. W. 502; *Phillips v. Rensselaer &c. R. Co.*, 49 N. Y. 177; *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 9 N. E. 430, 57 Am. Rep. 760; *Hunter v. Cooperstown &c. R. Co.*, 112 N. Y. 371, 19 N. E. 820, 2 L. R. A. 832, 8 Am. St. 752; *Burgin v. Richmond R. Co.*, 115 N. Car. 673, 20 S. E. 473; *Morrow v. Atlantic R. Co.*, 134 N. Car. 92, 46 S. E. 12; *New York &c. R. Co. v. Enches*, 127 Pa. St. 316, 17 Atl. 991, 4 L. R. A. 432, 14 Am. St. 848; *O'Tolle v. Pittsburgh &c. R. Co.*, 158 Pa. St. 99, 27 Atl. 737, 22 L. R. A. 606, 38 Am. St. 830; *Worthington v. Central &c. R. Co.*, 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326 and note; *Richmond &c. R. Co. v. Pickleseimer*, 85 Va. 798, 10 S. E. 44; *Bartley v. Western Md. Ry. Co.*, 81 W. Va. 795, 95 S. E. 443; *Jewell v. Chicago &c. R. Co.*, 54 Wis. 610, 12 N. W. 83, 41 Am.

courts to be a question of fact for the jury,¹⁸ and it certainly becomes a question of fact where a passenger is put to his election to get off a slowly moving train or probably receive an injury if he remains there, by the wrongful act of the company,

Rep. 63; *Schiffler v. Chicago &c. R. Co.*, 96 Wis. 141, 71 N. W. 97, 65 Am. St. 35. But see 3 *Thomp. Neg.* (2d ed.) § 2995; *Irvin v. Missouri &c. Ry. Co.*, 81 Kans. 649, 106 Pac. 1063, 26 L. R. A. (N. S.) 739; *Baltimore &c. R. Co. v. Kane*, 69 Md. 11, 13 Atl. 387, 9 Am. St. 387; *Johnson v. West Chester &c. R. Co.*, 70 Pa. St. 357; *Jamison v. San Jose &c. R. Co.*, 55 Cal. 593; *Raben v. Central Iowa R. Co.*, 74 Iowa 732, 34 N. W. 621. It is held negligence per se to attempt to board a moving elevated train after the gate is closed, where the train is accustomed to stop and start quickly. *Card v. Manhattan R. Co.*, 103 N. Y. 670, 9 N. E. 433. It is negligence to board a moving freight train not intended for the carriage of passengers, even though so directed by the ticket agent. *Chicago &c. R. Co. v. Koehler*, 47 Ill. App. 147, 2 Am. Neg. Cas. 523. Or to get on a moving train at a place not intended for a stopping place. *Denver &c. R. Co. v. Pickard*, 8 Colo. 163, 6 Pac. 149.

¹⁸ *Central R. &c. Co. v. Miles*, 88 Ala. 256, 6 So. 696; *Montgomery &c. R. Co. v. Stewart*, 91 Ala. 421, 8 So. 708; *Carr v. Eel River &c. R. Co.*, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354, 2 Am. Neg. Cas. 207; *Harris v. Pittsburgh &c. R. Co.*, 32 Ind. App. 600, 70 N. E. 407; *Atchison &c. R. Co. v. Holloway*,

71 Kans. 1, 80 Pac. 31, 114 Am. St. 462; *Chesapeake &c. R. Co. v. Dean*, 160 Ky. 757, 170 S. W. 167; *Baltimore &c. R. Co. v. Kane*, 69 Md. 11, 13 Atl. 387, 9 Am. St. 387; *New York &c. R. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. 430; *United Railways v. Weir*, 102 Md. 487, 62 Atl. 588; *Strand v. Chicago &c. R. Co.*, 64 Mich. 216, 31 N. W. 184; *Burke v. Bay City &c. Co.*, 147 Mich. 172, 110 N. W. 524; *Butler v. St. Paul &c. R. Co.*, 59 Minn. 135, 60 N. W. 1090; *Wooten v. Railroad*, 79 Miss. 26, 29 So. 61; *King v. Railroad Co.* 87 Miss. 270, 39 So. 810; *Doss v. Missouri &c. R. Co.*, 59 Mo. 27, 21 Am. Rep. 371; *Swigert v. Hannibal &c. R. Co.*, 75 Mo. 475, 9 Am. & Eng. R. Cas. 322; *Fulks v. St. Louis &c. R. Co.*, 111 Mo. 335, 19 S. W. 818; *Schaefer v. Railway*, 128 Mo. 64, 30 S. W. 331; *Bond v. Chicago &c. R. Co.*, 122 Mo. App. 207, 99 S. W. 30; *Filer v. New York &c. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Lent v. New York &c. R. Co.*, 120 N. Y. 467, 24 N. E. 653; *Lewis v. President &c.*, 145 N. Y. 508, 40 N. E. 248, 1 Am. Neg. Cas. 963; *Johnson v. West Chester &c. R. Co.*, 70 Pa. St. 357; *Creech v. Railway*, 66 S. Car. 528, 45 S. E. 86; *Louisville &c. R. Co. v. Stacker*, 86 Tenn. 343, 6 S. W. 737; *Kansas &c. R. Co. v. Dorough*, 72 Tex. 108, 10 S. W. 711; *Mills v. Railway*, 94 Tex.

or obeys the directions of the conductor under such circumstances that a reasonably prudent man might do so in the exercise of ordinary care.¹⁹ And it is not necessarily negligence, but is generally for the jury to determine, where a passenger leaves his seat before the train fully stops, preparatory to get-

242, 59 S. W. 874, 55 L. R. A. 497; *San Antonio &c. R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445. In *Hayden v. Chicago &c. R. Co.*, 160 Ky. 836, 170 S. W. 200, L. R. A. 1915C, 181n, it is held that as a general rule it is negligence per se to get off of a train moving so rapidly as to make it probably unsafe but is ordinarily for the jury when the speed is slow, yet that even when the speed is slow the circumstances may be such as to make it negligent as matter of law. See also *Hannestad v. Chicago &c. R. Co.*, — Iowa —, 118 N. W. 38. In *Montgomery &c. R. Co. v. Stewart*, 91 Ala. 421, 8 So. 708, it was held not contributory negligence when a passenger boarded a train which should have come to a full stop but only slacked its speed, the conductor calling out "all aboard." But directly the contrary was held in a recent case in which a passenger got off of a moving train after the brakeman or porter had called the station and said "all out." *Mearns v. Central R. Co.*, 139 Fed. 543, citing *England v. Boston &c. R. Co.*, 153 Mass. 490, 27 N. E. 1. See upon the general subject notes in 21 L. R. A. 354; 22 L. R. A. (N. S.) 741, and L. R. A. 1915C, 181.

¹⁹ *Puget Sound Elec. R. Co. v. Felt*, 181 Fed. 938; *Birmingham &c.*

R. Co. v. Hardin, 156 Ala. 244, 47 So. 327; *Southern R. Co. v. Morgan*, 171 Ala. 294, 54 So. 626; *St. Louis &c. R. Co. v. Pierson*, 49 Ark. 182, 4 S. W. 755; *Kansas City &c. R. Co. v. Worthington*, 101 Ark. 128, 141 S. W. 1173; *Georgia &c. R. Co. v. McCurdy*, 45 Ga. 288, 12 Am. St. 577; *Cincinnati &c. R. Co. v. Carper*, 112 Ind. 26, 39, 13 N. E. 122, 14 N. E. 352, 2 Am. St. 144; *Pittsburgh &c. R. Co. v. Miller*, 33 Ind. App. 128, 70 N. E. 1006; *Gannon v. Chicago &c. R. Co.*, 141 Iowa 37, 117 N. W. 966, 23 L. R. A. (N. S.) 1061; *South Covington &c. R. Co. v. Ware*, 84 Ky. 267, 1 S. W. 493; *Baltimore &c. R. Co. v. Leapley*, 65 Md. 571, 4 Atl. 891; *Minock v. Detroit &c. R. Co.*, 97 Mich. 425, 56 N. W. 780; *Loyd v. Hannibal &c. R. Co.*, 53 Mo. 509; *Price v. St. Louis &c. R. Co.*, 72 Mo. 414; *McGee v. Missouri &c. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. 706; *Filer v. New York &c. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Bartholomew v. New York &c. R. Co.*, 102 N. Y. 716, 7 N. E. 623; *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494, 8 Am. Rep. 508; *Hinshaw v. Raleigh &c. R. Co.*, 118 N. Car. 1047, 24 S. E. 426; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. R. 597, 3 Am. & Eng. R. Cas. 361 and note; *Delaware &c. Canal Co. v. Webster* (Pa. St.), 6 Atl. 841; *Pennsylvania*

ting off at a regular stopping place.²⁰ So, he may be misled and justified in alighting from the train at some place other than the regular station or platform by the invitation of the company.²¹ But a passenger is not justified in attempting to get on or off of a moving train when it is clearly and obviously dangerous so that no ordinarily prudent man in the exercise of reasonable care would do so under the circumstances.²² The mere an-

R. Co. v. Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. 701, 25 W. N. C. 6; Thomas v. Charlotte &c. R. Co., 38 S. Car. 485, 17 S. E. 226; Bodie v. Carolina Midland R. Co., 46 S. Car. 203, 24 S. E. 180; Baltimore &c. R. Co. v. Mullen, 217 Ill. 203, 75 N. E. 474, 2 L. R. A. (N. S.) 115, reviewing the Illinois cases and citing a number of others. Where a brakeman stationed where he could see up and down the track suddenly and excitedly called "Jump! Jump for your lives!" it was held that a passenger was not negligent in so doing, although there was no real danger. McPeak v. Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. 170; Ephland v. Missouri Pac. R. Co., 57 Mo. App. 147. See also Puget Sound Elec. R. Co. v. Felt, 181 Fed. 938; Findley v. Central of Ga. R. Co., 7 Ga. App. 180, 66 S. E. 485; Owens v. Atlantic &c. R. Co., 152 N. Car. 439, 67 S. E. 993; Galveston &c. R. Co. v. Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279.

²⁰ Thomas v. San Pedro &c. R. Co., 170 Fed. 129; Pruitt v. San Pedro &c. R. Co., 161 Cal. 29, 118 Pac. 223, 36 L. R. A. (N. S.) 331; Central of Ga. R. Co. v. Forehand, 128 Ga. 547, 58 S. E. 44; Lake Erie &c. R. Co. v. Cotton, 45 Ind. App. 580, 91 N. E. 253; Forbes v. Chi-

cago &c. R. Co., 135 Iowa 679, 113 N. W. 477; Young v. Boston &c. R. Co., 213 Mass. 267, 100 N. E. 541, 50 L. R. A. (N. S.) 450n, Ann. Cas. 1914A, 635, and note citing additional authorities.

²¹ Gadsden &c. R. Co. v. Causler, 97 Ala. 235, 12 So. 439, 2 Am. Neg. Cas. 85; Mitchell v. Western &c. R. Co., 30 Ga. 22; Illinois Cent. R. Co. v. Able, 59 Ill. 131; Columbus &c. R. Co. v. Farrell, 31 Ind. 408; Louisville &c. R. Co. v. Holsapple, 12 Ind. App. 301, 38 N. E. 1107; Cartwright v. Chicago &c. R. Co., 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274; Keating v. New York &c. R. Co., 49 N. Y. 673; Bucher v. New York Cent. R. Co., 98 N. Y. 128; Curtis v. Detroit &c. R. Co., 27 Wis. 158; Cockle v. London &c. R. Co., L. R. 7 C. P. 321, 326; Whittaker v. Manchester &c. R. Co., L. R. 5 C. P. 464, note; Praeger v. Bristol &c. R. Co., 24 L. T. R. N. S. 105.

²² Lindsay v. Railway, 114 Ga. 896, 41 S. E. 46; Simmons v. Railway, 120 Ga. 225, 47 S. E. 570; Illinois Cent. R. Co. v. Souders, 178 Ill. 585, 53 N. E. 408; Toledo &c. R. Co. v. Wingate, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477; Lindsay v. Railway, 64 Iowa 407, 20 N. W. 737; Atchison R. Co. v. Hughes, 55 Kans. 491, 40 Pac. 919; La Pointe

nouncement of the station is not an invitation to alight while the train is moving,²³ yet if the passenger is told that the next stop will be at his station, or if the train stops shortly after the announcement of the station he may assume in the absence of anything to the contrary, that it is the proper place to alight, and will not necessarily be guilty of contributory negligence in so doing.²⁴ But if he knows that the train is not at the sta-

v. Railroad, 182 Mass. 227, 65 N. E. 44; Hecker v. Railway, 110 Mo. App. 162, 84 S. W. 126; Hunter v. Cooperstown &c. R. Co., 112 N. Y. 371, 19 N. E. 820, 2 L. R. A. 830, 8 Am. St. 752 and note; Agulino v. Railroad, 21 R. I. 263, 43 Atl. 63; Louisville &c. R. Co. v. Collier, 104 Tenn. 189, 54 S. W. 980; St. Louis R. Co. v. Highnote, 99 Tex. 23, 86 S. W. 923; Farley v. Norfolk &c. R. Co., 67 W. Va. 350, 67 S. E. 1116, 27 L. R. A. (N. S.) 1111. See also Clayton v. Philadelphia &c. R. Co. (Del. Super.), 106 Atl. 577.

²³ Mearns v. Central R. Co., 139 Fed. 543; Jeffersonville &c. R. Co. v. Hendricks, 26 Ind. 228; Adams v. Louisville &c. R. Co., 82 Ky. 603; Frost v. Grand Trunk R. Co., 92 Mass. 387, 87 Am. Dec. 668; England v. Boston &c. R. Co., 153 Mass. 490, 27 N. E. 1; Hooks v. Alabama &c. R. Co., 73 Miss. 145, 18 So. 925; Illinois Cent. R. Co. v. Massey, 97 Miss. 794, 53 So. 385; Railroad Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; Lewis v. London &c. R. Co., L. R. 9 Q. B. 66; Bridges v. North London &c. R. Co., L. R. 6 Q. B. 377. See also Alabama &c. R. Co. v. Jones, 85 Miss. 263, 38 So. 545; Sweet v. Birmingham &c. R. Co., 145 Ala. 667, 39 So. 767 (nor the mere slowing of the train); Smith v. Railway Co., 88 Ala. 538, 7 So. 119, 16 Am. St.

63; Southern R. Co. v. Strickland, 130 Ga. 779, 61 S. E. 826; Glascock v. Cincinnati &c. R. Co., 140 Ky. 720, 131 S. W. 779 (nor the opening of the car doors); Fletcher v. Railroad Co., 187 Mass. 463, 73 N. E. 552, 105 Am. St. 414; Payne v. Railway Co., 106 Tenn. 167, 61 S. W. 86.

²⁴ St. Louis &c. R. Co. v. Farr, 70 Ark. 264, 68 S. W. 243; Central R. Co. v. Thompson, 76 Ga. 770; Miller v. East Tennessee &c. R. Co., 93 Ga. 630, 21 S. E. 153; Chicago &c. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; McNulta v. Ensich, 31 Ill. App. 100, 134 Ill. 46, 24 N. E. 631; Columbia &c. R. Co. v. Farrell, 31 Ind. 408; Pennsylvania Co. v. Hoagland, 78 Ind. 203, 3 Am. & Eng. R. Cas. 436; Terré Haute &c. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Southern &c. R. Co. v. Pavey, 48 Kans. 452, 29 Pac. 593; Philadelphia &c. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673n, 20 Am. St. 483; Hooks v. Alabama &c. R. Co., 73 Miss. 145, 18 So. 925; Central R. Co. v. Van Horn, 38 N. J. L. 133; Milliman v. New York &c. R. Co., 66 N. Y. 642. See also Cincinnati &c. R. Co. v. Worthington, 30 Ind. App. 663, 65 N. E. 557, 96 Am. St. 355; Chicago &c. R. Co. v. Mitchell, 56 Ind. App. 354, 105 N.

tion and that it is a dangerous and improper place to get off he is not, ordinarily at least, justified in so doing,²⁵ and in crossing other tracks or the like even at a regular station he can not do so blindly without exercising any care,²⁶ although he may assume, to a certain extent, that the company has performed its duty to provide a safe passage to and from the train and will

E. 396; *Indiana Union Trac. Co. v. Swafford*, 179 Ind. 279, 100 N. E. 840; *Houston R. Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. 642; *Englehaupt v. Railroad Co.*, 209 Pa. St. 182, 58 Atl. 154; *Richmond &c. R. Co. v. Smith*, 92 Ala. 237, 9 So. 223. But where the train stopped at a crossing, as required by law, near the station, after it had been announced, and a passenger attempted to alight and was injured in so doing it was held that the company was not liable. *Mitchell v. Chicago &c. R. Co.*, 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566. See also *Minock v. Detroit &c. R. Co.*, 97 Mich. 425, 56 N. W. 780; *Sevier v. Vicksburg &c. R. Co.*, 61 Miss. 8, 48 Am. Rep. 74; *Wolford v. New York &c. R. Co.*, 191 N. Y. 554, 85 N. E. 1118; *Farley v. Norfolk &c. R. Co.*, 67 W. Va. 350, 67 S. E. 1116, 27 L. R. A. (N. S.) 1111.

²⁵ *East Tennessee &c. R. Co. v. Holmes*, 97 Ala. 332, 12 So. 286; *Ohio &c. R. Co. v. Stratton*, 78 Ill. 88; *Illinois &c. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255; *Terre Haute &c. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *New York &c. R. Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 7 Am. St. 451; *Eckerd v. Chicago &c. R. Co.*, 70 Iowa 353, 30 N. W. 615; *Dewald v. Kansas City &c. R. Co.*, 44 Kans.

586, 24 Pac. 1101; *Louisville &c. Co. v. Ricketts*, 96 Ky. 44, 27 S. W. 860 (getting off on wrong side); *England v. Boston &c. R. Co.*, 153 Mass. 490, 27 N. E. 1; *Sturgis v. Detroit &c. R. Co.*, 72 Mich. 619, 40 N. W. 914; *Chicago &c. R. Co. v. Hague*, 48 Nebr. 97, 66 N. W. 1000; *Morgan v. Camden &c. R. Co.*, 1 Monag. (Pa.) 122, 16 Atl. 353 (getting off on wrong side). See *Blodgett v. Bartlett*, 50 Ga. 353, 2 Am. Neg. Cas. 350; *Hemmingway v. Chicago &c. R. Co.*, 67 Wis. 668, 31 N. W. 268; also *Chicago &c. R. Co. v. Collins*, 59 Ind. App. 572, 108 N. E. 377; *Cincinnati &c. R. Co. v. Peters*, 80 Ind. 168; *Ouellette v. Grand Trunk R. Co.*, 106 Maine 153, 76 Atl. 280, 138 Am. St. 340; *Frost v. Grand Trunk &c. R. Co.*, 92 Mass. 387, 87 Am. Dec. 668; *Laub v. Chicago &c. R. Co.*, 118 Mo. App. 488, 94 S. W. 550. See also *Kellogg v. Smith*, 179 Mass. 595, 61 N. E. 138. But compare *Indianapolis &c. R. Co. v. Barnes*, 35 Ind. App. 485, 74 N. E. 583. Nor in getting on at an unusual and dangerous place. *Haase v. Oregon R. Co.*, 19 Ore. 354, 24 Pac. 238; *Comly v. Pennsylvania R. Co.*, 9 Sad. (Pa.) 369, 12 Atl. 496.

²⁶ *Illinois Cent. R. Co. v. Davidson*, 64 Fed. 301; *MacLeod v. Graven*, 73 Fed. 627; *East Ten-*

not expose him to unnecessary danger.²⁷ The fact that the conductor tells a passenger who desires to get off at a crossing where the train is accustomed to stop, but which is not a station or regular place for taking on or letting off passengers, that he can go upon the platform when the train begins to slow up and get off when it stops will not justify him in standing upon the lowest step of the car while the train is moving at from twelve to fourteen miles an hour, and even if he is directed by the conductor to stand upon the step and be ready to get off, this, it is held, will not relieve him from contributory negligence in taking a position known to him to be one of great danger.²⁸

nessee &c. R. Co. v. Kornegay, 92 Ala. 228, 9 So. 557; Railway Co. v. Cox, 60 Ark. 106, 20 S. W. 38; Weeks v. New Orleans &c. R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. 560; Baltimore &c. R. Co. v. State, 63 Md. 135; Bancroft v. Boston &c. R. Co., 97 Mass. 275; Forsyth v. Boston &c. R. Co., 103 Mass. 510; Mayo v. Boston &c. R. Co., 104 Mass. 137; Commonwealth v. Boston &c. R. Co., 129 Mass. 500, 37 Am. Rep. 382n; Bradley v. Grand Trunk R. Co., 107 Mich. 243, 65 N. W. 102; De Kay v. Chicago &c. R. Co., 41 Minn. 178, 43 N. W. 182, 4 L. R. A. 632, 16 Am. St. 687; Morrison v. Erie R. Co., 56 N. Y. 302; Pennsylvania R. Co. v. Bell, 122 Pa. St. 58, 15 Atl. 561; Hall v. Southern R. Co., 88 S. Car. 430, 70 S. E. 1039.

²⁷ Atchison &c. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; Weeks v. New Orleans &c. R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. 560; Baltimore &c. R. Co. v. State, 60 Md. 449, 12 Am. & Eng. R. Cas. 149; Philadelphia &c. R. Co. v. Anderson, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673n, 20

Am. St. 483, 3 Am. Neg. Cas. 706; Warren v. Fitchburg R. Co., 90 Mass. 227, 85 Am. Dec. 700n; Cartwright v. Chicago &c. R. Co., 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274, 16 Am. & Eng. R. Cas. 321; Brassell v. New York Cent. R. Co., 84 N. Y. 241, 3 Am. & Eng. R. Cas. 380; Pennsylvania R. Co. v. White, 88 Pa. St. 327; Rogers v. Rhymney R. Co., 26 L. T. R. N. S. 879; Klein v. Jewett, 26 N. J. Eq. 474. See also Richmond &c. R. Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. ed. 642; Kohler v. Pennsylvania R. Co., 135 Pa. St. 346, 19 Atl. 1049; Birmingham R. Co. v. Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. 25; Franklin v. Southern California &c. R. Co., 85 Cal. 63, 24 Pac. 723; Chicago &c. R. Co. v. Lowell, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. ed. 131. See generally and compare Chicago &c. R. Co. v. Collins, 59 Ind. App. 572, 108 N. E. 377 (company negligent but passenger guilty of contributory negligence), with Henry v. Swailes, 57 Ind. App. 218, 105 N. E. 162.

²⁸ Cincinnati &c. R. Co. v. Mc-

§ 2473 (1628a). Injuries received in boarding trains—Illustrative cases.—A complaint alleging that the defendant had neglected to construct a platform at its station where the plaintiff took passage; that it stopped its train at a place where the distance from the ground to the lowest step of the car was three feet, and invited the plaintiff to board the car in such position, without furnishing a stool or anything to assist her in reaching the step; that she requested that a stool be furnished, but the com-

Clain, 148 Ind. 188, 44 N. E. 306; Reibel v. Cincinnati &c. R. Co., 114 Ind. 476, 17 N. E. 107; Cincinnati &c. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, 123, 2 Am. St. 144. See also Chicago &c. R. Co. v. Claunts, 99 Ark. 248, 138 S. W. 332; Chicago &c. R. Co. v. Hazzard, 26 Ill. 373; Vimont v. Chicago &c. R. Co., 71 Iowa 58, 32 N. W. 100; Bardwell v. Mobile &c. R. Co., 63 Miss. 574, 56 Am. Rep. 842; Aufdenberg v. St. Louis &c. R. Co., 132 Mo. 565, 34 S. W. 485; Hunter v. Cooperstown &c. R. Co., 126 N. Y. 18, 26 N. E. 958, 12 L. R. A. 429; Newport News &c. Co. v. McCormick, 106 Va. 517, 56 S. E. 281 (carrying beyond destination does not justify passenger in jumping from moving train). But see Galloway v. Chicago &c. R. Co., 87 Iowa 458, 54 N. W. 447; Brashear v. Houston &c. R. Co., 47 La. Ann. 735, 17 So. 260, 49 Am. St. 382; post, § 2497. In the first case just cited the complaint alleged that plaintiff desiring to get off at a crossing where the train was accustomed to stop, was informed by the conductor that he could do so, and was directed to go out on the platform when the train reached a certain point,

ready to get off as soon as the train stopped at the crossing, as it stopped but a moment; that he went on the platform as directed, and stood on the lower step of the car; that the train slowed down, but suddenly started with a jerk, throwing plaintiff under the car, by which he was injured; that the place at which he was directed to get off was not a safe and proper place, and that the injury occurred by reason of the negligence of the defendant and without any fault on his part. The jury returned answers to interrogatories finding the facts as alleged, except that the accident occurred at a switch about 1,600 feet from the crossing, where the engineer slowed down to pass the switches; that the stopping place was about 250 feet from the crossing; and that plaintiff's position on the lower step was dangerous, and was known by him to be dangerous. It was held that the plaintiff was not shown to be free from contributory negligence, and that the special findings did not support a verdict for plaintiff. But compare Baltimore &c. R. Co. v. Huskins, 183 Ind. 614, 109 N. E. 764.

pany's servants in charge of the train assured her that they would assist her to board the car in safety, and, in making the effort, she was injured, without any fault or negligence on her part, was held sufficient, in a recent case, to show actionable negligence; and it was also held that the complaint did not show contributory negligence on her part.²⁹ In another recent case it was held that a cradle track consisting of a detached railway track with irons connecting the rails, and resting upon the regular track and connected with it where the regular track ran under the water at the river's edge, arranged so as to be moveable up and down the regular track, thus forming a connection with a steam ferry in the river at any stage of water, and which was subject to frequent accidental shovings up the regular track by the steamboat, was not a reasonably safe means of getting foot passengers on the boat; and the court laid down the general proposition that a carrier is liable for failure to provide at least a reasonably safe way to board its boat for one intending to take passage, even though not yet a passenger, in that fare has not been paid or the intention signified.³⁰ Other recent decisions show the duty of the company to furnish reasonably safe

²⁹ *Illinois &c. R. Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641. See also *Foley v. Detroit &c. Ry. Co.*, 179 Mich. 586, 146 N. W. 186. In another case where the injured passenger, plaintiff's wife, testified that it was "quite a high step" from the platform to the steps of the coach, and defendant's employes testified that the distance was 12 or 14 inches, it was held that the question of defendant's negligence in not providing a better platform was for the jury; also that if, in attempting to board the train, she slipped and fell by reason alone of the icy condition of the car steps, the fact that the railroad company may also have been negligent in not providing a

better station platform or in not providing a portable step is not a ground of recovery. It was also held in the same case that it was error, under the complaint, to submit as an independent ground of recovery the question of negligence in failing to provide an employe to assist, but that the question was for the jury with the other circumstances. *Ft. Worth &c. R. Co. v. Work* (Tex. Civ. App.), 100 S. W. 962.

³⁰ *Burke v. St. Louis &c. R. Co.*, 120 Mo. App. 683, 97 S. W. 981. Upon the last point the court said: "If plaintiff was not a passenger, but was walking along a way which it was defendant's custom to permit the use of in taking pass-

means of entering the car,⁸¹ and its duty, under certain circumstances, to furnish assistance to passengers needing it.⁸² It has also been said that under certain circumstances, as in depots where there are many tracks and many trains are constantly going and coming, some limited and some unlimited, and in different directions and to various destinations, the duty of the carrier may reasonably include the timely announcement of trains, with proper directions and precautions to prevent travelers from taking the wrong train.⁸³ So, as stated in the last preceding section, while the company is not required to wait an unreasonable time for passengers,⁸⁴ it is the duty of the company to give them a reasonable time to get on,⁸⁵ and it is liable,

age on its boats, and plaintiff was using it for that purpose, defendant is liable for the injury he suffered, if due to its failure to employ, at the least, ordinary care to keep the way safe; and that is all we need to say in this case. *Dodge v. Steamboat Co.*, 148 Mass. 214, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. 541; *Wood v. Railroad*, 181 Mo. 433, 81 S. W. 152; *Fullerton v. Fordyce*, 121 Mo. 10, 25 S. W. 587, 42 Am. St. 516."

⁸¹ *Missouri Pac. R. Co. v. Watson*, 72 Tex. 631, 10 S. W. 731. See also *Plummer v. Boston El. R. Co.*, 198 Mass. 499, 84 N. E. 849.

⁸² *Western &c. R. Co. v. Voils*, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655. See also *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467, 75 S. W. 713; *Jacobs v. West End St. R. Co.*, 178 Mass. 116, 59 N. E. 639; *Rearden v. St. Louis &c. R. Co.*, 215 Mo. 105, 114 S. W. 961; *Cawfield v. Asheville St. R. Co.*, 111 N. Car. 597, 16 S. E. 703. But it is not ordinarily required to so assist passengers apparently able to take care of themselves. *Yar-*

nell v. Kansas City &c. R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Lafflin v. Buffalo &c. R. Co.*, 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; *Central R. Co. v. Whitehead*, 74 Ga. 441; *Raben v. Railway Co.*, 74 Iowa 732, 34 N. W. 621; *Simms v. South Carolina R. Co.*, 27 S. Car. 268, 3 S. E. 301; *New Orleans &c. R. Co. v. Stattham*, 42 Miss. 607, 97 Am. Dec. 478.

⁸³ See *Allender v. Railroad Co.*, 43 Iowa 276; *McKimble v. Railroad Co.*, 139 Mass. 542, 2 N. E. 97; *Marshall v. Railway Co.*, 78 Mo. 610, 616.

⁸⁴ See *Paulitsch v. Railroad Co.*, 102 N. Y. 280, 6 N. E. 577; *Swan v. Manchester &c. R. Co.*, 132 Mass. 116, 42 Am. Rep. 432; *Dawson v. Railroad Co.*, 156 Mass. 127, 30 N. E. 466; *Flint &c. R. Co. v. Stark*, 38 Mich. 714.

⁸⁵ *Railway Co. v. Gardner*, 114 Fed. 186; *Alabama &c. R. Co. v. Siniard*, 123 Ala. 557, 26 So. 689; *Alabama &c. R. Co. v. Horn*, 132 Ala. 407, 31 So. 481; *Central R. Co. v. Smith*, 74 Md. 212, 21 Atl.

in a proper case, if it negligently starts the train while a passenger is in the act of getting on, or negligently backs a car against it³⁶ or so negligently starts it with an unusual and extraordinary jerk as to throw down and injure a passenger before he can get a seat.³⁷

§ 2474 (1628b). Injuries received in alighting—Illustrative cases.—In a recent case in which it appeared that a passenger was injured while alighting from a car it was held as matter of law that the use of a standard three step car such as is in common use on railroads was not negligence, although there are

706; Daley v. Railroad Co., 21 N. Y. S. 1011; Hatch v. Railway Co., 212 Pa. St. 29, 61 Atl. 480; Texas &c. R. Co. v. Mayfield, 23 Tex. Civ. App. 415, 56 S. W. 942. See also to same effect Southern R. Co. v. Nichols, 137 Ga. 670, 74 S. E. 268; Chicago &c. R. Co. v. Wimmer, 72 Kans. 566, 84 Pac. 378, 4 L. R. A. (N. S.) 140n, 7 Ann. Cas. 756; Chesapeake &c. R. Co. v. Austin, 137 Ky. 611, 126 S. W. 144, 136 Am. St. 307; Formiller v. Detroit United R. Co., 164 Mich. 653, 130 N. W. 347; Choctaw &c. R. Co. v. Burgess, 21 Okla. 653, 97 Pac. 271.

³⁶ Moore v. Saginaw R. Co., 119 Mich. 613, 78 N. W. 666. See also Foley v. Detroit &c. Ry. Co., 179 Mich. 586, 146 N. W. 186; Devoy v. St. Louis Transit Co., 192 Mo. 197, 91 S. W. 140 (start with sudden lurch while passenger was on step); Gabriel v. Metropolitan St. R. Co., 164 Mo. App. 56, 148 S. W. 168; Duty v. Chesapeake &c. R. Co., 70 W. Va. 14, 73 S. E. 331.

³⁷ Sheffer v. Railway Co., 22 Ky. L. 1305, 60 S. W. 403. See also Pennsylvania R. Co. v. Stockton,

184 Fed. 422, Ann. Cas. 1916E, 171; Louisville &c. R. Co. v. Deason, 29 Ky. L. 1257, 96 S. W. 1115; Rice v. Puget Sound Trac. & Co., 80 Wash. 47, 141 Pac. 191, L. R. A. 1915A, 797 and note; Spearman v. California &c. R. Co., 57 Cal. 432; ante, §2402. But it is not ordinarily required to wait before starting in the ordinary manner until all passengers have obtained seats. Louisville R. Co. v. Hale, 102 Ky. 600, 44 S. W. 213; Yarnell v. Kansas City &c. R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; Bennett v. Louisville R. Co., 28 Ky. L. 998, 90 S. W. 1052, 4 L. R. A. (N. S.) 558 and note; Sharp v. New Orleans &c. Co., 111 La. Ann. 395, 35 So. 614, 100 Am. St. 488. But see where passenger is known to be a cripple. Central &c. R. Co. v. Holloway (Tex.), 54 S. W. 419. Compare Little Rock &c. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Haug v. Railway Co., 8 N. Dak. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. 727. See also Gulf &c. R. Co. v. Coopwood (Tex.), 96 S. W. 102.

also four step cars, having the lower step about eight inches nearer the ground, in use to some extent on some roads.³⁸ But the use of a platform to which a coupling pin is attached in such a manner that it projects beyond the platform and is likely to catch the attire of female passengers, and does do so, has been held to be negligent.³⁹ And it has been held that where the step of the car is high above the landing place it is the duty of the carrier to furnish a moveable platform, stool or box of some kind to assist passengers in alighting.⁴⁰ Passengers have been held guilty of contributory negligence in attempting to alight from a three step car from which the lower step was missing, without looking to see where they were stepping⁴¹ and in attempting to alight on a small and slippery bench too far

³⁸ *Crowe v. Michigan Cent. R. Co.*, 142 Mich. 692, 106 N. W. 395. The court also said that while only reasonable care is required as to platforms, a dangerous hole six inches deep would be a negligent defect, but found that the injury was not caused thereby. See also as to company not being liable for icy platform caused by cold and storm shortly before the accident. *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252n. And as to duty generally to keep steps free from snow and ice see cases and notes in 15 L. R. A. (N. S.) 523 and 35 L. R. A. (N. S.) 592. For other cases in which the company was held not to be liable where the complaint was because of the height of the steps or platform, see *Lafflin v. Buffalo & C. R. Co.*, 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; *Traphagen v. Erie R. Co.* (N. J.), 64 Atl. 1072.

³⁹ *Illinois & C. R. Co. v. O'Connell*, 160 Ill. 636, 43 N. E. 704. See also where nails or the like project and thus cause injury. *Poulin*

v. Railroad, 34 N. Y. Super. 296, *affd.* in 61 N. Y. 621; *Delamatyr v. Railroad Co.*, 24 Wis. 578.

⁴⁰ *Atlanta & C. R. Co. v. Wheeler*, 154 Ala. 530, 46 So. 262; *Truesdell v. Erie R. Co.*, 114 App. Div. 34, 99 N. Y. S. 694. See *infra* note 43. See also as to duty of company generally to furnish safe means of alighting, *Missouri & C. R. Co. v. Dunbar*, 49 Tex. Civ. App. 12, 108 S. W. 500. As to negligence in leaving snow or ice, banana peel, or the like on steps or platform, the question usually depends on whether it has been left an unreasonable time. *Lapin v. Northwestern El. R. Co.*, 162 Ill. App. 296; *Pittsburgh & C. R. Co. v. Harris*, 38 Ind. App. 77, 77 N. E. 1051; *Pittsburgh & C. R. Co. v. Rose*, 40 Ind. App. 240, 79 N. E. 1094; *Hull v. Minneapolis & C. R. Co.*, 116 Minn. 349, 133 N. W. 852.

⁴¹ *Coburn v. Philadelphia & C. R. Co.*, 198 Pa. St. 436, 48 Atl. 265. See also *Chalker v. Detroit & C. Ry. Co.*, 207 Mich. 138, 173 N. W. 532.

away from the car to be reached;⁴² but where the conductor placed a step or stool on the wrong side of a car the passenger was held not to be negligent in alighting on that side.⁴³ Many cases are cited in another section showing the liability of the company for negligently starting a train while passengers are known to be in the act of getting on or off, and in many recent cases the company was held liable for suddenly starting the train with a "lurch" or jerk, without notice to passengers engaged in boarding or alighting from it.⁴⁴ But in another recent case it is held that, where the company has stopped its train a reasonable time, it owes no further duty to notify passengers of the starting of the train, unless its employes know that passengers are still in the act of alighting.⁴⁵ So, where the plain-

⁴² *McDermott v. Chicago &c. R. Co.*, 82 Wis. 246, 52 N. W. 85. See as to moving of stool placed for passengers to alight on, *St. Louis &c. R. Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039.

⁴³ *Lustig v. New York &c. R. Co.*, 65 Hun 547, 20 N. Y. S. 477. See also *Yancy v. Boston Elev. Ry. Co.*, 205 Mass. 162, 91 N. E. 202, 26 L. R. A. (N. S.) 1217 and note, 137 Am. St. 431; *Chesapeake &c. R. Co. v. Harris*, 103 Va. 635, 49 S. E. 997; *Keating v. Railroad*, 49 N. Y. 673; *Texas &c. R. Co. v. Whiteley*, 43 Tex. Civ. App. 346, 96 S. W. 109. But compare *Margo v. Pennsylvania Co.*, 213 Pa. St. 463, 62 Atl. 1079. As to whether the carrier is under any duty to furnish a stool or portable steps, see *Atlanta &c. R. Co. v. Wheeler*, 154 Ala. 530, 46 So. 262; *Young v. Railway Co.*, 93 Mo. App. 267; *Missouri &c. R. Co. v. Sherrill*, 32 Tex. Civ. App. 116, 72 S. W. 429; *Missouri &c. Ry. Co. v. Kemp* (Tex. Civ. App.), 173 S. W. 532; *Cincinnati R. Co. v. Bell*, 25 Ky. L. 10, 74 S. W. 700; *Madden v. Port Royal &c.*

R. Co., 35 S. Car. 381, 14 S. E. 713, 28 Am. St. 855.

⁴⁴ *St. Louis &c. R. Co. v. Briggs*, 87 Ark. 581, 113 S. W. 644; *Florida R. Co. v. Dorsey*, 59 Fla. 260, 52 So. 963; *Louisville &c. R. Co. v. Deason*, 29 Ky. L. 1259, 96 S. W. 1115; *Darden v. Atlantic &c. R. Co.*, 144 N. Car. 1, 56 S. E. 512; *Gulf &c. R. Co. v. Williams* (Tex. Civ. App.), 136 S. W. 527; *Johnson v. Atlantic Coast Line R. Co.*, 125 Va. 136, 99 S. E. 558. See and compare *Graf v. West Jersey St. R. Co.* (N. J.), 62 Atl. 333; *Field v. Delaware &c. R. Co.*, 69 N. J. L. 433, 55 Atl. 241 *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30, 44 Atl. 845. And see also *Braun v. Grand Rapids &c. Ry. Co.*, 183 Mich. 569, 150 N. W. 144; *Burke v. Bay City Trac. Co.*, 147 Mich. 172, 110 N. W. 524, with which compare *Etson v. Ft. Wayne &c. Co.*, 110 Mich. 494, 68 N. W. 298.

⁴⁵ *Gulf &c. R. Co. v. Booth* (Tex. Civ. App.), 97 S. W. 128. See also *McElvane v. Central of Ga. R. Co.*, 170 Ala. 525, 54 So. 489, 34 L. R. A. (N. S.) 715n.

tiff was injured while alighting from defendant's train at night after the train had started, and it appeared that the train had stopped about two minutes, and if plaintiff had not come back into the car to get her umbrella, which she left therein, she could have alighted with safety while the train was standing, and that she knew the train was moving slowly when she attempted to alight, but made no effort to ascertain its speed, and attempted to get off, holding a parcel in one hand and her skirts in the other, by stepping straight out from the train, it was held that she was guilty of contributory negligence as a matter of law; and the court said that she was not entitled to claim that the injury resulted from the defendant's failure to stop the train long enough to enable her to alight in safety, nor to complain that the train did not stop long enough for all the other passengers to alight.⁴⁶

§ 2475 (1628c). Injuries received in alighting—Announcement of station.—As shown in a preceding section,⁴⁷ the mere announcement of a station is not an invitation to alight while the train is in motion, but it may constitute negligence⁴⁸ to announce a station or invite passengers to alight at an improper place without warning, and may justify a passenger in alighting when he is misled thereby and exercises ordinary and reasonable care under the circumstances. In a recent case it is held that the

⁴⁶ *Dunning v. Lake Erie &c. R. Co.*, 38 Ind. App. 91, 77 N. E. 1049. But see *St. Louis &c. R. Co. v. Ross* (Tex.), 89 S. W. 1105. In a recent case, under the North Carolina statute, providing that railroad companies shall not be liable for injury to a passenger on the platform of a car in violation of the printed and posted regulations of the company, it was held that a passenger could not recover when she went on the platform while the train was moving, in violation of such regulations, although she went there in the

belief that the train was at the station and was stopping for her and other passengers to alight. *Shaw v. Seaboard &c. R. Co.*, 143 N. Car. 312, 55 S. E. 713 (two judges, however, dissenting).

⁴⁷ Ante, § 2471.

⁴⁸ In *Darden v. Atlantic &c. R. Co.*, 144 N. Car. 1, 56 S. E. 512, a passenger on a train came out on the platform preparatory to getting off in response to a call of "All off for Springhill." As he was stepping off, when the train had almost come to a stop, the brakeman signaled the engineer to

announcement of the next station by a porter, though made on the near approach to the station, is not an invitation to alight before the train actually stops,⁴⁹ and that where a passenger got up, on such announcement being made and stood on the platform while the train was moving somewhat rapidly and was pushed or knocked off by the porter, without wilfulness, he was guilty of contributory negligence and not entitled to recover.⁵⁰ But there was a dissenting opinion and the decision has been severely criticised.⁵¹

go ahead and halloed "All off for Springhill," and the train jerked, throwing the passenger to the ground. The brakeman knew that the passenger was to get off the train at the station, and, at the time of signaling to go ahead he was in a place where he could easily have seen the position of the passenger. It was held that the brakeman's carelessness was the cause of the injury, and the company was liable therefor. The court distinguished the case of *Shaw v. Seaboard &c. R. Co.*, 143 N. Car. 312, 55 S. E. 713. So, opening the gates of a "pay as you enter" type of car may be found to be an invitation to alight. *Ferrell v. Washington Water Power Co.*, 83 Wash. 319, 145 Pac. 442 (distinguishing a number of cases). See also *Midland Val. R. Co. v. Hamilton*, 84 Ark. 81, 104 S. W. 540. But compare *Crowley v. Boston El. R. Co.*, 204 Mass. 241, 90 N. E. 532.

⁴⁹ Citing *Adams v. Louisville &c. R. Co.*, 82 Ky. 607; *Jeffersonville &c. R. v. Hendricks*, 26 Ind. 228; *England v. Boston &c. R. Co.*, 153 Mass. 490, 27 N. E. 1; *Pennsylvania R. Co. v. Asbell*, 23 Pa. 147,

62 Am. Dec. 323; *Lewis v. London &c. R. Co.*, L. R. 9 Q. B. 66; *Bridges v. North London &c. R. Co.*, L. R. 6 Q. B. 377. See also *Illinois Cent. R. Co. v. Warren*, 149 Fed. 658; *Diggs v. Louisville &c. R. Co.*, 158 Fed. 97; *Southern R. Co. v. Strickland*, 130 Ga. 779, 61 S. E. 826; *Union Pac. R. Co. v. Brown*, 73 Kans. 233, 84 Pac. 1026; *Morris v. Illinois Cent. R. Co.*, 127 La. 445, 53 So. 698, 31 L. R. A. (N. S.) 629; *Illinois Cent. R. Co. v. Massey*, 97 Miss. 794, 53 So. 385.

⁵⁰ *Illinois Cent. R. Co. v. Warren*, 149 Fed. 658, 64 Cent. L. J. 254, citing *Alabama R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *Secor v. Toledo, P. & W. R. Co.*, 10 Fed. 15; *Blodgett v. Bartlett*, 50 Ga. 353; *Quinn v. Railroad Co.*, 51 Ill. 495; *Rockford Co. v. Coultas*, 67 Ill. 398; *Illinois &c. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255; *Bemiss v. Lake R. Co.*, 47 La. Ann. 1671, 18 So. 711; *Goodwin v. Boston &c. R. Co.*, 84 Maine 203, 24 Atl. 816; *President &c. v. Cason*, 72 Md. 377, 20 Atl. 113; *Malcomb v. Richmond &c. R. Co.*, 106 N. Car. 63, 11 S. E. 187.

⁵¹ See note in 64 Cent. L. J. 254; also *Brashear v. Houston &c.*

§ 2476 (1629). **Injuries received on freight trains.**—In a general sense it may be said that where a railroad company carries passengers on freight or mixed trains, it must exercise the same high degree of care for the safety of its passengers as in other cases.⁵² But we do not mean that its duties and the precautions it must take are absolutely the same with respect to the operation of such trains as with respect to regular passenger trains. As to its roadbed, bridges and the like, it would seem that the duty is absolutely the same,⁵³ but it is obvious that the risk is

R. Co., 47 La. Ann. 735, 17 So. 260, 28 L. R. A. 811, 49 Am. St. 382; Watkins v. Birmingham R. &c. Co., 120 Ala. 147, 152, 24 So. 392, 43 L. R. A. 297; Pennsylvania R. Co. v. Reed, 60 Fed. 694; James v. Chicago &c. R. Co., 81 Kans. 23, 105 Pac. 40; Doss v. Missouri &c. R. Co., 59 Mo. 27, 38, 21 Am. Rep. 371. And see to the effect that such an announcement after the train is stopped is an invitation to alight. Dye v. Chicago &c. R. Co., 135 Mo. App. 254, 115 S. W. 497; Wolford v. New York &c. R. Co., 191 N. Y. 554, 85 N. E. 1118; Tilden v. Rhode Island Co., 27 R. I. 482, 63 Atl. 675.

⁵² Southern R. Co. v. Crowder, 130 Ala. 256, 30 So. 592, 594 (citing text); Southern R. Co. v. Burgess, 143 Ala. 364, 42 So. 35; Secord v. St. Paul &c. R. Co., 18 Fed. 221; Delaware &c. R. Co. v. Ashley, 67 Fed. 209; Illinois Cent. R. Co. v. Axley, 47 Ill. App. 307; Indianapolis &c. R. Co. v. Beaver, 41 Ind. 493; Ohio &c. R. Co. v. Dickerson, 59 Ind. 317; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; Vandalia R. Co. v. Darby, 60 Ind. App. 294, 108 N. E. 778; St. Joseph &c. R. Co. v. Wheeler, 35 Kans. 185, 10 Pac. 461;

Dunn v. Grand Trunk R. Co., 58 Maine 187, 4 Am. Rep. 267; Campbell v. Duluth &c. R. Co., 107 Minn. 358, 120 N. W. 375, 22 L. R. A. (N. S.) 190n; Doran v. Chicago &c. R. Co., 128 Minn. 193, 150 N. W. 800; Whitehead v. St. Louis &c. R. Co., 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410; Edgerton v. New York &c. R. Co., 39 N. Y. 227; St. Louis &c. R. Co. v. Gosnell, 23 Okla. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892; Mexican Cent. R. Co. v. Lauricella (Tex.), 26 S. W. 301; International &c. R. Co. v. Irvine, 64 Tex. 529.

⁵³ Ohio Valley R. Co. v. Watson, 93 Ky. 654, 21 S. W. 244, 19 L. R. A. 310, 4 Am. St. 211; Indianapolis &c. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898. Compare Arkansas &c. R. Co. v. Canman, 52 Ark. 517, 13 S. W. 280. See also as to the duty to furnish a caboose and the liability of the company where a common box-car with temporary seats was substituted while the caboose was in the repair shop. Missouri Pac. R. Co. v. Holcomb, 44 Kans. 332, 24 Pac. 467, 44 Am. & Eng. R. Cas. 303, and compare Pittsburgh &c. R. Co. v. Williams, 74 Ind. 462.

greater in riding upon freight trains, that the same appliances can not be used and that the same speed and comparative freedom from sudden jerks and the like can not be attained.⁵⁴ The duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated, and while the general rule that the highest practicable degree of care must be exercised holds good, the nature of the train and the necessary difference in its mode of operation must be considered, and the company is bound to exercise only the highest degree of care that is usually and practically exercised and consistent with the operation of trains of that nature.⁵⁵ Thus, it is not bound to equip every

⁵⁴ In *Green v. Missouri &c. R. Co.*, 121 Mo. App. 720, 97 S. W. 646, it is held that the company is liable for injuries caused by negligent delay in transportation, but in determining the question the nature of the train is to be considered (citing *Whitehead v. St. Louis R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *Wait v. Omaha &c. R. Co.*, 165 Mo. 612, 65 S. W. 1028); and, in the course of the opinion, the court said: "We, however, readily concede that, if one, with the consent of the conductor, voluntarily rides in a freight car, he must accept the consequences which naturally follow from such position, which are not directly influenced or brought about by the negligence of the carrier. Thus, the plaintiff in this case had no right to expect that heat would be provided for him in the car in which he chose to ride. . . . It may be said that the absence of heat from the car caused the plaintiff to suffer from the cold. But that fact was known and voluntarily accepted by plaintiff. His

complaint, as submitted to the jury, is a negligent delay of more than twelve hours in carrying him a distance of only five or six miles, whereby he was exposed to the cold for such an unnecessary time as caused his suffering and consequent impairment to health. So we further concede that a passenger, in the absence of a binding engagement by the carrier, has no right to expect that he will be carried in as short a time by an ordinary freight train as by a passenger train. But he may expect that there will be no unnecessary and negligent delay in his transportation on a freight train. The question of negligent delay was for the jury to determine, and it was properly submitted to them, consistently with what we have written, by the court's instruction wherein they were told to take into consideration the character of the train in determining the question whether there was any negligence."

⁵⁵ *Crine v. East Tennessee &c. R. Co.*, 84 Ga. 651, 11 S. E. 555;

car with an air brake nor to run a bell rope through the cars to the engine.⁵⁶ Nor is the company necessarily negligent, because in starting or in taking up and letting out slack there is more or less of a jerk or sudden motion of the cars.⁵⁷ Nor is it obliged to have a brakeman on every car.⁵⁸ So, a passenger riding on a freight train or a mixed train must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel upon such trains and is not entitled to insist upon having the same care and attention that he might justly demand upon a regular passenger train.⁵⁹ The

Galena &c. R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Chicago &c. R. Co. v. Hazzard, 26 Ill. 373; Chicago &c. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313, 315, 316; Woolery v. Louisville &c. R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; Western R. Co. v. State, 95 Md. 637, 53 Atl. 969, 973 (quoting text); Wallace v. Western &c. R. Co., 101 N. Car. 454, 8 S. E. 166, 37 Am. & Eng. R. Cas. 159. See also to same effect Moore v. Saginaw &c. R. Co., 115 Mich. 103, 72 N. W. 1112; Campbell v. Duluth &c. R. Co., 107 Minn. 358, 120 N. W. 375, 22 L. R. A. (N. S.) 190n; Schultz v. Missouri &c. Ry. Co., 123 Minn. 405, 143 N. W. 1131; Rodgers v. Choctaw &c. R. Co., 76 Ark. 520, 89 S. W. 468, 469, 113 Am. St. 102 (citing text); Chesapeake &c. R. Co. v. Jordan, 25 Ky. L. 574, 76 S. W. 145, 147 (quoting text).

⁵⁶ Oviatt v. Dakota Cent. R. Co., 43 Minn. 300, 45 N. W. 436; Arkansas &c. R. Co. v. Canman, 52 Ark. 517, 13 S. W. 280.

⁵⁷ Rockford &c. R. Co. v. Coultas, 67 Ill. 398; Crine v. East Tennessee &c. R. Co., 84 Ga. 651, 11

S. E. 555; Marable v. Southern R. Co., 142 N. Car. 557, 55 S. E. 355. But a sudden stop or jerk throwing passengers and crew out of their seats on to the floor may be so violent and unusual as to justify the inference of negligence. Ramsey v. McKay, 44 Okla. 774, 146 Pac. 210; St. Louis &c. R. Co. v. Fitts, 40 Okla. 685, 140 Pac. 144 (reviewing many cases).

⁵⁸ See Delaware &c. R. Co. v. Ashley, 67 Fed. 209; Indianapolis &c. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898.

⁵⁹ Hazard v. Chicago &c. R. Co., 1 Biss. (U. S.) 503; McKinney v. Neil, 1 McL. (U. S.) 540; Fisher v. Southern Pac. R. Co., 89 Cal. 399, 26 Pac. 894, 23 Am. St. 474; Crine v. East Tennessee &c. R. Co., 84 Ga. 651, 11 S. E. 555; Louisville &c. R. Co. v. Bisch, 120 Ind. 549, 22 N. E. 662; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; Powers v. Boston &c. R. Co., 153 Mass. 188, 26 N. E. 446; Harris v. Hannibal &c. R. Co., 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111; Murch v. Concord &c. R. Co., 29 N. H. 9, 61 Am. Dec. 631; Browne v. Raleigh &c. R. Co., 108 N. Car.

nature of the train may also have an important bearing upon the question of contributory negligence. As the passenger upon a freight train assumes the risks incident to that means of conveyance and must take notice thereof, he must exercise ordinary and reasonable care to guard against injury from such risks and must not voluntarily take a position where he is likely to be injured by a sudden jerk of the car resulting from the taking up of slack in the ordinary way or the like.⁶⁰ But if the train is sud-

34, 12 S. E. 958; ante, § 2394. See also *Arkansas Cent. R. Co. v. Janson*, 90 Ark. 494, 119 S. W. 648; *Hedrick v. Missouri Pac. R. Co.*, 195 Mo. 104, 93 S. W. 268, 6 Ann. Co., 142 N. Car. 557, 55 S. E. 355; *Nashville &c. Ry. Co. v. Hopper*, 142 Tenn. 200, 217 S. W. 661. So where he rides in a stock or box-car. *Gardner v. New Haven &c. R. Co.*, 51 Conn. 143, 50 Am. Rep. 12; *Jenkins v. Chicago &c. R. Co.*, 41 Wis. 112; *Omaha &c. R. Co. v. Crow*, 47 Nebr. 84, 66 N. W. 21. But see *Florida &c. Co. v. Webster*, 25 Fla. 394, 5 So. 714. Or a construction train. *Rosenbaum v. St. Paul &c. R. Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. 653. Freight train is not required to have a water closet. *Rodgers v. Choctaw &c. R. Co.*, 76 Ark. 520, 89 S. W. 468, 469, 1 L. R. A. (N. S.) 1145, 113 Am. St. 102 (quoting text). But compare *Dallas &c. R. Co. v. Langston* (Tex. Civ. App.), 98 S. W. 425.

⁶⁰ *Reber v. Bond*, 38 Fed. 822; *Louisville &c. R. Co. v. Bisch*, 120 Ind. 549, 22 N. E. 662; *Harris v. Hannibal &c. R. Co.*, 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111, *Smith v. Richmond &c. R. Co.*, 99 N. Car. 241, 5 S. E. 896 (passenger sitting

on arm of seat); *Wallace v. Western &c. R. Co.*, 98 N. Car. 494, 4 S. E. 503, 2 Am. St. 346 (passenger standing in caboose and thrown down and injured by sudden jerk of the train); *Suttle v. Southern R. Co.*, 150 N. Car. 668, 64 S. E. 778; *Norfolk &c. R. Co. v. Ferguson* 79 Va. 241. See also *Krumm v. St. Louis &c. R. Co.*, 71 Ark. 590, 76 S. W. 1075; *Yazoo &c. Valley R. Co. v. Humphrys*, 83 Miss. 721, 16 So. 154. But compare *Lusby v. Atchison &c. R. Co.*, 41 Fed. 181; *Chicago &c. R. Co. v. Carpenter*, 56 Fed. 451; *St. Louis &c. R. Co. v. Morgan*, 44 Tex. Civ. App. 155, 98 S. W. 408. In this last case it is said: "We do not think the simple fact that a position in the cupola of a car would be more dangerous than one on the floor of such car would, of itself, render the act of appellee in taking the former position contributory negligence as matter of law; but it would be a question of fact to be determined by the jury, after considering all of the circumstances in evidence relating to such act. *Bonner & Eddy, Receivers v. Glenn*, 79 Tex. 531, 15 S. W. 572; *Gulf &c. R. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W.

denly and negligently started immediately after it has stopped for passengers to alight and a passenger who has arisen from his seat for the purpose of alighting is thrown down and injured by the violent jerk he is entitled to recover the same as if the train were a regular passenger train.⁶¹ Railroad companies

653; *Mexican R. Co. v. Lauricella* (Tex.), 26 S. W. 301; *International R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 191; *St. Louis &c. R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 881." But riding in cupola or the like has been held negligence in many cases. *St. Louis &c. R. Co. v. Gilbreath*, 87 Ark. 572, 113 S. W. 200; *Central of Ga. R. Co. v. Clay*, 3 Ga. App. 286, 59 S. E. 842; *Reed v. Yazoo &c. R. Co.*, 94 Miss. 639, 47 So. 670; *McLean v. Atlantic &c. R. Co.*, 81 S. Car. 100, 61 S. E. 800, 128 Am. St. 892, 18 L. R. A. (N. S.) 763. In *Farrell v. Great Northern R. Co.*, 100 Minn. 361, 111 N. W. 388 a passenger on a freight train was told by the conductor that he would have time at the next stopping place to go from the car in which he was riding for his own pleasure to the car carrying his live stock. When the train slackened speed to stop at a junction across the river from such place, plaintiff, hearing a whistle, jumped off. While he was getting into his own car a sudden lurch threw him off and hurt him. He relied only on what the conductor told him, and paid no attention to the surroundings. Although he knew he was on a high hill near a cut and on a grade, the buildings at the place at which he was told the train would stop were in plain sight, and the place

at which he alighted showed that it was wholly unused for the departure or arrival of passengers. It was held (1) that his contributory negligence precluded a recovery of damages; (2) that he was not within the exceptions to the ordinary rule requiring the exercise of diligence on the part of departing passengers to take heed of the physical surroundings in cases which present the alternative of getting off where the train stops or of being carried beyond the passenger's destination, or which involved emergency or peril.

⁶¹ *Chicago &c. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313. See also *Lusby v. Atchison &c. R. Co.*, 41 Fed. 181; *Doran v. Chicago &c. Ry. Co.*, 128 Minn. 193, 150 N. W. 800 (question as to whether train was negligently started while plaintiff was getting on for jury). And see where seats are all taken. *St. Louis &c. R. Co. v. Johnson*, 111 Ark. 640, 163 S. W. 1157; *Tickell v. St. Louis &c. R. Co.*, 149 Mo. App. 648, 129 S. W. 727; *Allison v. St. Louis &c. R. Co.*, 157 Mo. App. 72, 137 S. W. 896. In *Hardin v. Ft. Worth &c. R. Co.* (Tex. Civ. App.), 100 S. W. 995, when the plaintiff was injured while a passenger on a freight car, held that it was error to instruct that defendant was not

which run both passenger and freight trains reasonably sufficient for the accommodation of both kinds of traffic may lawfully refuse to carry passengers on freight trains or prescribe reasonable conditions on which they may ride on such trains.⁶² It has been held that one who offers himself as a passenger upon a freight train, having no knowledge of the rules of the company prohibiting the transportation of passengers upon such trains, is, when accepted as such by the conductor entitled to be treated and protected as a passenger even though he pays no fare.⁶³ But he

liable for injuries done plaintiff by an unusually violent coupling, while switching, if none of its servants knew or had notice of plaintiff's presence in the car, since this want of knowledge or notice may have been due to their negligence, and the question whether a prudent person would have made an unusually violent coupling without ascertaining if plaintiff was in the car, was for the jury. It was also held that the fact that he was traveling on the train under a contract that he would not be in any freight car while switching was being done would not bar a recovery, unless his negligence in not being aware that switching was being done contributed to the accident. See also *Ramsey v. McKey*, 44 Okla. 774, 146 Pac. 210.

⁶² *Hobbs v. Texas &c. R. Co.*, 49 Ark. 357, 5 S. W. 586; *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404, 27 Am. & Eng. R. Cas. 246; *Western &c. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842; *Arnold v. Illinois &c. R. Co.*, 83 Ill. 273, 25 Am. Rep. 383; *Falkner v. Ohio &c. R. Co.*, 55 Ind. 369; *Southern Kans. R. Co. v. Hinsdale*, 38 Kans. 507,

16 Pac. 937, 34 Am. & Eng. R. Co. 256; *Thomas v. Chicago &c. R. Co.*, 72 Mich. 355, 40 N. W. 463, 37 Am. & Eng. R. Cas. 108; *Randall v. Chicago &c. R. Co.*, 113 Mich. 115, 71 N. W. 450, 38 L. R. A. 666; *Dunn v. Grand Trunk R. Co.*, 58 Mo. 187, 4 Am. Rep. 267; *Burlington &c. R. Co. v. Rose*, 11 Nebr. 177, 8 N. W. 433; *Eikins v. Boston &c. R. Co.*, 23 N. H. 275; *Eaton v. Delaware &c. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140. So they may run a "pay train" and exclude passengers therefrom. *Southwestern &c. R. Co. v. Singleton*, 66 Ga. 252.

⁶³ See *Whitehead v. St. Louis &c. R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409, 39 Am. & Eng. R. Cas. 410; *Keith v. Pinkham*, 43 Maine 501, 69 Am. Dec. 80; *Dunn v. Grand Trunk R. Co.*, 58 Maine 187, 4 Am. Rep. 267; *Jacobus v. St. Paul &c. R. Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Gradin v. St. Paul &c. R. Co.*, 30 Minn. 217, 14 N. W. 881; *McGee v. Missouri &c. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. 706; *Wagner v. Missouri Pac. R.*

has no right to rely upon the invitation of the brakeman or other subordinate employe when a conductor is in charge,⁶⁴ nor upon that of the conductor himself when he knows of the rule forbidding passengers to ride on freight trains.⁶⁵ Indeed, we are inclined to think that the better rule is that he must take notice that passengers are not usually carried upon freight trains where no provision is made for them and that the conductor has no implied authority to invite persons to ride on such a train or to receive them as passengers thereon.⁶⁶

Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156n; McDonald v. St. Louis &c. R. Co., 165 Mo. App. 75, 146 S. W. 83; Everett v. Oregon &c. R. Co., 9 Utah 340, 34 Pac. 289; Lucas v. Milwaukee &c. R. Co., 33 Wis. 41, 14 Am. R. 735. See also Simmons v. Oregon R. &c. Co., 41 Ore. 151, 69 Pac. 440, 1022.

⁶⁴ Chicago &c. R. Co. v. Field, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. 444; Reary v. Louisville &c. R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. 497; Candiff v. Louisville &c. R. Co., 42 La. Ann. 477, 7 So. 601; McNamara v. Great Northern R. Co., 61 Minn. 296, 63 N. W. 726; Woolsey v. Chicago &c. R. Co., 39 Nebr. 798, 58 N. W. 444; Goodney v. International &c. R. Co., 51 Tex. Civ. App. 596, 113 S. W. 171; ante, § 2391.

⁶⁵ St. Louis &c. R. Co. v. White (Tex.), 34 S. W. 1042; Gulf &c. R. Co. v. Campbell, 76 Tex. 174, 13 S. W. 19; Toledo &c. R. Co. v. Brooks, 81 Ill. 245; Louisville &c. R. Co. v. Hailey, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549; McVeety v. St. Paul &c. R. Co., 45 Minn. 268, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. 728. But it

has been held otherwise where he does not know of the rule and the company knew, or should have known that it was habitually violated. St. Louis &c. R. Co. v. Morgan, 44 Tex. Civ. App. 155, 98 S. W. 408.

⁶⁶ See ante, §§ 2387, 2391; Bergen v. Central Vt. R. Co., 82 Conn. 574, 74 Atl. 937; Powers v. Boston &c. R. Co., 153 Mass. 188, 26 N. E. 446; Eaton v. Delaware &c. R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Texas &c. R. Co. v. Black, 87 Tex. 160, 27 S. W. 118; San Antonio &c. R. Co. v. Lynch, 8 Tex. Civ. App. 513, 28 S. W. 252. See also Huston &c. R. Co. v. Bolling, 59 Ark. 395, 27 S. W. 492, 27 L. R. A. 190n, 43 Am. St. 38; Atchison &c. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185; Smith v. Louisville &c. R. Co., 124 Ind. 394, 24 N. E. 753; Stalcup v. Louisville &c. R. Co., 16 Ind. App. 584, 45 N. E. 802; Kansas City &c. R. Co. v. Berry, 53 Kans. 112, 36 Pac. 53, 42 Am. St. 278; Hoar v. Maine Cent. R. Co., 70 Maine 65, 35 Am. Rep. 299; Powell v. East Tenn. &c. R. Co. (Miss.), 8 So. 738; Murch v. Concord &c. R. Co., 29 N. H. 9, 61 Am. Dec. 631.

§ 2477 (1630). **Injuries to passengers riding on platforms and steps.**—In the second case cited in support of the last proposition stated in the preceding section it is held that standing on the lower step of a rapidly moving car is negligence per se. We think there can be no doubt that this is the law,⁶⁷ however it may be as to standing on the platform when the car is crowded, or as to standing on the steps of a street car. One so doing at least takes the risks of accidents not caused by negligence of the company even in case of a tramway or street car.⁶⁸ It is also negligence, under ordinary circumstances, to stand upon the platform of a rapidly moving commercial railroad car.⁶⁹

⁶⁷ "The steps must be regarded as a more dangerous place for a passenger to occupy while the car is in motion than the platform." *Fisher v. West Virginia &c. R. Co.*, 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758. See also *Scheiber v. Chicago &c. R. Co.*, 61 Minn. 499, 63 N. W. 1034; *Patterson v. Central R. &c. Co.*, 85 Ga. 653, 11 S. E. 872; *Hoehn v. Chicago &c. R. Co.*, 152 Ill. 223, 38 N. E. 549; *Cleveland &c. R. Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141; *Cincinnati &c. R. Co. v. McClain*, 148 Ind. 188, 44 N. E. 306; *Fletcher v. Railroad*, 187 Mass. 463, 73 N. E. 552, 105 Am. St. 414; *Ashbrook v. Frederick Ave. R. Co.*, 18 Mo. App. 290; *Francisco v. Troy &c. R. Co.*, 78 Hun 3, 29 N. Y. S. 247; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495; *Rose v. Northern Pac. R. Co.*, 81 Wash 684, 143 Pac. 145, L. R. A. 1915B, 166n. But compare *Baltimore &c. R. Co. v. Huskins*, 183 Ind. 614, 109 N. E. 764.

⁶⁸ *Martin v. Dublin &c. Co.*, (1909) 2 Ir. R. 13; *McGann v. Bos-*

ton El. R. Co., 199 Mass. 446, 85 N. E. 570, 18 L. R. A. (N. S.) 505, 127 Am. St. 509.

⁶⁹ *Secor v. Toledo &c. R. Co.*, 10 Fed. 15; *Chicago &c. R. Co. v. Mohaupt*, 162 Fed. 665, 18 L. R. A. (N. S.) 760; *Alabama &c. R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *Clanton v. Southern R. Co.*, 165 Ala. 485, 51 So. 616, 27 L. R. A. (N. S.) 253; *Memphis &c. R. Co. v. Salinger*, 46 Ark. 528; *Blodgett v. Bartlett*, 50 Ga. 353; *Patterson v. Central &c. R. Co.*, 85 Ga. 653, 11 S. E. 872; *Quinn v. Illinois Cent. R. Co.*, 51 Ill. 495; *Rockford &c. Co. v. Coultas*, 67 Ill. 398; *Illinois Cent. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255; *Bemiss v. New Orleans &c. R. Co.*, 47 La. Ann. 1671, 18 So. 711; *President &c v. Cason*, 72 Md. 377, 20 Atl. 113; *Hickey v. Boston &c. R. Co.*, 14 Allen (Mass.) 429; *Fletcher v. Boston &c. R. Co.*, 187 Mass. 463, 73 N. E. 552, 105 Am. St. 414; *Benedict v. Minneapolis R. Co.*, 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. 345; *Smotherman v. St. Louis &c. R. Co.*, 29 Mo. App. 265; *Malcom v. Rich-*

But there may be exceptional cases in which this is not true, and a number of the courts have held that standing upon the platform is not contributory negligence where the car is so crowded that the passenger is unable to get a seat therein, although there is room for him to stand inside the car.⁷⁰ This seems to us,

mond &c. R. Co., 106 N. Car. 63, 11 S. E. 187; Railroad Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637n; Meyere v. Nashville &c. R. Co., 110 Tenn. 166, 72 S. W. 114. "The danger of standing on the narrow platform of a passenger car, while the car is moving with the usual speed of railroad trains, is most conspicuous . . . The knowingly incurring such an imminent, visible peril, the choosing to ride in such a conspicuously dangerous place, must be held by all reasonable people to be reckless in a high degree. The danger, the chance of injury, is visibly imminent and great. No man of reason can fail to apprehend it. No prudent man would fail to avoid it. There seems to us no room for debate or question upon this proposition." Goodwin v. Boston &c. R. Co., 84 Maine 203, 24 Atl. 816. See also McLean v. Atlantic &c. R. Co., 81 S. Car. 100, 61 S. E. 900, 1071, 18 L. R. A. (N. S.) 763, 128 Am. St. 982, and note; Miller v. Chicago &c. R. Co., 135 Wis. 247, 115 N. W. 794, 17 L. R. A. (N. S.) 158, and note 128 Am. St. 1021; Norvell v. Kanawha &c. Ry. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A. (N. S.) 325 (and note stating rule and exceptions). But compare Birmingham R. &c. Co. v. Yates, 169 Ala. 381, 53 So. 915; Myrick v. Macon &c. R. Co., 6

Ga. App. 38, 64 S. E. 296; Brice v. Southern R. Co., 85 S. Car. 216, 67 S. E. 243, 27 L. R. A. (N. S.) 768.

⁷⁰ Texas &c. R. Co. v. Lacey, 185 Fed. 225; Chicago &c. R. Co. v. Lindhal, 102 Ark. 533, 145 S. W. 191, Ann. Cas. 1914A, 561 and note; Lynn v. Southern Pac. Co. 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; Morgan v. Lake Shore &c. R. Co., 138 Mich. 626, 101 N. W. 836 (but two of the five members of the court dissented, and there is a strong dissenting opinion reviewing authorities and citing text, and it also appeared that the plaintiff was faint and went out to get fresh air); Willis v. Long Island R. Co., 34 N. Y. 670; Werle v. Long Island R. Co., 98 N. Y. 650. See also International &c. R. Co. v. Welsh (Tex.), 24 S. W. 854; Thomas v. San Pedro &c. R. Co., 170 Fed. 129; Southern R. Co. v. Nappier, 138 Ga. 31, 74 S. E. 778; Lobner v. Metropolitan St. R. Co., 79 Kans. 811, 101 Pac. 463, 21 L. R. A. (N. S.) 872 (street car); Yazoo &c. R. Co. v. Byrd, 89 Miss. 308, 42 So. 286; Trussell v. Morris County Trac. Co., 79 N. J. L. 533, 77 Atl. 535, 30 L. R. A. (N. S.) 351 (electric street railway car); Brice v. Southern R. Co., 85 S. Car. 216, 67 S. E. 243, 27 L. R. A. (N. S.) 768; Norvell v. Kanawha &c. Ry. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A. (N. S.) 325; Ward v. Chi-

however, to be contrary to principle and, perhaps, to the real weight of authority.⁷¹ The failure to furnish him with a seat may be of importance in determining the question of negligence or breach of duty on the part of the carrier, but we are unable to see its bearing upon the question of contributory negligence,

cago &c. R. Co., 102 Wis. 215, 78 N. W. 442. But it seems that in the California case there was not even standing room inside and the New York cases have been criticised by text writers. See also *Cleveland &c. R. Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141. Some of the cases, however, make the same distinction in regard to riding on the platforms of street cars and hold that it is not negligence per se where there is no room inside. In *Chicago &c. R. Co. v. Dumser*, 161 Ill. 190, 43 N. E. 698, it was held that one who had an excursion ticket, good only on a certain train, was not necessarily guilty of contributory negligence, as a matter of law, in standing on the platform of that train, when he did not know at the time he came to take the train that it was so crowded that he could not get inside. See also to same effect *Central R. Co. of Ga. v. Brown*, 165 Ala. 493, 51 So. 565; *Trumbull v. Donahue*, 18 Colo. App. 460, 72 Pac. 684; *Norvell v. Kanawha &c. R. Co.*, 67 W. Va. 467, 68 S. E. 288, 29 L. R. A. (N. S.) 325n; *Pennsylvania Co. v. Paul*, 126 Fed. 157. In *Baltimore &c. R. Co. v. Meyers*, 62 Fed. 367, it was held that the Indiana statute relieving railroad companies from liability to passenger on the platform when no-

tice prohibiting them from riding there have been properly posted does not apply to passengers who go upon the platform at the invitation of the brakeman for the purpose of alighting. And, as already shown, it may be for the jury to determine whether there is contributory negligence in going on to a platform preparatory to alight when the train is about to stop at a station, although it has not yet come to a stop. See ante, § 2471; *Lake Erie &c. R. Co. v. Cotton*, 45 Ind. App. 580, 91 N. E. 25; *Houston &c. R. Co. v. Harris*, 103 Tex. 422, 128 S. W. 897.

⁷¹ *Chicago &c. R. Co. v. Carroll*, 5 Bradw., (Ill.) 201; *Quinn v. Illinois Cent. R. Co.*, 51 Ill. 495; *Cleveland &c. R. Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141; *Rolette v. Great Northern R. Co.*, 91 Minn. 16, 97 N. W. 431, 1 Ann. Cas. 313, and note; *Camden &c. R. Co. v. Hoosey*, 99 Pa. St. 492, 44 Am. Rep. 120; *Meyere v. Nashville &c. R. Co.* 110 Tenn. 166, 72 S. W. 114 (quoting text); *Worthington v. Central Vt. &c. R. Co.*, 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326. *Goodwin v. Boston &c. R. Co.*, 84 Maine 203, 24 Atl. 816. It appeared in the last case cited that there was standing-room inside the car, but that the seats were all occupied; that the crowd and

where there is plenty of room to stand inside the car. In such a case there is no necessity for standing on the platform, and the failure to furnish a seat does not make it any safer or any the less negligent to stand on the platform, and is not the proximate cause of the injury.⁷² In the case of ordinary street cars the danger is obviously much less, such cars are frequently overcrowded, and custom acquiesced in by the company seems to sanction standing on the platform, so there seems to be good reason for holding as it is generally held, that it is not necessarily negligence per se to stand on the platform of a street car.⁷³ So, perhaps, in view of this fact and the general custom

heat made it very uncomfortable inside the car, and that the conductor took the plaintiff's ticket while the latter was standing on the platform and made no objection to his standing there. "All these circumstances," said the court, "may have made it more agreeable to ride on the platform in the open air than to stand inside the hot, crowded car, but they did not in the least lessen the danger nor the appearance of danger in so doing. That Goodwin was not ordered off the platform could not have led him to believe it was safe to ride there. He needed no warning of such danger. He knew the place for passengers was inside the car. The discomfort of the hot and crowded car did not make it any more prudent for him to ride outside on the platform. Within the car, with all its discomforts, was safety. Without the car was obvious peril. The safe path is often more narrow and difficult than the way which leads to destruction, but no man is excused for that reason for seeking the one and

avoiding the other." See also *Alabama &c. R. Co. v. Gilbert*, 6 Ala. App. 372, 60 So. 542; *Shelton v. Louisville &c. R. Co.*, 19 Ky. L. 215, 39 S. W. 842; *McDade v. Philadelphia &c. Transit Co.*, 215 Pa. St. 105, 64 Atl. 327, 328; *Aiken v. Frankford &c. R. Co.*, 142 Pa. St. 47, 21 Atl. 781; *Kirchner v. Oil City R. Co.*, 210 Pa. St. 45, 59 Atl. 270. In some of the cases cited to the opposite effect there was in fact room to stand in the car although not to sit and in some of the others it did not clearly appear whether there was room to stand in the car or not. For this reason it is difficult to tell upon which side of the precise question is the weight of authority.

⁷² See *Meyere v. Nashville &c. R. Co.*, 110 Tenn. 166, 72 S. W. 114, 115 (quoting text).

⁷³ *Highland Ave. &c. R. Co. v. Donovan*, 94 Ala. 299, 10 So. 139; *Augusta &c. R. Co. v. Renz*, 55 Ga. 126; *Marion St. R. Co. v. Shaffer*, 9 Ind. App. 486, 36 N. E. 861; *Maguire v. Middlesex &c. R. Co.*, 115 Mass. 239; *Upham v. Detroit City R. Co.*, 85 Mich. 12, 48

it is not necessarily negligence to stand upon the steps or foot-boards of crowded street cars.⁷⁴ But to stand on a coupling pin

N. W. 199, 12 L. R. A. 129n; *Brusch v. St. Paul City R. Co.*, 52 Minn. 512, 55 N. W. 57; *Burns v. Bellefontaine R. Co.*, 50 Mo. 139; *Nolan v. Brooklyn City & R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345; *Thirteenth St. R. Co. v. Boudrou*, 92 Pa. St. 475, 37 Am. Rep. 707; *Germantown &c. R. Co. v. Walling*, 97 Pa. St. 55, 39 Am. Rep. 796; *Muldoon v. Seattle &c. R. Co.*, 7 Wash. 528; 35 Pac. 422, 38 Am. St. 901. See also *Oliver v. Ft. Smith &c. Trac. Co.*, 89 Ark. 222, 116 S. W. 204, 131 Am. St. 86; *Lobner v. Metropolitan &c. St. R. Co.*, 79 Kans. 811, 101 Pac. 463, 21 L. R. A. (N. S.) 872, and note; *Blair v. Lewiston &c. St. R. Co.*, 110 Maine 235, 85 Atl. 792; *Eldredge v. Boston El. R. Co.*, 203 Mass. 582, 89 N. E. 1041; *Kalis v. Detroit United Ry.*, 155 Mich. 485, 119 N. W. 906. No distinction seems to be made on account of the motive power, but in most of these cases stress is laid upon the fact that the cars were crowded, and, in the absence of such a showing, some of the courts and text writers think the better rule is that standing on the platform is negligence per se. This is certainly true if the passenger is knowingly violating a rule of the company. 3 *Thomp. Neg.* (2d. ed.) § 3472; *Andrews v. Capitol &c. R. Co.*, 2 Mack. (D. C.) 137, 47 Am. Rep. 266; *Twiss v. Boston El. R. Co.*, 208 Mass. 108, 94 N. E. 253, 32 L. R. A. (N. S.) 728; *Willmott v. Corrigan &c. Co.*, 106 Mo. 535, 17 S. W. 490; *Graville v. Manhat-*

tan R. Co., 105 N. Y. 525, 12 N. E. 51, 59 Am. Rep. 516; *Connolly v. Knickerbocker Ice. Co.*, 114 N. Y. 104, 21 N. E. 101, 11 Am. St. 617; *Aiken v. Frankford &c. R. Co.*, 142 Pa. St. 47, 21 Atl. 781. See also *Rights of Street Car Platform Passengers*, 20 Cent. L. J. 104; *Cunningham v. Kentucky Trac. Co.*, 156 Ky. 30, 160 S. W. 767, 49 L. R. A. (N. S.) 135n; *Pike v. Boston Elevated R. Co.*, 192 Mass. 426, 78 N. E. 497; *Gaffney v. Trac. Co.* 211 Pa. St. 91, 6 Atl. 488. See for cases on both sides, notes in 49 L. R. A. (N. S.) 135; in 12 L. R. A. (N. S.) 831, and in 10 L. R. A. (N. S.) 352.

⁷⁴ *Oliver v. Ft. Smith &c. Trac. Co.*, 89 Ark. 222, 116 S. W. 204, 131 Am. St. 86; *Topeka City R. Co. v. Higgs*, 38 Kans. 375, 15 Pac. 667, 5 Am. St. 754; *Pray v. Omaha St. R. Co.*, 44 Nebr. 167, 62 N. W. 447, 48 Am. St. 717; *McGrath v. Brooklyn &c. R. Co.*, 87 Hun 310, 34 N. Y. S. 365; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495; *Wood v. Brooklyn City R. Co.*, 5 App. Div. 592, 38 N. Y. S. 1077; *Elliott v. Newport St. R. Co.*, 18 R. I. 707, 31 Atl. 694, 23 L. R. A. 208; *Cogswell v. West St. &c. R. Co.*, 5 Wash. 46, 31 Pac. 411. See also *Lapointe v. Middlesex R. Co.*, 144 Mass. 18, 10 N. E. 497; *Willmott v. Corrigan &c. R. Co.* (Mo.), 16 S. W. 500; *Meesel v. Lynn &c. R. Co.*, 8 Allen (Mass.) 234; *Wilde v. Lynn &c. R. Co.*, 163 Mass. 533, 40 N. E. 851; *Previsich v. Butte Elec. R. Co.*, 47 Mont. 170, 131 Pac.

or bumpers,⁷⁵ or to sit on the driver's high stool with feet elevated, or the like, so as to easily be thrown over backward by a jerk or rough motion of the street car,⁷⁶ is negligence per se.

§ 2478 (1630a). Passenger on platform—When company liable.—In accordance with what is said in the last preceding section, we think that a passenger who voluntarily and unnecessarily stands on the platform of a rapidly moving commercial railroad car is prima facie guilty of negligence or assumes the risk, and that this may usually be said to be true as matter of law, but there are exceptional cases in which one who is on the platform may not be guilty of negligence as matter of law, and in which the question may be for the jury. Cases in which the company habitually carries passengers on the platform and receives compensation therefor, and there is no room inside

25. But compare *Alabama City &c. R. Co. v. Ventress*, 171 Ala. 285, 54 So. 652 (when there was room inside); *Oliver v. Ft. Smith Light & Trac. Co.*, 89 Ark. 222, 116 S. W. 204, 131 Am. St. 86; *Cunningham v. Kentucky Trac. Co.*, 156 Ky. 30, 160 S. W. 767, 49 L. R. A. (N. S.) 135n (where there was room inside); *Francisco v. Troy &c. R. Co.*, 78 Hun 13, 29 N. Y. S. 247; *Craighead v. Brooklyn City R. Co.*, 123 N. Y. 391, 25 N. E. 387; *Schoenfeld v. Milwaukee City R. Co.*, 74 Wis. 433, 43 N. W. 162. See ante, § 1552. In *Ward v. International R. Co.*, 206 N. Y. 83, 99 N. E. 262, Ann. Cas. 1914A, 1170, this held to be the rule where there are no vacant seats but not so if there is a vacant seat which the passenger could find and occupy if he exercised reasonable and proper vigilance and effort. In most of the recent cases as

shown in the note to such case, as last reported, the question of contributory negligence in standing on a running board has been left to the jury.

⁷⁵ *Bard v. Pennsylvania &c. Co.*, 176 Pa. St. 97, 34 Atl. 953. See also *Feldheim v. Brooklyn &c. R. Co.*, 122 App. Div. 883, 107 N. Y. S. 413. But compare *Chicago City R. Co. v. Schmidt*, 217 Ill. 396, 75 N. E. 383. Or to sit in the driving bar. *Downie v. Hendrie*, 46 Mich. 498, 9 N. W. 828, 41 Am. Rep. 177.

⁷⁶ *Mann v. Philadelphia &c. Co.*, 175 Pa. St. 122, 34 Atl. 572. See also *Wills v. Lynn &c. R. Co.*, 129 Mass. 351; *Randall v. Frankford &c. R. Co.*, 139 Pa. St. 464, 22 Atl. 639; *Hill v. Birmingham Union R. Co.*, 100 Ala. 447, 14 So. 201; *Butler v. Pittsburgh &c. R. Co.*, 139 Pa. St. 195, 21 Atl. 500; *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331.

even to stand, are usually regarded as of this exceptional class.⁷⁷ So, the conduct and directions of the company's agent and authorized employes may make the case one for the jury.⁷⁸ A passenger in going from one car to another in search of a seat, under the direction of the conductor, is not necessarily negligent,⁷⁹ and we presume that, where the train is vestibuled, standing on the platform within the vestibule, when no seat can be obtained, is not necessarily negligence per se. In such a case we suppose the question of contributory negligence is,

⁷⁷ Trumbull v. Erickson, 97 Fed. 891; Pennsylvania Co. v. Paul, 126 Fed. 157 (on steps); Chicago &c. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406; Chicago &c. R. Co. v. Newell, 212 Ill. 332, 72 N. E. 416; Chesapeake &c. R. Co. v. Long, 100 Ky. 221, 40 S. W. 451; Jackson v. Natchez &c. R. Co., 114 La. 981, 38 So. 701, 70 L. R. A. 294, 108 Am. St. 366; Benedict v. Minneapolis &c. R. Co., 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. 345; Graham v. McNeill, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. 121. See also Lake Shore &c. R. Co. v. Kelsey, 180 Ill. 530, 54 N. E. 608; St. Louis &c. R. Co. v. Ball, 28 Tex. Civ. App. 287, 66 S. W. 879. Compare also Capuono v. Rhode Island Co. (R. I.), 102 Atl. 721. But he must exercise care proportionate to the increased danger. Magrane v. St. Louis &c. R. Co., 83 Mo. 119, 81 S. W. 1158.

⁷⁸ Railroad Co. v. Meyers, 62 Fed. 367; Southern R. Co. v. Roebuck, 132 Ala. 412, 31 So. 611; Prescott &c. R. Co. v. Smith, 70 Ark. 179, 67 S. W. 865; Augusta &c. R. Co. v. Snider, 118 Ga. 146, 44 S. E. 1005; Louisville &c. R. Co. v. Head, 22 Ky. L. 863, 59 S. W. 23;

Olivier v. Louisville &c. R. Co., 43 La. Ann. 804, 9 So. 431; Choate v. Railroad Co., 67 Mo. App. 105. See also Willmott v. Corrigan R. Co., 106 Mo. 535, 17 S. W. 490; Nolan v. Railroad Co., 87 N. Y. 63, 41 Am. Rep. 345; Southern R. Co. v. Smith, 95 Va. 187, 28 S. E. 173; Dennis v. Pittsburgh &c. R. Co., 165 Pa. St. 624, 31 Atl. 52; Graham v. Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917; Trumbull v. Donahue, 18 Colo. App. 460, 72 Pac. 684. Passenger may be excused for going on platform to escape what reasonably appears to him as impending danger from negligence of company. Prescott &c. R. Co. v. Smith, 70 Ark. 179, 67 S. W. 865; Mitchell v. Southern &c. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130. See also Fox v. Michigan R. Co., 138 Mich. 433, 101 N. W. 624, 68 L. R. A. 336, ante note 70.

⁷⁹ Cotchett v. Savannah &c. R. Co., 84 Ga. 687, 11 S. E. 553; Hannibal &c. R. Co. v. Martin, 111 Ill. 219; Lent v. New York &c. R. Co., 120 N. Y. 467, 24 N. E. 653; Louisville &c. R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; Atchison &c. R. Co. v. McCandliss, 33 Kans. 366; Dewire v. Boston &c. R. Co.,

ordinarily, for the jury to determine as a question of fact.⁸⁰ But even if a passenger is rightfully upon the platform, under such circumstances that he is not necessarily guilty of contributory negligence as matter of law, it does not necessarily follow, although it may do so, that the company is negligent or that he is entitled to recover because he is injured by the jerking or oscillation of the train. It is matter of common knowledge, of which we think the courts ought to take judicial notice, that more or less of an oscillating or jerking motion is necessarily incident to the running of trains.⁸¹ Ordinarily, however, an

148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166; *Cleveland &c. R. Co. v. Manson*, 30 Ohio St. 451. See also *Chesapeake &c. R. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833; *Railway Co. v. Leftwich*, 117 Fed. 127; *McIntyre v. Railroad*, 37 N. Y. 287; *Boston &c. R. Co. v. Stockwell*, 146 Fed. 505. See also *Central of Ga. R. Co. v. Carleton*, 163 Ala. 62, 51 So. 27. But it has been held otherwise if the passenger is going from one car to another merely for his own convenience or pleasure. *Stewart v. Boston &c. R. Co.*, 146 Mass. 605, 16 N. E. 466; *McDaniel v. Hiland &c. R. Co.*, 90 Ala. 64, 8 So. 41; *State v. Maine Cent. R. Co.*, 81 Maine 84, 16 Atl. 368; *Snowden v. Boston &c. R. Co.*, 151 Mass. 220, 24 N. E. 40; *Dougherty v. Yazoo R. Co.*, 84 Miss. 502, 36 So. 699; *Piper v. New York R. Co.*, 156 N. Y. 224, 50 N. E. 851, 41 L. R. A. 724, 66 Am. St. 560; *Hunter v. Atlantic &c. R. Co.* 72 S. Car. 336, 51 S. E. 860, 110 Am. St. 605. But see *Burt v. Douglas &c. R. Co.*, 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479; *St. Louis R. Co. v. Pollock*, 93 Ark. 240, 123 S. W. 790; *Davis v. Louisville &c. R. Co.*, 69 Miss. 136, 10 So. 450.

⁸⁰ See *Graham v. McNeill*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. 121; *St. Louis &c. R. Co. v. Oliver*, 92 Ark. 432, 123 S. W. 662; *Pittsburgh &c. R. Co., v. Schepman* (Ind. App.), 82 N. E. 998; *Rivers v. Pennsylvania R. Co.*, 83 N. J. L. 513, 83 Atl. 883; *Costikyan v. Rome &c. R. Co.*, 35 N. Y. St. 163, 12 N. Y. S. 683.

⁸¹ *Chicago &c. R. Co. v. Hazard*, 26 Ill. 373; *Rockford &c. R. Co. v. Coultas*, 67 Ill. 398; *Illinois Cent. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255; *Bemiss v. New Orleans &c. R. Co.*, 47 La. 1671, 18 So. 711, 713; *President &c. v. Cason*, 72 Md. 377, 20 Atl. 113; *Hite v. Metropolitan &c. R. Co.*, 130 Mo. 132, 31 S. W. 262, 51 Am. St. 555. See also *Houston &c. R. Co. v. Johnson* (Tex.), 103 S. W. 239; *Walker v. Canadian Pac. R. Co.*, 15 Ont. W. R. 833; *Siner v. Great Western R. Co.*, L. R. 4 Exch. 117; *Dublin &c. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155. So, the mere failure to provide a seat is not of itself, conclusive proof of negligence. *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960, 29 L. ed. 215; *Houston &c. R. Co. v. Bryant*, 31 Tex. Civ.

injury caused by a sudden and unnecessary jerk of the car will make a *prima facie* case, so far as the question of negligence on the part of the company is concerned. So the company is liable for injuries willfully caused by it to a passenger upon the platform, notwithstanding he is negligent in standing there, and there are also cases in which it may be liable because the act of the passenger in standing on the platform does not in fact proximately contribute to his injury.⁸² This phase of the subject, however, will be discussed in a subsequent section.

§ 2479 (1631). Injuries to passengers riding in baggage car.—A baggage car is “a known place of danger. In this respect it differs from the cow-catcher and platform only in degree. It is placed ahead of the passenger cars and next to or near the locomotive. In cases of collision it is the first car to give way to the shock and frequently is the only one seriously injured.”⁸³ The danger from falling baggage in case of collision, derailment or a sudden jerk is also obvious. Railroad companies generally, if not universally, provide in their rules and regulations that passengers shall not ride in the baggage car, and such a rule is not only reasonable, but is also one, we think, which a conductor or other employe has no authority to waive, and does not waive at least by mere silence, so as to bind the company under ordinary circumstances.⁸⁴ Even in the absence of proof of any

App. 483, 72 S. W. 585. But see *Pray v. Omaha St. R. Co.*, 44 Nebr. 167, 62 N. W. 447, 48 Am. St. 717; *International &c. R. Co. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732; *Graham v. McNeill*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. 121. See generally as to this duty. *Cave v. Seaboard &c. R. Co.*, 94 S. Car. 282, 77 S. E. 1017, L. R. A. 1915B, 915 and note.

⁸²*Zemp v. Willington &c. R. Co.*, 9 Rich. L.(S. Car.) 84, 64 Am. Dec. 763; *Kansas &c. R. Co. v. White*, 67 Fed. 481. See also *Dewire v.*

Boston &c. R. Co., 148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166n; *Treat v. Railroad*, 131 Mass. 371; *Marquette v. Railroad*, 33 Iowa 562; *Passenger Ry. Co. v. Boudrou*, 92 Pa. St. 475, 37 Am. Rep. 707.

⁸³*Paxson, J.*, in *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21, 27, 37 Am. Rep. 651, 1 Am. & Eng. R. Cas. 87. The carrier should not use a baggage car for the transportation of passengers. *Baltimore &c. R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313n.

⁸⁴*Reary v. Louisville &c. R. Co.*, 40 La. Ann. 32, 3 So. 390, 8 Am. St.

such regulation the fact is well known that the proper place for passengers is in the cars fitted up for that purpose and that a baggage car is a more dangerous place. A railroad company is not liable, therefore, for an injury to a passenger who voluntarily rides in a baggage car for his own pleasure or convenience, if riding therein was the proximate cause of his injury.⁸⁵ But if he would have been injured just the same had

497, 34 Ann. & Eng. R. Cas. 277; Hickey v. Boston &c. R. Co., 14 Allen (Mass.) 429; Bromley v. New York &c. R. Co., 193 Mass. 453, 79 N. E. 775; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651; 3 Thomp. Neg. (2d. ed.) § 2958; post § 2497. See also Florida R. Co. v. Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. 17; Yazoo &c. R. Co. v. Anderson, 77 Miss. 28, 25 So. 865. But see Jacobus v. St. Paul &c. R. Co., 20 Minn. 125, 18 Am. Rep. 360; Florida &c. R. Co. v. Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631n, 32 Am. St. 17; Dunn v. Grand Trunk R. Co., 58 Maine 187, 4 Am. Rep. 267, 10 Am. L. Reg. (N. S.) 615; Cody v. New York &c. R. Co., 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843; Carroll v. New York &c. R. Co., 1 Duer (N. Y.) 571; Washburn v. Nashville &c. R. Co., 40 Tenn. 638, 75 Am. Dec. 784; Watson v. Northern &c. R. Co., 24 U. C. Q. B. 98. A passenger who went into the baggage car to see the conductor on business connected with his journey was held not necessarily chargeable with negligence, and the case was held one for the jury, in Gardner v. Air Line Co., 97 Ga. 482, 25 S. E. 334, 54 Am. St. 435. See also Creason v. St. Louis &c. R. Co., 149 Mo.

App. 223, 130 S. W. 445. And where a passenger was directed to go there he was held not necessarily guilty of negligence. Baltimore &c. R. Co. v. Swann, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313. Postal clerk riding in postal car may recover although it may be more dangerous. Baltimore &c. R. Co. v. State, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. 454; Gulf &c. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345. See also Blake v. Burlington R. Co., 89 Iowa 8, 56 N. W. 405, 21 L. R. A. 559; McGoffin v. Missouri &c. R. Co., 102 Mo. 540, 15 S. W. 76, distinguishing Price v. Pennsylvania R. Co., 113 U. S. 218, 5 Sup. Ct. 427, 28 L. ed. 980. But it has been held that he assumes the risk of any danger from such jolts and jars as may be incident to the ordinary and usual handling and operation of mail cars. Farmer v. St. Louis &c. R. Co., 178 Mo. App. 579, 161 S. W. 327.

⁸⁵ Houston &c. R. Co. v. Clemmons, 55 Tex. 88, 40 Am. Rep. 799; Peoria &c. R. Co. v. Lane, 83 Ill. 448, and authorities cited in following note. See also New York &c. R. Co. v. Ball, 53 N. J. L. 283, 21 Atl. 1052; Railroad Co. v. Root, 49 Nebr. 900, 69 N. W. 397; Chesa-

he been riding where he belonged, in the passenger car, so that riding in the baggage car was not a proximate cause of his injury, it will not be considered such contributory negligence as to defeat his right, if any he has, to recover damages from the railroad company.⁸⁶

§ 2480 (1632). Injuries received by passengers riding in other dangerous and improper places.—It seems clear that travelers ought to know that they can not expect to be carried as passengers upon an engine,⁸⁷ nor upon a hand-car,⁸⁸ and that an employe has no implied authority, under ordinary circumstances,

peake &c. R. Co. v. Jordan, 25 Ky. L. 574, 76 S. W. 145. But compare Lane v. Choctaw &c. R. Co., 19 Okla. 324, 91 Pac. 883.

⁸⁶ Kansas &c. R. Co. v. White, 67 Fed. 481; Chicago &c. R. Co. v. Reilly, 40 Ill. App. 416; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208; Jones v. Chicago &c. R. Co., 43 Minn. 279, 45 N. W. 444; Fremont &c. R. Co. v. Root, 49 Nebr. 900, 69 N. W. 397; New York &c. R. Co. v. Ball, 53 N. J. L. 283, 21 Atl. 1052; Webster v. Rome &c. R. Co., 115 N. Y. 112, 21 N. E. 725; O'Donnell v. Allegheny &c. R. Co., 59 Pa. St. 239, 98 Am. Dec. 336. But see Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Thane v. Scranton Tract. Co., 191 Pa. St. 249, 43 Atl. 136, 71 Am. St. 767; Atchison &c. R. Co. v. Flinn, 24 Kans. 627.

⁸⁷ Waterbury v. New York &c. R. Co., 17 Fed. 671 and note; Chicago &c. R. Co. v. Michie, 83 Ill. 427; Liles v. Boston R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. 411; Stringer v. Missouri Pac. R. Co., 96 Mo. 299, 9 S. W. 905; Woolsey v. Chicago &c. R. Co., 39 Nebr. 798, 58 N. W. 444, 25 L. R. A. 79;

Radley v. Columbia R. Co., 44 Ore. 332, 75 Pac. 212; Robertson v. New York &c. R. Co., 22 Barb. (N. Y.) 91; Distler v. Long Island R. Co., 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; Kansas City &c. R. Co. v. Williford, 115 Tenn. 108, 88 S. W. 178; Texas &c. R. Co. v. Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086; Virginia &c. R. Co. v. Roach, 83 Va. 375, 5 S. E. 175; ante, § 2392. But see Nashville &c. R. Co. v. Erwin (Tenn.), 3 Am. & Eng. R. Cas. 465; Missouri R. R. Co. v. Avis, 41 Tex. Civ. App. 72, 91 S. W. 877, aff'd in 100 Tex. 33, 92 S. W. 424.

⁸⁸ Hoar v. Maine Central R. Co., 70 Maine 65, 35 Am. Rep. 299; Rathbone v. Oregon R. Co., 40 Ore. 225, 66 Pac. 909; International &c. R. Co. v. Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. 521; Gulf &c. R. Co. v. Dawkins, 77 Tex. 228, 13 S. W. 982; Graham v. Toronto &c. R. Co., 23 U. C. C. P. 541; see ante, § 2394. But compare International &c. R. Co. v. Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. 795; Pool v. Chicago &c. R. Co., 56 Wis. 227, 14 N. W. 46, 8 Am. & Eng. R. Cas. 360.

to receive them as passengers in such a place.⁸⁹ So, it would seem that to ride upon the cow-catcher or pilot of an engine, where it is a proximate cause of the injury, is clearly contributory negligence as matter of law.⁹⁰ These rules apply also to riding on the top of a car.⁹¹ But there are cases in which it has been held that a passenger is justified in riding on top of a car under the direction of the conductor.⁹² It seems to us, however, that such an act is so obviously dangerous that, except, perhaps, in case of an emergency, a passenger can not do so, even with the consent of the conductor, and still hold the company liable to him the same as if he had remained in the place provided for passengers.⁹³ This, we think, is true,

⁸⁹ *Illinois Cent. R. Co. v. Jennings*, 217 Ill. 140, 75 N. E. 457, 459 (citing text). For an exceptional case in which under the circumstances or emergency the employe had or might rightfully be supposed to have such authority, see *Lake Shore &c. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. 510. See also *Southern R. Co. v. Cullen*, 221 Ill. 392, 77 N. E. 470; *Radley v. Columbia &c. R. Co.*, 44 Ore. 332, 75 Pac. 212.

⁹⁰ *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Brown v. Scarborough*, 97 Ala. 316, 12 So. 289; *Doggett v. Illinois Cent. R. Co.*, 34 Iowa 284; *McGucken v. Western &c. R. Co.*, 77 Hun 69, 28 N. Y. S. 298; *Rucker v. Missouri Pac. R. Co.*, 61 Tex. 499, 21 Am. & Eng. R. Cas. 245; *Virginia &c. R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175; *Downey v. Chesapeake &c. R. Co.*, 28 W. Va. 732; 3 *Thomp. Neg.* (2d. ed.) § 2943. But see *Wabash &c. R. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791, 12 Am. & Eng. R. Cas. 166; *Hanson v. Mansfield R. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162.

⁹¹ *Kimball v. Palmer*, 80 Fed.

240; *Winters v. Baltimore &c. R. Co.*, 163 Fed. 106; *Little Rock &c. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Atchison &c. R. Co. v. Lindley*, 42 Kans. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. 515; *Ft. Scott &c. R. Co. v. Sparks*, 55 Kans. 288, 39 Pac. 1032; *Patterson v. Louisville &c. R. Co.*, 138 Ky. 648, 128 S. W. 1068, 30 L. R. A. (N. S.) 425n, 137 Am. St. 405; *Tuley v. Chicago &c. R. Co.*, 41 Mo. App. 432.

⁹² *Indianapolis &c. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Tibby v. Missouri Pac. R. Co.*, 82 Mo. 292; *Chicago &c. R. Co. v. Carpenter*, 56 Fed. 451; *Saunders v. Southern Pac. R. Co.*, 13 Utah 275, 44 Pac. 932. (Company held liable to drover struck by low bridge when compelled to walk on top of car in order to reach his stock and return to caboose.) See also *Nelson v. Southern R. Co.*, 15 Utah 325, 49 Pac. 644, 18 Utah 244, 55 Pac. 364; *Railroad Co. v. Thomas*, 60 Fed. 379.

⁹³ See *St. Louis &c. R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525; *Ft. Scott &c. R. Co. v.*

not only because such conduct would, ordinarily at least, be negligent, and because the traveler should be deemed to have assumed the increased risks of his hazardous position, but also because he must know that a conductor, under ordinary circumstances, can have no power to authorize passengers to ride on the engine or on top of cars.⁹⁴ The company may, of course, be liable to one who is invited or directed to take such a position, or even to one who is clearly a trespasser, for willfully injuring him, and there may be cases in which it will also be liable for negligently injuring him after discovering his danger, but it is not, we think, liable to him as a passenger; that is, he can not insist upon that high degree of care and comparative immunity from injury to which a passenger in his proper place inside the car is entitled. The duties and liabilities of the car-

Sparks, 55 Kans. 288, 39 Pac. 1032; Texas &c. R. Co. v. Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086; Downey v. Chesapeake &c. R. Co., 28 W. Va. 732. In Boisen v. Cobbs, 147 Mich. 429, 111 N. W. 82, it is said: "But the conductor's direction to plaintiff to finish his journey upon the flat car was not within the scope of his agency. He was expressly prohibited from allowing passengers to ride upon the flat cars. The defendant did not permit passengers to ride upon its flat cars upon any part of its road. The flat cars were not designed for or adapted to the carriage of passengers, but for hauling logs, bark, and other products of defendant's principal business. They were, in themselves, notice to all who saw them that they were not intended for the carriage of passengers, and the act of the conductor in directing the plaintiff to ride upon the flat car was obviously outside of

the apparent, as well as the actual, scope of his agency. The case of Greenfield v. Detroit &c. R. Co., 133 Mich. 557, 95 N. W. 546, is distinguishable from the present case, in that defendant was a common carrier of passengers, and there was evidence that defendant had waived its rule forbidding the carrying of passengers on freight trains without a permit."

⁹⁴ See Illinois Cent. R. Co. v. Jennings, 229 Ill. 608, 82 N. E. 403; Files v. Boston &c. R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. 411. As to general doctrine that a passenger is negligent in obeying the directions of the servant when he is thereby placed in obvious and known danger, see Pennsylvania R. Co. v. Hoagland, 78 Ind. 203; Louisville &c. R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149, 13 Am. & Eng. R. Cas. 1, and authorities cited in note; Pool v. Chicago &c. R. Co., 56 Wis. 227, 14 N. W. 46; post, § 2495.

rier in such cases have been elsewhere considered.⁹⁵ One who rides in a stock car, in pursuance of a contract with the company, to take care of the stock, assumes the increased danger and discomforts necessarily incident thereto, but is not guilty of contributory negligence in so doing.⁹⁶

§ 2481 (1633). Injuries received by passenger occupying an improper position in car.—A passenger may be guilty of contributory negligence not only in going into a dangerous place not intended for passengers but also in assuming a dangerous position in or upon a passenger car. Thus, where a passenger rides with his arm or head far outside of the window and beyond the sideline or outer surface of the car he is, according to the weight of authority, guilty of negligence as matter of law, and can not recover for injuries received by reason of his arm or head coming in contact with some external object while in such position.⁹⁷ But it has been held that it is not negligence per se

⁹⁵ Ante, §§ 1793, 2392, 2394. See also *Illinois Cent. R. Co. v. Brown*, 77 Miss. 338, 28 So. 949.

⁹⁶ *Lawson v. Chicago &c. R. Co.*, 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634; *Florida &c. R. Co. v. Webster*, 25 Fla. 394, 5 So. 714; ante, § 2476; *Lake Shore &c. R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599, 602, 5 L. R. A. (N. S.) 425n (citing text). See also *Railway Co. v. Lee*, 92 Fed. 318; *Nashville &c. Ry. Co. v. Hopper*, 142 Tenn. 200, 217 S. W. 61. A passenger on a freight train, however, who voluntarily rides in the stock car instead of in the caboose assumes the risk and cannot recover for injuries which he would not otherwise have sustained. *Atchison &c. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641. And this has been held true also of a stockman who voluntarily and unnecessarily does so. *Walker v. Green*, 60 Kans. 289,

56 Pac. 477; *Heumphreus v. Fremont R. Co.*, 8 S. Dak. 103, 65 N. W. 466. But compare *Texas &c. R. Co. v. Reeder*, 170 U. S. 530, 18 Sup. Ct. 705, 42 L. ed. 1134; *Chicago &c. R. Co. v. Dickson*, 143 Ill. 368, 32 N. E. 380; *Missouri &c. R. Co. v. Cook*, 12 Tex. Civ. App. 203, 33 S. W. 669.

⁹⁷ *Georgia &c. R. Co. v. Underwood*, 90 Ala. 49, 8 So. 116, 24 Am. St. 756; *Indianapolis &c. R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336; *Huber v. Cedar Rapids &c. R. Co.*, 124 Iowa 536, 100 N. W. 478; *Morel v. Mississippi &c. Co.*, 4 Bush (Ky.) 535; *Louisville &c. R. Co. v. Sickings*, 69 Ky. 1, 96 Am. Dec. 320; *Favre v. Louisville &c. R. Co.*, 91 Ky. 541, 16 S. W. 370; *Clark v. Louisville &c. R. Co.*, 18 Ky. L. 1082, 39 S. W. 840; *Shelton v. Louisville &c. R. Co.*, 19 Ky. L. 215, 39 S. W. 842; *Pitts-*

for a passenger having a severe headache to rest his elbow on the window-sill and that he may recover in such a case for injuries received where his elbow is forced outside the window by a sudden jolt and injured by coming in contact with a freight car which the railroad company had left upon the siding too near the main track.⁹⁸ And there are authorities, especially in the

burgh &c. R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568; Todd v. Old Colony &c. R. Co., 85 Mass. 18, 80 Am. Dec. 49, 7 Allen 207, 83 Am. Dec. 679; Holbrook v. Utica &c. R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Dale v. Delaware &c. R. Co., 73 N. Y. 468; Pittsburgh &c. R. Co. v. McClurg, 56 Pa. St. 294; Dun v. Seaboard &c. R. Co., 78 Va. 645, 49 Am. Rep. 388, 16 Am. & Eng. R. Cas. 363. See also Richmond &c. R. Co. v. Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; Baltimore &c. R. Co. v. Sims, 28 Ind. App. 544, 63 N. E. 485; Knauss v. Lake Erie &c. R. Co., 29 Ind. App. 216, 64 N. E. 95; Moore v. Edison &c. Co., 43 La. Ann. 792, 9 So. 433; Benedict v. Minneapolis &c. R. Co., 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. 345; Union Pacific R. Co. v. Roeser, 69 Nebr. 62, 95 N. W. 68; Coleman v. Second Ave. R. Co., 114 N. Y. 609, 21 N. E. 1064; Interurban R. Co. v. Hancock, 75 Ohio St. 88, 78 N. E. 964, 6 L. R. A. (N. S.) 997, 116 Am. St. 710; Malakia v. Rhode Island Co., 36 R. I. 149, 89 Atl. 337, 50 L. R. A. (N. S.) 42, Ann. Cas. 1916C, 1216, 1217 (citing text) and notes. But compare Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Clerc v. Morgan &c. R. Co., 107 La. Ann. 370, 31 So. 886, 90 Am. St. 319; Kird

v. New Orleans &c. R. Co., 109 La. Ann. 525, 33 So. 587, 60 L. R. A. 727, 94 Am. St. 452; Shields v. Minneapolis &c. Trac. Co., 124 Minn. 327, 144 N. W. 1092, 50 L. R. A. (N. S.) 49; McCord v. Atlanta &c. R. Co., 134 N. Car. 53, 45 S. E. 1031; Gulf &c. R. Co. v. Danshank, 6 Tex. Civ. App. 385, 25 S. W. 295; Spencer v. Railroad, 17 Wis. 487, 84 Am. Dec. 758.

⁹⁸ Farlow v. Kelly, 108 U. S. 288, 2 Sup Ct. 555, 27 L. ed. 726. See also Jackson Elec. Co. v. Dillon, 67 Fla. 114, 64 So. 669; New Orleans &c. R. Co. v. Schneider, 60 Fed. 210; Chicago &c. R. Co. v. Pondrom, 51 Ill. 333; Louisville &c. R. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. 60n; Kentucky Cent. R. Co. v. Jacoby, 14 Ky. L. 763; Summers v. Crescent &c. R. Co., 34 La. Ann. 139, 44 Am. Rep. 419; North Baltimore &c. R. Co. v. Kaskell, 78 Md. 517, 28 Atl. 410; Dahlberg v. Minneapolis &c. R. Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585n, 18 Am. & Eng. R. Cas. 202; Lacey v. Minneapolis St. R. Co., 118 Minn. 301, 136 N. W. 878; Winters v. Hannibal &c. R. Co., 39 Mo. 468; Breen v. New York &c. R. Co., 109 N. Y. 297, 16 N. E. 60, 4 Am. St. 450; Moakler v. Willamette &c. R. Co., 18 Ore. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am.

case of street cars, where there is merely a very slight extension of the arm or the like outside of the window, in which the question may be one for the jury.⁹⁹ As we have elsewhere shown, even where it is held that riding upon the platform of a street car is not negligence per se, a passenger is guilty of negligence if he voluntarily and unnecessarily assumes a position of obvious danger upon the platform.¹ So, in a Colorado case a passenger upon an excursion train who seated himself on a railing at the rear end of an open car in which passengers were carried, with his feet elevated by being placed on a seat in front of him, so that there was no possible way of protecting himself in case of a sudden jolt, was held guilty of contributory negligence as matter of law.² It is generally a question of fact for the jury to determine, under the circumstances, whether a passenger is guilty of contributory negligence in standing up in a passenger car,³ but to voluntarily and unnecessarily stand up in a freight

St. 717, 41 Am. & Eng. R. Cas. 135; *Germantown &c. R. Co. v. Brophy*, 105 Pa. St. 38, 16 Am. & Eng. R. Cas. 361; *Quinn v. South Carolina R. Co.*, 29 S. Car. 381, 7 S. E. 614, 1 L. R. A. 682n; *Gulf &c. R. Co. v. Killebrew (Tex.)*, 20 S. W. 182; *Gulf &c. R. Co. v. Danshank*, 6 Tex. Civ. App. 385, 25 S. W. 295; *Carrico v. West Virginia R. Co.*, 35 W. Va. 389, 14 S. E. 12; *Spencer v. Milwaukee &c. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758. But compare *Christensen v. Metropolitan St. R. Co.*, 137 Fed. 708.

⁹⁹ *Salmon v. City Elec. R. Co.*, 124 Ga. 1056, 53 S. E. 575; *Pell v. Joliet &c. R. Co.*, 142 Ill. App. 362; *La Barge v. Union Elec. Co.*, 138 Iowa 691, 116 N. W. 816, 19 L. R. A. (N. S.) 213; *Gardner v. Metropolitan St. R. Co.*, 223 Mo. 389, 122 S. W. 1068; *Goller v. Fonda &c. R. Co.*, 110 App. Div. 620, 96 N. Y. S. 483, and cases last cited in

note 94. And it is so held where he raises the window and it falls and injures him because it has a defective catch or the like. *Cleveland &c. R. Co. v. Hadley*, 170 Ind. 204, 84 N. E. 13, 82 N. E. 1025, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1. See also *Cincinnati &c. R. Co. v. Lorton*, 33 Ky. L. 689, 110 S. W. 857.

¹ Ante, § 2477. See also *Carroll v. Interstate &c. Co.*, 107 Mo. 653, 17 S. W. 889; *Benedict v. Minneapolis &c. R. Co.*, 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. 345 (passenger on platform protruding part of body beyond car precluded from recovery where it proximately contributed to the injury).

² *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331. See also *Butler v. Pittsburgh &c. R. Co.*, 139 Pa. St. 195, 21 Atl. 500.

³ *Romine v. Evansville &c. R.*

car, which is more liable to sudden jerks, has been held to be negligence as matter of law.⁴ It is not contributory negligence for a passenger to walk from his seat to the water closet while the car is in motion,⁵ nor for him to go to the wash-room in a Pullman car in which he is riding for the purpose of washing

Co., 24 Ind. App. 230, 56 N. E. 245; Barden v. Boston &c. R. Co., 121 Mass. 426; Lapointe v. Middlesex R. Co., 144 Mass. 18, 10 N. E. 497; Farnon v. Boston &c. R. Co., 180 Mass. 212, 62 N. E. 254; Colwell v. Manhattan R. Co., 57 Hun 452, 10 N. Y. S. 636; Griffith v. Utica &c. R. Co., 63 Hun 626, 17 N. Y. S. 692; Wylde v. Northern R. Co., 53 N. Y. 156; Whipple v. West Phila. R. Co., 11 Phila. (Pa.) 345; Sturdivant v. Ft. Worth &c. R. Co. (Tex.), 27 S. W. 170; Lane v. Spokane Falls R. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. 821; Gee v. Metropolitan R. Co., L. R. 8 Q. B. 161. But see De Soucey v. Manhattan R. Co., 39 N. Y. St. 79, 15 N. Y. S. 108. Compare Gulf &c. R. Co. v. Bell, 93 Tex. 632, 57 S. W. 939; Burr v. Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845. See also St. Louis &c. R. Co. v. Hartung, 95 Ark. 220, 128 S. W. 1025; Lancon v. Morgan's La. &c. R. Co., 127 La. 1, 53 So. 365.

⁴ Wallace v. Western &c. R. Co., 98 N. Car. 494, 4 S. E. 503, 2 Am. St. 346; Harris v. Hannibal &c. R. Co., 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111; ante, § 2476. See also St. Louis &c. R. Co. v. Harmon, 85 Ark. 503, 109 S. W. 295; Zamore v. Boston El. R. Co., 198 Mass. 594, 84 N. E. 858; Foley v. Boston &c. R. Co., 193 Mass. 332,

79 N. E. 765, 7 L. R. A. (N. S.) 1076n; Shamblin v. New Orleans &c. R. Co., 114 La. 467, 38 So. 421; Freeman v. Pere Marquette R. Co., 131 Mich. 544, 91 N. W. 1021, 100 Am. St. 621; Young v. Missouri R. Co., 113 Mo. App. 636, 84 S. W. 175, 88 S. W. 767; Shive v. Philadelphia &c. R. Co., 235 Pa. St. 256, 83 Atl. 707; Felton v. Horner, 97 Tenn. 579, 37 S. W. 696. But much may depend on circumstances. See Indiana &c. R. Co. v. Masterson, 16 Ind. App. 323, 44 N. E. 1004; Holland v. St. Louis &c. R. Co., 105 Mo. App. 117, 79 S. W. 508; Tickell v. St. Louis &c. R. Co., 149 Mo. App. 648, 129 S. W. 727; St. Louis &c. R. Co. v. Burrows, 62 Kans. 89, 61 Pac. 439. So where a passenger in a passenger coach stood up on a seat to get a bundle. East Tennessee &c. R. Co. v. Green, 95 Ga. 376, 22 S. E. 658, 51 Am. St. 89. Compare Branan v. Southern R. Co., 135 Ga. 24, 68 S. E. 793.

⁵ Lavin v. Wisconsin Cent. R. Co. 54 Ill. App. 636. Nor to sit near a car stove. Texas &c. R. Co. v. Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962. For a peculiar case in which a railroad company was held not to be liable to a female passenger locked in water-closet by reason of a defective lock, see Gulf &c. R. Co. v. Smith, 10 Tex. Civ. App. 338, 30 S. W. 361.

his hands.⁶ It has also been held that it is not necessarily contributory negligence for a passenger to take hold of the brake wheel in boarding a passenger car⁷ nor for him to place his hand, in preparing to alight, where it will be caught by the closing of the door, due to a sudden starting or stopping of the train after passengers have been invited to alight,⁸ but it does not necessarily follow that the railroad company is always liable to one

⁶ *Sturdivant v. Ft. Worth &c. R. Co.* (Tex.), 27 S. W. 170. See also *Piper v. New York Cent. R. Co.*, 76 Hun 44, 27 N. Y. S. 593; *Indiana &c. R. Co. v. Masterson*, 16 Ind. App. 323, 44 N. E. 1004. But in going to the engine to get water because there was none in the passenger coach, a passenger was correctly held negligent as matter of law in *McDaniel v. Highland Ave. &c. R. Co.*, 90 Ala. 64, 8 So. 41. In *Galveston &c. R. Co. v. Patillo*, 45 Tex. Civ. App. 572, 101 S. W. 492, however, it was held that a passenger was not guilty of contributory negligence merely because he attempted to pass from one car to another to do a favor for a lady passenger. See also *Sickles v. Missouri &c. R. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493; *Choate v. San Antonio &c. R. Co.*, 90 Tex. 82, 36 S. W. 247, 37 S. W. 319; *Chesapeake &c. R. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833; *Costikyan v. Rome &c. R. Co.*, 58 Hun 590, 12 N. Y. S. 683; *Cotchett v. Savannah &c. R. Co.*, 84 Ga. 687, 11 S. E. 553. And see where the conductor was held not negligent in failing to assist a lady passenger down the aisle to a seat after assisting her from one car to another. *Plummer v. Washington &c. R. Co.*, 124 Md. 200, 92 Atl.

536 (distinguishing *Chicago City Ry. Co. v. McCaughna*, 216 Ill. 202, 74 N. E. 819).

⁷ *Cleveland &c. R. Co. v. McHenry*, 47 Ill. App. 301. It seems to us, however, that under ordinary circumstances, a passenger should not touch the brake wheel in getting on the car, and it is certainly not intended to be so used.

⁸ *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666. See also *Louisville &c. R. Co. v. Mulder*, 149 Ala. 676, 42 So. 742; *Bennett v. Central of Ga. R. Co.*, 6 Ga. App. 185, 64 S. E. 700; *Carter v. Boston &c. R. Co.*, 205 Mass. 21, 91 N. E. 142; *Martin v. Missouri Pac. R. Co.*, 137 Mo. App. 694, 119 S. W. 444; *Ward v. Kansas City &c. R. Co.*, 189 Mo. App. 305, 175 S. W. 296; *Christenson v. Oregon &c. R. Co.*, 35 Utah 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159. But in a somewhat similar case it was said that "placing his hand in such a position upon the jamb of the door that it would certainly be injured by any one closing the door was an act of negligence." *Texas &c. R. Co. v. Overall*, 82 Tex. 247, 18 S. W. 142. And along the same line see also *Atchison &c. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641; *Warburton*

who gets his fingers caught in this way. In one case it appeared that the injury was the result of pure accident, without fault on either side, and it was held that the railroad company was not liable.⁹

§ 2482 (1634). Injuries caused by derailment.—We have already considered, in a general way, the duties of railroad companies respecting their road-beds, tracks and equipments and the care required in the operation of their trains.¹⁰ One of the most common accidents or causes of injury to passengers upon railroads is derailment of the cars. This may be caused by the negligence of the company in failing to perform its duties respecting any of the matters above specified, or it may be caused by something over which the company has no control. In the former case the company is liable to a passenger who is free from contributory negligence and in the latter case it is not. In other words, if it is caused by the failure of the company to exercise the highest degree of care which is practicable and usual in the maintenance, management and operation of a railroad and a passenger is injured thereby as a proximate cause of the company's breach of duty, without contributory negligence on his part, it is liable; but if his own negligence proximately contributed thereto, or if there is no failure to exercise such care on the part of the company, it is not liable. As such so-called acci-

v. Midland R. Co., 21 L. T. 835; *Gee v. Metropolitan &c. R. Co.*, L. R. 8 Q. B. 161, 21 W. R. 584; *Thompson v. Duncan*, 76 Ala. 334; *Adams v. Lancashire &c. R. Co.*, L. R. 4 C. P. 739, 17 W. R. 884. But compare *Western Md. R. Co. v. Stanley*, 61 Md. 266, 48 Am. Rep. 96; *Kentucky &c. R. Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338.

⁹ *Murphy v. Atlanta &c. R. Co.*, 89 Ga. 832, 15 S. E. 774. See also *Snyder v. Colorado &c. R. Co.*, 36 Colo. 288, 85 Pac. 686, 8 L. R. A. (N. S.) 781, 118 Am. St. 110. The company is not negligent merely

because the upper part of the door is not all glass so that persons on each side can see each other when about to open it, nor is it negligent to have a small projecting screw in the door for the purpose of holding it back. *Graeff v. Philadelphia &c. R. Co.*, 161 Pa. St. 230, 28 Atl. 1107, 23 L. R. A. 606, 41 Am. St. 885. Compare also *Sturdivant v. Ft. Worth &c. R. Co. (Tex.)*, 27 S. W. 170; *Hayman v. Pennsylvania R. Co.*, 118 Pa. St. 508, 11 Atl. 815.

¹⁰ Ante, §§ 2398, 2399, 2402.

dents do not ordinarily happen, however, unless the company fails to exercise such care, and as it is better able to explain how they happened, proof of the derailment of the car and injury thereby caused to the passenger generally raises a presumption that the company was negligent.¹¹ But this presumption is not

¹¹ *Gleeson v. Virginia &c. R. Co.*, 140 U. S. 435, 443, 11 Sup. Ct. 859, 35 L. ed. 458; *Bryce v. Railway*, 129 Fed. 966; *Minahan v. Railway*, 138 Fed. 37; *Winters v. Baltimore &c. R. Co.*, 163 Fed. 106; *Montgomery &c. R. Co. v. Mallette*, 92 Ala. 209, 9 So. 363; *Southern Pac. R. Co. v. Hogan*, 13 Ariz. 34, 108 Pac. 240, 29 L. R. A. (N. S.) 813, and note; *St. Louis &c. R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *Arkansas &c. R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550; *Denver &c. R. Co. v. Woodward*, 4 Colo. 1; *Louisville &c. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476, 28 Am. & Eng. R. Cas. 170; *Terre Haute &c. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Cronk v. Wabash &c. R. Co.*, 123 Iowa 349, 98 N. W. 884; *Railroad Co. v. Elder*, 57 Kans. 312, 46 Pac. 310; *Cloud v. Kansas &c. Trac. Co.*, 103 Kans. 249, 173 Pac. 338; *Stevens v. European &c. R. Co.*, 66 Maine 74; *Brown v. Yazoo R. Co.*, 88 Miss. 687, 41 So. 383; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. 781; *Norton v. St. Louis &c. R. Co.*, 40 Mo. App. 642; *Spellman v. Lincoln &c. Co.*, 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. 753 (street car case); *Bergen Co. T. Co. v. Demarest*, 62 N. J. L. 755, 42 Atl. 729, 72 Am. St. 683; *O'Clair v. Rhode Island Co.*, 27 R. I. 238, 63 Atl. 238; *Stembridge*

v. Southern R. Co., 65 S. Car. 440, 43 S. E. 968; *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202, 203 (quoting text); *Gulf &c. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345; *Davis v. Galveston R. Co.*, 42 Tex. Civ. App. 55, 93 S. W. 222. See also *Louisville &c. R. Co. v. Miller*, 140 Ind. 685, 37 N. E. 343, 40 N. E. 116; *Peoria &c. R. Co. v. Reynolds*, 88 Ill. 418; *Baltimore &c. R. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578; *Dawson v. Manchester &c. R. Co.*, 5 L. T. R. (N. S.) 682; *Chicago &c. Trac. Co. v. Newmiller*, 215 Ill. 383, 74 N. E. 410; *Southern R. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979. But in a number of cases it is held that this presumption does not arise as a matter of law without proof of other circumstances. *Texas &c. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. 994; *San Antonio &c. R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327; *Roanoke R. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 19 L. R. A. (N. S.) 316 and note, 128 Am. St. 971, and note; *Transportation Co. v. Downer*, 11 Wall. (U. S.) 129, 20 L. ed. 160. See also *Vischer v. Northwestern El. R. Co.*, 256 Ill. 572, 100 N. E. 270; *Williams v. Spokane &c. R. Co.*, 39 Wash. 77, 80 Pac. 1100; *Irvine v. Delaware &c. R. Co.*, 184 Fed. 664.

conclusive,¹² for it may be rebutted by showing that the injury arose from an unavoidable accident or an occurrence which could not have been prevented by the highest practicable degree of care and foresight.¹³ Thus, it may be rebutted by showing that the derailment and injury were caused by the act of a stranger which the company could not have foreseen and anticipated.¹⁴ So, where the derailment is caused by a broken rail, the presumption against the company may be overcome by showing that the rails were properly inspected, tested and laid and that the accident was caused by the cold or the like, notwithstanding the exercise of the highest practicable degree of care on the part of the company.¹⁵ In one case it appeared that the train was derailed by reason of the breaking of a wheel which had been carefully inspected and showed no defects; that

¹² *Pattee v. Chicago &c. R. Co.*, 5 Dak. 267, 38 N. W. 435, 34 Am. & Eng. R. Cas. 399, and authorities cited in following notes.

¹³ *Eureka &c. R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690, 40 Am. & Eng. R. Cas. 698; *Wabash &c. R. Co. v. Friedman*, 41 Ill. App. 270; *Pittsburgh &c. R. Co. v. Williams*, 74 Ind. 462; *Andrews v. Chicago &c. R. Co.*, 86 Iowa 677, 53 N. W. 399; *Southern Kans. &c. R. Co. v. Walsh*, 45 Kans. 653, 26 Pac. 45; *Eldridge v. Minneapolis &c. R. Co.*, 32 Minn. 253, 20 N. W. 151, 21 Am. & Eng. R. Cas. 494; *Hipsley v. Kansas City &c. R. Co.*, 88 Mo. 348, 27 Am. & Eng. R. Cas. 287; *McClary v. Sioux City &c. R. Co.*, 3 Nebr. 44, 19 Am. Rep. 631; *Ward v. Bonner*, 80 Tex. 168, 15 S. W. 805. See also *Houston &c. R. Co. v. Anderson*, 44 Tex. Civ. App. 394, 98 S. W. 440. The circumstances as detailed by the plaintiff himself may be such as to rebut or prevent the presumption from arising.

See *Smith v. St. Paul &c. R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Gillespie v. St. Louis &c. R. Co.*, 6 Mo. App. 554; *Buckland v. New York &c. R. Co.*, 181 Mass. 3, 62 N. E. 955.

¹⁴ *Dimmitt v. Hannibal &c. R. Co.*, 40 Mo. App. 654; *Houston &c. R. Co. v. Lee*, 69 Tex. 556, 7 S. W. 324, 34 Am. & Eng. R. Cas. 452. See also *Whipple v. Michigan Cent. R. Co.*, 130 Mich. 460, 90 N. W. 287; *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306n.

¹⁵ *Heazle v. Indianapolis &c. R. Co.*, 76 Ill. 501; *Cleveland &c. R. Co. v. Newell*, 75 Ind. 542; *Michigan &c. R. Co. v. Lantz*, 29 Ind. 528; *McPadden v. New York &c. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705; *Canadian Pac. R. Co. v. Califoux*, 22 Can. S. Ct. 721. But compare *Pittsburgh &c. R. Co. v. Williams*, 74 Ind. 462; *Reed v. New York Central &c. R. Co.*, 56 Barb. (N. Y.) 493.

there was nothing in the track, road-bed or other equipments nor in the speed of the train to cause the accident; that a passenger told the conductor that he felt a jolt and heard an unusual noise before the accident, and the conductor thereupon listened and looked inside and outside the car without discovering anything wrong, but did not stop it, and that soon afterwards the car was derailed and the plaintiff injured. It was held that as there had been a proper inspection the company was not liable for the injury caused by the hidden defect,¹⁶ and that it was not liable because the conductor failed to stop the car.¹⁷ In another case the accident occurred on a dark and rainy night by reason of an embankment being washed out by a water-spout or water which backed up from a culvert that failed to carry off the extraordinary rainfall, and it was held that the railroad company was not liable.¹⁸ So, in a case where the plaintiff was injured while riding in a caboose, and it appeared that the train, at the place where it was wrecked, encountered a cyclone which passed over the right of way; its path extending from 250 to 400 yards in width and 7 or 8 miles in length; that the cyclone unroofed, wrenched from their foundations, and destroyed houses, and its force stopped the train, wrenched and lifted the cars from their

¹⁶ Citing *Toledo &c. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Grand Rapids &c. R. Co. v. Huntley*, 38 Mich. 537, 548, 31 Am. Rep. 321; *McPadden v. New York &c. R. Co.*, 44 N. Y. 478, 481, 4 Am. Rep. 705. See also *Texas &c. R. Co. v. Buckalew* (Tex.), 34 S. W. 165. And see generally as to inspection and whether buying from reputable manufacturer will exonerate carrier when it could not discover defect. *Dibbert v. Metropolitan &c. Co.*, 158 Wis. 69, 147 N. W. 3, 148 N. W. 1095, in L. R. A. 1915D, 305n, Ann. Cas. 1916E, 924n, and other cases and notes in same series of reports therein referred to.

¹⁷ *Frelson v. Southern Pac. R. Co.*, 42 La. Ann. 673, 7 So. 800, 44 Am. & Eng. R. Cas. 319.

¹⁸ *Norfolk &c. R. Co. v. Marshall*, 90 Va. 836, 20 S. E. 823. See also *Denver &c. R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. 518; *Withers v. Railway Co.*, 27 L. J. Exch. 417. Where, however, a train was derailed and a passenger injured by an animal wounded by a preceding train and left on or near the track, the railroad company was held liable. *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. 103. But compare *Houston &c. R. Co. v. Anderson*, 44 Tex. Civ. App. 394, 98 S. W. 440.

trucks, and hurled one of them a distance of 150 feet into a field beyond, and when it struck the ground it whirled it around like a top, so that only the engine and three heavy iron-tanked oil cars remained on the track, it was held that the carrier was not responsible.¹⁹ Other decisions showing the application of the presumption in derailment cases and what has, and has not, been considered to rebut it are cited below.²⁰

§ 2483 (1635). Collisions.—Where a passenger is injured in a collision between two trains of the same railroad company the only questions that can well arise are as to whether it was caused by the failure of the company to exercise that high degree of care which it owes to its passengers and as to whether the passenger was guilty of contributory negligence. As we have elsewhere seen, if the passenger was wrongfully or negligently riding in an improper car or place, and would not have been injured if riding in a proper place, he can not recover;²¹ but, according to what seems to us the better rule, the mere fact that he was riding in what might be regarded as a more dangerous place than

¹⁹ *Galveston &c. R. Co. v. Crier*, 45 Tex. Civ. App. 434, 100 S. W. 1177.

²⁰ As to what is sufficient to rebut see: *Florida &c. R. Co. v. Rudolph*, 113 Ga. 143, 38 S. E. 328; *Chicago &c. R. Co. v. Brandon*, 77 Kans. 612, 95 Pac. 573; *Cheet-ham v. Union R. Co.*, 26 R. I. 279, 58 Atl. 881; *Davis v. Galveston &c. R. Co.*, 42 Tex. Civ. App. 55, 93 S. W. 222. As to what is insufficient to rebut see, *Sloan v. Little Rock &c. R. Co.*, 89 Ark. 574, 117 S. W. 551; *Shaw v. Chicago &c. R. Co.*, 173 Ill. App. 107; *Western Md. R. Co. v. Shivers*, 101 Md. 391, 61 Atl. 618.

²¹ But a passenger who sees a train on an intersecting road approaching the crossing is not guilty of contributory negligence in

failing to pull the bell rope or warn the engineer. *Grand Rapids &c. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135, 39 Am. & Eng. R. Cas. 480. Nor in leaping from the car in an attempt to avoid a collision if a person of ordinary prudence would have done so. *Twomley v. Central Park &c. R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162n; *Buel v. New York &c. R. Co.*, 31 N. Y. 314, 88 Am. Dec. 271. See also *Tillett v. Norfolk &c. R. Co.*, 118 N. Car. 1031, 24 S. E. 111. In *Anderson v. Missouri Pac. R. Co.*, 196 Mo. 442, 93 S. W. 394, 113 Am. St. 748, one in the regular coach was presumed to be lawfully there as a passenger and the company was held liable for injury caused by a collision.

his seat in the passenger coach will not defeat a recovery if he would have been injured just the same. As we shall hereafter show,²² proof of the collision and injury caused thereby to a passenger, no contributory negligence appearing on his part, usually makes a prima facie case of negligence against the company, for the general rule is that in such a case the collision itself gives rise to the presumption of negligence on its part.²³

²² Post, § 2498.

²³ Rouse v. Hornsby, 67 Fed. 219; Minneapolis St. R. Co. v. Odegard, 182 Fed. 56; Green v. Pacific &c. Co., 130 Cal. 435, 62 Pac. 747; Bonneau v. North Shore R. Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. 68; North Chicago St. R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899; Flaherty v. Northern Pac. R. Co., 39 Minn. 382, 40 N. W. 160, 1 L. R. A. 681, and note, 12 Am. St. 654; New Orleans &c. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Iron R. Co. v. Mowery, 36 Ohio St. 418, 38 Am. Rep. 597, 3 Am. & Eng. R. Cas. 361; Chattanooga &c. Transit Co. v. Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202, 204 (citing text); Skinner v. London &c. R. Co. 5 Ex. 787. See also Central of Ga. R. Co. v. Geopp, 153 Ala. 108, 45 So. 65; Louisville &c. R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Elgin &c. Trac. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610; Cincinnati &c. R. Co. v. Bravard 38 Ind. App. 422, 76 N. E. 899; Cloud v. Kansas &c. Trac. Co., 103 Kans. 249, 173 Pac. 338; Louisville &c. R. Co. v. Long, 94 Ky.

410, 22 S. W. 747; Copson v. New York R. Co., 171 Mass. 233, 50 N. E. 613; Kansas City &c. R. Co. v. Nichols (Miss.), 38 So. 371; Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 S. W. 932, 132 Am. St. 588; Holland v. St. Louis &c. R. Co., 105 Mo. App. 117, 79 S. W. 508; Galveston &c. R. Co. v. Green (Tex.), 91 S. W. 380; Southern R. Co. v. Dawson, 98 Va. 577, 36 S. E. 996; note in L. R. A. 1916C, 372. But compare Mars v. President of Delaware &c. R. Co., 54 Hun (N. Y.), 625, 8 N. Y. S. 107. As to what is sufficient to rebut the presumption, see Fredericks v. Northern &c. R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306n; Pennsylvania R. Co. v. McKinney, 124 Pa. St. 462, 17 Atl. 14, 10 Am. St. 601; Pittsburg &c. R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.), 1081n; Deyo v. New York &c. R. Co., 34 N. Y. 9, 88 Am. Dec. 418. Wet track is not sufficient to relieve company. Indiana Union Trac. Co. v. Ohne, 45 Ind. App. 632, 89 N. E. 507. And to same effect is Fuhry v. Chicago City Ry. Co., 144 Ill. App. 521, affd. in 88 N. E. 221. As to whether there is such a presumption when the collision is with a vehicle of a third party,

So, we suppose that the same presumption ordinarily arises where a passenger train breaks apart and one section collides with the other, but it is well known that it is almost impossible to always prevent this in the case of freight trains, and, in such a case, the presumption might not so readily arise and the passenger might, perhaps, be deemed to have assumed the risk.²⁴ Where, however, it appears that the brakemen had left their posts and were riding in the engine and caboose at the time of the parting and collision, in violation of the rules of the company, there is sufficient evidence of negligence to go to the jury, although the cars had been inspected shortly before the break occurred.²⁵ A railroad company can not escape liability for injury to a passenger upon its train caused by its own negligence in coming into collision at a crossing with a train, on another road, although the other railroad company was also negligent, and it was held in a recent case that this is true although the

see *Black v. Boston &c. R. Co.*, 187 Mass. 172, 72 N. E. 970, 68 L. R. A. 799, and note, reviewing many decisions upon the subject; also note in 29 L. R. A. (N. S.) 813, and L. R. A. 1916C, 373; *Blew v. Philadelphia Rapid Trans. Co.*, 227 Pa. St. 319, 76 Atl. 17 (presumption does not arise in such a case); *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808 (presumption does arise). In some cases it is held that a presumption of negligence on the part of the carrier arises in favor of a passenger where the car collides with a vehicle on the highway. *Housel v. Pacific Elec. R. Co.*, 167 Cal 245, 139 Pac. 73, Ann. Cas. 1915C, 665n, 51 L. R. A. (N. S.), 1105 and other cases and notes there referred to; *Stauffer v. Metropolitan St. R. Co.*, 243 Mo. 305, 147 S. W. 1032. But in other cases the contrary is held. *Singer &c.*

Mach. Co. v. Springfield St. R. Co., 216 Mass. 138, 103 N. E. 283; *Stangy v. Boston &c. R. Co.*, 220 Mass. 414, 107 N. E. 933; *Simkins v. Philadelphia Rapid Transit Co.*, 244 Pa. 182, 90 Atl. 527. See notes in 13 L. R. A. (N. S.), 610 and 29 L. R. A. (N. S.), 813.

²⁴ But see *Georgia Pac. R. Co. v. Love*, 91 Ala. 432, 8 So. 714, 24 Am. St. 927, and authorities cited in following note. See also *Louisville &c. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 10 Am. St. 60; *Grote v. Railway*, 2 Exchs. 251.

²⁵ *Delaware &c. R. Co. v. Ashley*, 67 Fed. 209. The inspection, however, was also claimed to be negligent and insufficient. See also *Tillett v. Norfolk &c. R. Co.*, 118 N. Car. 1031, 24 S. E. 111; *Louisville &c. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869.

other company was more negligent than it was, provided that by the exercise of the care and diligence which a railroad company owes a passenger it could have avoided the injury.²⁶ So, on the other hand, in another recent case it was held that a railroad company which operates a train in charge of its own servants on the track of another company under an arrangement that the train dispatcher and operators employed by such other company may stop the train at pleasure at any telegraph station, is liable in damages for injuries resulting in the death of a passenger on the train of such other company by reason of the negligence of the engineer in running into it, although the negligence of the train dispatcher and operators and crew of the train of such other company may have been greater than that of such engineer.²⁷ But the company owning the track and carrying

²⁶ *Chicago &c. R. Co. v. Ransom*, 56 Kans. 559, 44 Pac. 6; *Eaton v. Boston &c. R. Co.*, 11 Allen (Mass.), 500, 87 Am. Dec. 730; *Clark v. Chicago &c. R. Co.*, 127 Mo. 197, 29 S. W. 1013; *Union Pac. R. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. ed. 1003; *Graham v. Great Western R. Co.*, 41 U. C. Q. B. 324. See also *Louisville &c. R. Co. v. Blum* (Ky.) 89 S. W. 186; *Nagel v. United R. Co.*, 169 Mo. App. 284, 152 S. W. 621; *Augustus v. Chicago &c. R. Co.*, 153 Mo. App. 572, 134 S. W. 22. It was also held in the Kansas case that the rules of railroad commissioners governing the management of trains at grade crossings of railroads are not admissible in evidence without showing that they have been served upon or brought to the knowledge of the company against which they are offered.

²⁷ *Chicago &c. R. Co. v. Groves*, 56 Kans. 601, 44 Pac. 628. The court

did not decide the case upon the ground that the train dispatcher and operatives were joint employes of the two companies, or, in the particular matter, employes of the company whose business they were attending to for the time-being, although it was said that, perhaps, they might be so considered under the evidence, and the following cases were cited as tending to support that contention; *Hannibal &c. R. Co. v. Martin*, 11 Ill. App. 386-390; *Wabash &c. R. Co. v. Peyton*, 106 Ill. 534, 540, 46 Am. Rep. 705; *Nashville &c. Co. v. Carroll*, 6 Heisk. (Tenn.) 347, 352, 354; *Vary v. Burlington &c. R. Co.*, 42 Iowa 246. Many other cases hold that a passenger who is without fault, may recover for injuries inflicted by the negligence of another company in running its train into that of the company which is carrying him, even though the latter company may also be guilty of negli-

the passenger was not a party in the case to which we have just referred, and nothing was decided as to whether or not it might have been held liable. The general rule is that where a person is injured by the concurrent negligence of two companies in causing a collision he may recover of both jointly, or of either of them.²⁸ His relation to one of them as a passenger, however, may sometimes render it easier for him to recover against that one.²⁹

§ 2484 (1636). **Injuries from obstructions.**—A railroad company is liable to a passenger who, without fault on his part, is injured by reason of its tracks being so close together that its trains

gence. *Pittsburgh &c. R. Co. v. Spencer*, 98 Ind. 186; *Kansas City &c. R. Co. v. Stoner*, 51 Fed. 649; *Wabash &c. R. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Danville &c. R. Co. v. Stewart*, 2 Met. (Ky.) 119; *Bennett v. New Jersey &c. R. Co.*, 36 N. J. L. 225, 13 Am. Rep. 435; *Chapman v. New Haven &c. R. Co.*, 19 N. Y. 341, 75 Am. Dec. 344n; *Wylde v. Northern R. Co.*, 53 N. Y. 156; *Robinson v. New York Cent. &c. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1. But see *People's &c. R. Co. v. Lauderbach*, 2 Sad. (Pa.) 187, 3 Atl. 672, 26 Am. & Eng. R. Cas. 166.

²⁸ *Kansas City &c. R. Co. v. Stoner*, 51 Fed. 649; *Wabash &c. R. Co. v. Shacklet*, 105 Ill. 464, 44 Am. Rep. 791, 12 Am. & Eng. R. Cas. 166; *Elgin &c. Tract. Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436; *Railway Co. v. McDonnell*, 91 Ill. App. 488; *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Am. St. 309; *McDonald v. Louisville &c. R. Co.*, 47 La. Ann. 1440, 17 So. 873; *Linderbaum v. New York &c. R. Co.*, 197 Mass.

314, 84 N. E. 129; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; *Flaherty v. Minneapolis &c. R. Co.*, 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680n, 12 Am. St. 654; *Colegrover v. New York &c. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *Transfer Co. v. Kelly*, 36 Ohio St. 86, 38 Am. Rep. 558. See also *Louisville &c. R. Co. v. Blum*, 28 Ky. L. 253, 89 S. W. 186, and other Kentucky cases there cited, including *Pugh v. Chesapeake &c. R. Co.*, 101 Ky. 77, 39 S. W. 695, 72 Am. St. 392. But see *Richmond &c. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495. Where both are sued and one is wholly at fault a charge that the verdict should be against that one and in favor of the other has been held proper. *Houston &c. R. Co. v. Ross* (Tex.), 28 S. W. 254. As to the liability of one company to the other, see *Louisville &c. R. Co. v. East Tennessee &c. R. Co.*, 60 Fed. 993; *Central R. &c. Co. v. Brunswick &c. Co.*, 87 Ga. 386, 13 S. E. 520.

²⁹ *Richmond &c. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495, 500;

strike each other, by leaving a car on a switch so that the train on which he is riding collides with it,⁸⁰ or by reason of its placing or negligently permitting obstructions to be placed and remain on or dangerously near the track.⁸¹ But it is not liable for injuries caused solely by the act of strangers in putting obstructions on the track, where it is guilty of no negligence.⁸²

Grand Rapids &c. R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135, 39 Am. & Eng. R. Cas. 480; See *Kellow v. Central &c. R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858; *Flint &c. R. Co. v. Detroit &c. R. Co.*, 64 Mich. 350, 31 N. W. 281; *Kleiber v. Peoples R. Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988. But it is not liable if the injury is caused solely by the negligence of the other company. *Bunting v. Pennsylvania R. Co.*, 118 Pa. St. 204, 12 Atl. 448; *Wright v. Midland R. Co.*, 42 L. J. Ex. 89, 21 W. R. 460, L. R. 8 Ex. 137.

⁸⁰ *Farlow v. Kelly*, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. ed. 726. See also *Clerc v. Railroad*, 107 La. Ann. 370, 31 So. 886, 90 Am. St. 319; *Goodloe v. Metropolitan St. R. Co.*, 120 Mo. App. 194, 96 S. W. 482; *Topeka City R. Co. v. Higgs*, 38 Kans. 375, 16 Pac 667, 5 Am. St. 754.

⁸¹ *Denver &c. R. Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106; *North Chicago &c. R. Co. v. Williams*, 140 Ill. 276, 29 N. E. 672, 2 Am. Neg. Cas. 684; *Kird v. New Orleans R. Co.*, 109 La. Ann. 525, 33 So. 587, 60 L. R. A. 727, 94 Am. St. 452; *Seymour v. Citizens R. Co.*, 114 Mo. 266, 21 S. W. 739; *Rice*

v. Chicago &c. R. Co., 153 Mo. App. 35, 131 S. W. 374; *Gray v. Rochester &c. R. Co.*, 61 Hun 212, 15 N. Y. S. 927; *McCord v. Atlanta &c. R. Co.*, 134 N. Car. 53, 45 S. E. 1031; *Elliott v. Newport &c. R. Co.*, 18 R. I. 707, 28 Atl. 338; 23 L. R. A. 208; *Carrico v. West Virginia &c. R. Co.*, 35 W. Va. 389, 14 S. E. 12, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. See also *Sias v. Rochester R. Co.*, 169 N. Y. 118, 62 N. E. 132, 56 L. R. A. 850; *Buehler v. Union Trac. Co.*, 200 Pa. St. 177, 49 Atl. 788.

⁸² *Jones v. Grand Trunk R. Co.*, 45 U. C. Q. B. 193; *Curtis v. Rochester &c. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258n; *Latch v. Rummer R. Co.*, 27 L. J. Ex. 155, 3 H. & N. (Am. ed.) 930; *Keeley v. Erie R. Co.*, 47 How. Pr. (N. Y.) 256; *Harris v. Union Pac. R. Co.*, 13 Fed. 591. See also *Delaware &c. R. Co. v. Donohue*, 238 Fed. 770; *Frederick v. Northern &c. R. Co.*, 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306. But it may be if it also is negligent. *Baker v. New York R. Co.*, 28 App. Div. 316, 50 N. Y. S. 999; *Kird v. New Orleans &c. R. Co.*, 105 La. Ann. 226, 29 So. 729; *Chicago &c. R. Co. v. Murphy*, 198 Ill. 462, 64 N. E. 1011; *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201.

We have treated one phase of this subject in considering the duties and liabilities of railroad companies to their employes,³³ but obstructions which might be dangerous to employes may be perfectly safe for passengers when they are in their proper place. Thus, a post, a fence, a low bridge, or the like might be dangerous to employes whose duty calls them on top of or at the side of cars and yet be perfectly safe so far as passengers inside the car are concerned. In a recent case it was held that, although the tracks of a street railway company were so close together that there was a space of only seventeen inches between passing cars, and the plaintiff while standing on the lateral step of an open car was struck and injured by a passing car on the other track, the railway company was not guilty of negligence.³⁴ When passengers are injured by obstructions near the track it is usually because they are not where they belong, and they can not recover if the injury is due to their own negligence, no matter whether the company is negligent or not. But there are many cases in which it has been held not to be negligence per se to ride on the platform or steps of a street car, especially if it is crowded, and in which passengers so riding have been allowed to recover for injuries received from obstructions near the track or passing vehicles or cars.³⁵ It is clear, however,

³³ Ante, § 1824.

³⁴ *Craighead v. Brooklyn City R. Co.*, 123 N. Y. 391, 25 N. E. 387. It was also held that it was not the duty of the company to warn him that he was in a position of danger, especially as past experience seemed to have shown that there was none. But see *Geitz v. Milwaukee City R. Co.*, 72 Wis. 307, 39 N. W. 866; *Citizens St. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 621, and cases cited, 56 N. E. 54; *Anderson v. City &c R. Co.*, 42 Ore. 505, 71 Pac. 659; *North Chicago St. R. Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793.

³⁵ *Topeka &c. R. Co. v. Higgs*, 38 Kans. 375, 16 Pac. 667, 5 Am. St. 754; *City R. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. 798; *Gray v. Rochester &c. R. Co.*, 61 Hun 212, 15 N. Y. S. 927; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495; *Bruno v. Brooklyn City R. Co.*, 55 N. Y. St. 215, 25 N. Y. S. 507; *Geitz v. Milwaukee &c. R. Co.*, 72 Wis. 307, 39 N. W. 866. See also *Hesse v. Meriden &c. Co.*, 75 Conn. 571, 54 Atl. 299; *Flynn v. Consolidated Trac. Co.*, 64 N. J. L. 375, 45 Atl. 799; *Cogswell v. West &c. Elec. R. Co.*, 5 Wash. 46, 31 Pac. 411. But see *Vrooman v. Houston &c.*

that one who hangs on the platform of a dummy car and is injured by thus striking a post, lawfully near the track, of the existence of which he was well aware, is guilty of negligence and can not recover for such injury.³⁶

§ 2485. **Sudden stopping of train in emergency.**—The question as to when the carrier is liable for injuries caused by sudden starts, stops and jolts has already been considered in various connections in this chapter,³⁷ but a somewhat unusual phase of the question was presented in a recent case in New York, where a passenger was injured by the sudden application of the emergency brake to avoid striking a traveler at a highway crossing. The court held that, as the company was negligent in failing to warn the traveler, or take action in time to avoid injury to him in any other way, the company was liable to the passenger.³⁸ As the carrier had created the emergency by its own negligence, we think the court rightly held that it was

R. Co., 7 Misc. (N. Y.) 745, 27 N. Y. S. 1128; *Carroll v. Interstate &c. Co.*, 107 Mo. 653, 17 S. W. 889; *Chicago &c. R. Co. v. Scates*, 90 Ill. 586.

³⁶ *Aikin v. Frankford &c. R. Co.* 142 Pa. St. 47, 21 Atl. 781. See also *Richmond &c. R. Co. v. Scott*, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91n; *State v. Lake Roland &c. R. Co.*, 84 Md. 163, 34 Atl. 1130; *Sidley v. New Orleans &c. R. Co.*, 49 La. Ann. 588, 21 So. 850; *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609, 21 N. E. 1064; *Nugent v. New Haven St. R. Co.*, 73 Conn. 139, 46 Atl. 875.

³⁷ See also notes to *Ottinger v. Detroit United R. Co.*, in 34 L. R. A. (N. S.) 225, and to *Guin v. New Orleans R. &c. Co.*, in 13 L. R. A. (N. S.) 601, and ante § 2402n, 42. It has been held not necessary to show that a sudden jolt

or jar was not in the ordinary course of the operation of the railroad if it was unusual. *Bell v. New York &c. R. Co.*, 217 Mass. 408, 104 N. E. 963. See also *Atwood v. Washington &c. Co.*, 79 Wash. 427, 140 Pac. 343. But compare *Work v. Boston El. R. Co.*, 207 Mass. 447, 93 N. E. 693. There is considerable difference as to when a presumption of negligence arises from sudden starts stops and jerks or jolts. The authorities are reviewed in *St. Louis &c. R. Co. v. Fitts*, 40 Okla. 685, 140 Pac. 144, L. R. A. 1916C, 348; *Wile v. Northern Pac. R. Co.*, 72 Wash. 82, 129 Pac. 889, L. R. A. 1916C, 355. and the elaborate note in L. R. A. 1916C, 373-376.

³⁸ *Dorr v. Lehigh Val. R. Co.*, 211 N. Y. 369, 105 N. E. 652, L. R. A. 1915D, 368n, Ann. Cas. 1915C, 763n.

liable.³⁹ But where the emergency is not due to the carrier's negligence, and it is not negligent in the manner of applying the brake under the circumstances, the carrier is not liable for injuries to a passenger caused by such application or sudden stopping of the car called for by the emergency.⁴⁰

§ 2486 (1637). Ejection of passengers.—We have elsewhere considered the right of railroad companies to eject travelers for not paying fare or presenting a proper ticket,⁴¹ but we did not consider, in that connection, the right of the company to eject disorderly passengers nor the manner of expulsion and the liability of the company where passengers are wrongfully or

³⁹ See *Willis v. St. Joseph R. &c. Co.*, 111 Mo. App. 580, 86 S. W. 567; *Southern R. Co. v. Brooks*, 125 Tenn. 260, 143 S. W. 62. But in one or two of the cases cited in the following note it is not clear that the emergency was not created by the carrier itself, yet it was held not liable for the sudden stop.

⁴⁰ *Craig v. Boston Elev. R. Co.*, 207 Mass. 548, 93 N. E. 575 (citing other Massachusetts cases to same effect); *Toad v. Missouri Pac. R. Co.*, 126 Mo. App. 684, 105 S. W. 671; *Cleveland City R. Co. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604; *Stewart v. Central Vt. R. Co.*, 86 Vt. 398, 85 Atl. 745, 44 L. R. A. (N. S.) 433. See also *Yaeger v. Southern Cal. R. Co.*, 5 Cal. Unrep. 870, 51 Pac. 190; *Chicago &c. R. Co. v. James (Kans.)*, 100 Pac. 641; *Corkhill v. Camden &c. R. Co.*, 69 N. J. L. 97, 54 Atl. 522.

⁴¹ Ante, § 2417, et seq. See also *Southern R. Co. v. Hawkins*, 28 Ky. L. 364, 89 S. W. 259; *Louisville &c. R. Co. v. Lyons*, 104 Ky. 23, 46

S. W. 209, with which compare *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. 469, and see *Little Rock &c. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97n, 19 Ann. Cas. 273; *Delmonte v. Southern Pac. Co.*, 2 Cal. App. 211, 83 Pac. 269; *Norton v. Consolidated R. Co.*, 79 Conn. 109, 63 Atl. 1087; *Leyser v. Chicago &c. R. Co.*, 138 Mo. App. 34, 119 S. W. 1068; *St. Louis &c. R. Co. v. Johnson*, 25 Okla. 883, 108 Pac. 378; *Freeman v. Costley*, 54 Tex. Civ. App. 388, 124 S. W. 458; *Loy v. Northern Pac. R. Co.* 68 Wash. 33, 122 Pac. 372; *Kirk v. Seattle Elec. R. Co.*, 58 Wash. 283, 108 Pac. 604, 31 L. R. A. (N. S.) 991n. Company may be liable for mistake in identity and wrongful expulsion although in good faith. *Seaboard Air Line R. v. O'Quin*, 124 Ga. 357, 52 S. E. 427, 2 L. R. A. (N. S.) 472, and note, with other cases there cited. As to ejection of trespassers, see ante, § 1793.

improperly ejected. It may be stated, as a general rule, that a railroad company may eject all persons who, having a reasonable opportunity, fail to comply with its reasonable regulations or whose presence, because of their misconduct or their having a contagious disease, or the like, is the cause of danger or great inconvenience to the other passengers.⁴² Thus, where pas-

⁴² *Chicago &c. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Hegen v. Ft. Dodge &c. R. Co.*, 150 Iowa 313, 130 N. H. 148 (drunk and disorderly passenger); *McGowen v. Morgan's &c. R. Co.*, 41 La. Ann. 732, 6 So. 606, 5 L. R. A. 817, and note, 17 Am. St. 415; *New Orleans &c. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Peck v. New York &c. R. Co.*, 70 N. Y. 587; *McMillan v. Federal &c. R. Co.*, 172 Pa. St. 523, 33 Atl. 560; *Gulf &c. R. Co. v. Moody*, 3 Tex. Civ. App. 622, 22 S. W. 1009; 3 *Thomp. Neg.* (2d ed.), § 3234, et seq. May eject for failure to pay back fare in accordance with regulations. *Manning v. Louisville &c. R. Co.*, 95 Ala. 392, 11 So. 8, 16 L. R. A. 55, and note, 36 Am. St. 225. For riding on freight train where ticket is for passenger train. *Thomas v. Chicago &c. R. Co.*, 72 Mich. 355, 40 N. W. 463; *Hobbs v. Texas &c. R. Co.*, 49 Ark. 357, 5 S. W. 586. For riding on fast train contrary to schedule and regulations. *Runyon v. Pennsylvania R. Co.*, 74 N. J. L. 225, 68 Atl. 107; *Albin v. Gulf Etc. R. Co.*, 43 Tex. Civ. App. 170, 95 S. W. 589. See also note in L. R. A. 1915D, 713. For riding in improper place contrary to rule. *Coombs v. Southern Wis. Ry. Co.*, 162 Wis. 111, 155 N. W.

922, L. R. A. 1916D, 539, Ann. Cas. 1918C, 532n, and other cases there reviewed in note. For smoking in street car contrary to rule. *McQuerry v. Metropolitan St. R. Co.*, 117 Mo. App. 225, 92 S. W. 912. For being disorderly. *Indianapolis Tract. R. Co. v. Lockman*, 49 Ind. App. 143, 96 N. E. 970; *Leonard v. St. Louis Trans. Co.*, 115 Mo. App. 349, 91 S. W. 452; *Hirte v. Eastern Wis. R. Co.*, 127 Wis. 230, 106 N. W. 1068. A father can not be expelled on account of the misconduct of an adult son with whom he is traveling. *Louisville &c. R. Co. v. Maybin*, 66 Miss. 83, 5 So. 401. But compare *Philadelphia &c. R. Co. v. Hoeflich*, 62 Md. 300, 59 Am. Rep. 223, 18 Am. & Eng. R. Cas. 373. As to ejection of one who claims to have a valid pass, see *Chicago &c. R. Co. v. Herring*, 57 Ill. 59; *Elliott v. Western &c. R. Co.*, 58 Ga. 454; *Graham v. Pacific &c. R. Co.*, 66 Mo. 536. Conductor may remove holder of second-class ticket from first-class car. *Alabama &c. R. Co. v. Drummond*, 73 Miss. 813, 20 So. 7; *New York &c. R. Co. v. Bennett*, 50 Fed. 496. But compare *Louisville &c. R. Co. v. Gaines*, 99 Ky. 411, 36 S. W. 174, 59 Am. St. 461. See generally as to reasonable rules *Runyan v. Central R. Co.*, 65 N. J. L. 228, 47 Atl.

sengers, after a reasonable opportunity has been afforded, fail to produce a ticket or pay the extra fare demanded on the train, in accordance with the reasonable regulations of the company, they may be expelled.⁴³ And in a recent case an answer in an action for ejecting an alleged passenger was held sufficient where it alleged that defendant operated a daily train, offering ample passenger accommodations, that stopped at plaintiff's destination; that the train plaintiff boarded was a fast passenger train which did not stop there and that defendant refused to accept plaintiff's fare for transportation on such train except to a station at which the train was scheduled to stop, and plain-

422; *Birmingham R. &c. Co. v. Stallings*, 154 Ala. 527, 45 So. 650; *Gregory v. Chicago &c. R. Co.*, 100 Iowa 345, 69 N. W. 532; *McQuerry v. Metropolitan St. R. Co.*, 117 Mo. App. 255, 92 S. W. 912; *Morris v. Atlantic R. Co.*, 116 N. Y. 552, 22 N. E. 1097. But compare *Western R. Co. v. Herold*, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75; *Coffee v. Louisville R. Co.*, 76 Miss. 569, 25 So. 157, 45 L. R. A. 112, 71 Am. St. 535; *Cathey v. St. Louis &c. R. Co.*, 149 Mo. App. 134, 130 S. W. 130; *Cherry v. Chicago R. Co.*, 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830; *Central R. Co. v. Motes*, 117 Ga. 923, 43 S. E. 990, 62 L. R. A. 507, 97 Am. St. 223. Reasonableness of the rule is held a question for the court in *Birmingham R. &c. Co. v. McDonough*, 153 Ala. 122, 44 So. 960, 127 Am. St. 18, 13 L. R. A. (N. S.) 445n. Information of the rules and regulations, or reasonable means of obtaining it, must be furnished by the carrier. *Union Trac. Co. v. Smith* (Ind. App.), 123 N. E. 4.

⁴³ *Cox v. Los Angeles &c. R.*

Co., 109 Cal. 100, 41 Pac. 794; *Scott v. Cleveland &c. R. Co.*, 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154; *Curl v. Chicago &c. R. Co.*, 63 Iowa 417, 16 N. W. 69, 19 N. W. 308; *Atchison &c. R. Co. v. Gants*, 38 Kans. 608, 17 Pac. 54, 5 Am. St. 780, 34 Am. & Eng. R. Cas. 290; *Atchison &c. R. Co. v. Brown*, 2 Kans. App. 604, 42 Pac. 588; *State v. Goold*, 53 Maine 279; *Baltimore &c. R. Co. v. Blocher*, 27 Md. 277; *Swan v. Manchester &c. R. Co.*, 132 Mass. 116, 42 Am. Rep. 432; *White v. Grand Rapids &c. R. Co.*, 107 Mich. 681, 65 N. W. 521; *Williams v. Mobile &c. R. Co.* (Miss.), 19 So. 90; *Post v. Chicago &c. R. Co.*, 14 Nebr. 110, 15 N. W. 225, 45 Am. Rep. 100; *Wiggins v. King*, 91 Hun 340, 36 N. Y. S. 768; *Peabody v. Oregon &c. Co.*, 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823, and note; *Church v. Chicago &c. R. Co. v. Benson*, 85 Tenn. 627, 854, 26 L. R. A. 616; *Memphis &c. R. Co. v. Benson*, 85 Tenn. 627; 4 S. W. 5, 4 Am. St. 776, 31 Am. & Eng. R. Cas. 112; *International &c. R. Co. v. Wilkes*, 68 Tex. 617, 5 S. W. 491, 2 Am. St. 515, 34 Am.

tiff, having refused to pay fare to such station, was ejected.⁴⁴ And in a very recent case where a rate schedule had been filed and approved by the Public Service Commission prohibited a through passenger from paying to an intermediate point and from there to the point of destination, the combined local fares being somewhat less than the through fare, the conductor was held justified in ejecting him on his refusal to pay the additional sum necessary to make up the amount of the through fare as scheduled.⁴⁵ So, where a passenger is so drunk⁴⁶ or

& Eng. R. Cas. 331; *Russell v. Missouri &c. R. Co.*, 12 Tex. Civ. App. 627, 35 S. W. 724; *Grogan v. Chesapeake &c. R. Co.*, 39 W. Va. 415, 19 S. E. 562. See also *Wilson v. Southern Ry. Co.*, 143 Ga. 189, 84 S. E. 445; *Mullins v. Illinois Cent. R. Co.*, 93 Miss. 184, 46 So. 529, 136 Am. St. 542; *Tarrant v. St. Louis &c. Ry. Co.*, 237 Mo. 655, 141 S. W. 600; *Daley v. Chicago &c. R. Co.*, 145 Wis. 249, 129 N. W. 1062, 32 L. R. A. (N. S.) 1164. Indeed, we have elsewhere shown, many authorities hold that even if the passenger has been misled by a ticket agent, or has not had a reasonable opportunity to purchase a ticket, he should pay his fare and then sue the company, and that he cannot sue for the ejection when the conductor acts in accordance with the reasonable regulations of the company, and the passenger refuses to pay the fare and has no ticket apparently good on its face.

⁴⁴ *Albin v. Gulf &c. R. Co.*, 143 Tex. Civ. App. 170, 95 S. W. 589. See also *Noble v. Atchison &c. R. Co.*, 4 Okla. 534, 46 Pac. 483; *Logan v. Hannibal &c. R. Co.*, 77 Mo. 663; *Runyon v. Pennsylvania R. Co.*, 74 N. J. L. 225, 68 Atl. 107;

Hamilton v. New York Cent. R. Co., 51 N. Y. 100. But where fare is paid beyond the place of ejection it has been held the duty of the company, before ejection, to tender back the unearned portion. *Burnham v. Railroad Co.*, 63 Maine 298, 18 Am. Rep. 220; *Wardwell v. Chicago &c. R. Co.*, 46 Minn. 514, 49 N. W. 206, 13 L. R. A. 596, 24 Am. St. 246; *Lake Shore &c. R. Co. v. Orndorff*, 55 Ohio St. 589, 45 N. E. 447, 38 L. R. A. 140, 60 Am. St. 716; *Bland v. Southern Pac. Co.*, 55 Cal. 570, 36 Am. Rep. 50.

⁴⁵ *Arbuckle v. State*, 188 Ind. 444, 124 N. E. 395, distinguishing *Brown v. Terre Haute Trac. Co.*, 63 Ind. App. 327, 110 N. E. 703, 113 N. E. 313, where it was held that a passenger could thus take advantage of the lower local rates but there was no such schedule or regulation against it. Compare *Louisville &c. R. Co. v. Harper*, 203 Ala. 398, 83 So. 142.

⁴⁶ *Lemont v. Washington &c. R. Co.*, 1 Mackey (D. C.), 180, 47 Am. Rep. 238, 1 Am. & Eng. R. Cas. 263; *Baltimore &c. R. Co. v. McDonald*, 68 Ind. 316; *McClelland v. Louisville &c. R. Co.*, 94 Ind. 276, 18 Am. & Eng. R. Cas. 260; *Haley*

disorderly⁴⁷ as to seriously inconvenience or endanger the other passengers, or is afflicted with a contagious disease,⁴⁸ he may be ejected. According to the weight of authority and the better reason, a passenger who has persistently refused to pay his fare or produce a ticket can not gain a right to be carried and make the expulsion unlawful by a tender of the fare after the conductor has begun to expel him,⁴⁹ or at least after the train

v. Chicago &c. R. Co., 21 Iowa 15; *Louisville &c. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 182; *Murphy v. Union R. Co.*, 118 Mass. 228. But compare *Putnam v. Broadway R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190. See generally note in L. R. A. 1915C, 136.

⁴⁷ *Thurston v. Union Pac. R. Co.*, 4 Dill. (U. C. C. C.) 321; *Murphy v. Western &c. R. Co.*, 23 Fed. 637; *Peavy v. Georgia &c. R. Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. 334, 37 Am. & Eng. R. Cas. 114; *Chicago &c. R. Co. v. Griffin*, 68 Ill. 499; *Robinson v. Rockland &c. R. Co.*, 87 Maine 387, 32 Atl. 994, 29 L. R. A. 530; *Philadelphia &c. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442; *Vinton v. Middlesex R. Co.*, 93 Mass. 304, 87 Am. Dec. 714; *Sullivan v. Old Colony &c. R. Co.*, 148 Mass. 119, 18 N. E. 678, 1 L. R. A. 513 and note; *Frank v. Monongahela Val. Tract. Co.*, 75 W. Va. 364, 83 S. E. 1009 (persistent use of profane and insulting language). But see *Chicago City R. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. 770; *Brown v. Memphis &c. R. Co.*, 7 Fed. 51.

⁴⁸ *Paddock v. Atchison &c. R. Co.*, 37 Fed. 841, 4 L. R. A. 231; *Atchison &c. R. Co. v. Weber*, 33 Kans. 543, 6 Pac. 877, 52 Am. Rep.

543, 21 Am. & Eng. R. Cas. 418. As to duty of carrier where it ejects passenger who becomes insane on the trip or is too weak to take care of himself, see *St. Louis &c. R. Co. v. Woodruff*, 89 Ark. 9, 115 S. W. 953; *Chesapeake &c. R. Co. v. Crank*, 32 Ky. L. 1202, 108 S. W. 276; *St. Louis &c. R. Co. v. Roane*, 93 Miss. 7, 46 So. 711. Compare also *Buckley v. Hudson Valley R. Co.*, 212 N. Y. 440, 106 N. E. 121, L. R. A. 1915C, 134n, Ann. Cas. 1915D, 143n. As to when an insane person may be ejected, although his conduct is not such as to indicate danger, see *Meyer v. St. Louis &c. R. Co.*, 54 Fed. 116.

⁴⁹ *Harrison v. Fink*, 42 Fed. 787; *Georgia &c. R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53 and note; *Stone v. Chicago &c. R. Co.*, 47 Iowa 82, 29 Am. Rep. 458; *Hoffbauer v. Davenport &c. R. Co.*, 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278; *Atchison &c. R. Co. v. Dwelle*, 44 Kans. 394, 24 Pac. 500, 44 Am. & Eng. R. Cas. 402; *O'Brien v. Boston &c. R. Co.*, 81 Mass. 20, 77 Am. Dec. 347; *Marshall v. Boston &c. R. Co.*, 145 Mass. 164, 13 N. E. 384, 31 Am. & Eng. R. Cas. 18; *Mullins v. Illinois Cent. R. Co.*, 93 Miss. 184,

has been stopped for that purpose, but it is held that if he has no money another may pay his fare for him before he is expelled.⁵⁰

§ 2487. Care in ejecting.—The company must exercise its right to eject passengers in a lawful manner and with some regard to their safety. Excessive and unnecessary force must

46 So. 529, 136 Am. St. 542; *State v. Campbell*, 32 N. J. L. 309; *Pease v. Delaware &c. R. Co.*, 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699; *Pickens v. Richmond &c. R. Co.*, 104 N. Car. 312, 10 S. E. 556; *Cincinnati &c. R. Co. v. Skillman*, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31; *Phillips v. Atlantic &c. R. Co.*, 90 S. Car. 187, 73 S. E. 75, 38 L. R. A. (N. S.) 1151, Ann. Cas. 1913C, 1244n; *Thomas v. Geldart*, 20 New Bruns. 95. See also notes in Ann. Cas. 1913C, 1244, 1246, and in L. R. A. 1915 E, 311; *Hibbard v. New York &c. R. Co.*, 15 N. Y. 455; *State v. Thompson*, 20 N. H. 250. Contra, *O'Brien v. New York &c. R. Co.*, 80 N. Y. 236; *Wardwell v. Chicago &c. R. Co.*, 46 Minn. 514, 49 N. W. 206, 13 L. R. A. 596, 24 Am. St. 246; *Louisville &c. R. Co. v. Harris*, 77 Tenn. 180, 42 Am. Rep. 668, 16 Am. & Eng. R. Cas. 374; *Gould v. Chicago &c. R. Co.*, 18 Fed. 155; *Texas &c. R. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532; *Bland v. Southern &c. R. Co.*, 55 Cal. 570, 36 Am. Rep. 50. See also *Louisville &c. R. Co. v. Cottongim* (Ky.), 119 S. W. 751; *Holt v. Hannibal &c. R. R. Co.* 174 Mo. 524, 74 S. W. 631. In most of these cases, however, the circumstances were peculiar or the refusal was not willful. See also *Chicago &c.*

R. Co. v. Bryan, 90 Ill. 126; *Louisville &c. R. Co. v. Breckinridge*, 98 Ky. 1, 34 S. W. 702. In *Kansas City &c. R. Co. v. Holden*, 66 Ark. 602, 53 S. W. 45, 47, the text is quoted, but it is held that where the conductor has elected to treat him as a passenger, and he tenders fare before the conductor begins to expel him, the rule does not apply. See also *Powell v. St. Louis &c. R. Co.*, 229 Mo. 246, 129 S. W. 963; *Missouri &c. R. Co. v. Smith*, 6 Ind. Ter. 99, 89 S. W. 668.

⁵⁰ And it is held in some cases that the rule does not apply if the passenger tenders his fare before the train is actually stopped even though he has refused up to that time. See *Louisville &c. R. Co. v. Cottongim* (Ky.), 119 S. W. 751; *Short v. St. Louis &c. R. Co.*, 150 Mo. App. 359, 130 S. W. 488; *Southern Kans. R. Co. v. Wallace* (Tex.), 152 S. W. 873; *Louisville &c. R. Co. v. Garrett*, 76 Tenn. 438, 41 Am. Rep. 640, 3 Am. & Eng. R. Cas. 416; *Randall v. Chicago &c. R. Co.*, 102 Mo. App. 342, 76 S. W. 493, 494 (citing text); *Missouri &c. R. Co. v. Smith*, 6 Ind. Ter. 99, 89 S. W. 668, 670 (quoting text). See also *Clark v. Wilmington &c. R. Co.*, 91 N. Car. 506, 49 Am. Rep. 647; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Hoff-*

not be used.⁵¹ So, if a passenger is injured by being ejected while the car is in motion, or in a dangerous and improper place, where he is exposed to unnecessary peril, the railroad company may be held liable for such injury.⁵² If he is so intoxicated or so young or feeble as not to be able to take care of himself or look out for his own safety, the company

bauer v. Davenport &c. R. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278; *Baltimore &c. R. Co. v. Norris*, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. 166; *Atchison &c. R. Co. v. Dwelle*, 44 Kans. 394, 24 Pac. 500; *O'Brien v. New York &c. R. Co.*, 80 N. Y. 236; *Pease v. Delaware &c. R. Co.*, 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699; *Gulf &c. R. Co. v. Bunn*, 41 Tex. Civ. App. 503, 95 S. W. 640. But compare where tender by another is without passenger's consent, *Birmingham &c. R. Co. v. Lee*, 153 Ala. 386, 45 So. 164; *Cox v. Los Angeles Term. R. Co.*, 109 Cal. 100, 41 Pac. 794; *Mullins v. Ill. Cent. R. Co.*, 93 Miss. 184, 46 So. 529, 136 Am. St. 542; *Kirk v. Seattle Elec. Co.*, 58 Wash. 283, 108 Pac. 604, 31 L. R. A. (N. S.) 991n.

⁵¹ *New Jersey &c. R. Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. ed. 1049; *Texas &c. R. Co. v. Diefenbach*, 167 Fed. 39; *Wright v. California Cent. R. Co.*, 78 Cal. 360, 20 Pac. 740; *Chicago &c. R. Co. v. Bills*, 118 Ind. 221, 20 N. E. 775, 37 Am. & Eng. R. Cas. 121 and note; *Citizens' St. R. Co. v. Willoebey*, 134 Ind. 563, 33 N. E. 627; *Marquette v. Chicago &c. R. Co.*, 33 Iowa 562; *Brown v. Hannibal &c. R. Co.*, 66 Mo. 588; *New York &c. R. Co. v. Haring*, 47 N. J. L. 137, 54 Am.

Rep. 123, 21 Am. & Eng. R. Cas. 436; *Jardine v. Cornell*, 50 N. J. L. 485, 14 Atl. 590; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274, 7 Am. Rep. 448; *Knowles v. Norfolk &c. R. Co.*, 102 N. Car. 59, 9 S. E. 7; *Gulf &c. R. Co. v. Kuenhle*, 4 Tex. App. (Civ. Cas.) 427, 16 S. W. 177; *Bass v. Chicago &c. R. Co.*, 39 Wis. 636; ante, § 1793. See also *Birmingham &c. R. Co. v. Yielding*, 155 Ala. 359, 46 So. 747; *Kansas City &c. R. Co. v. Holden*, 66 Ark. 602, 53 S. W. 45, 47 (citing text); *Louisville &c. R. Co. v. Forrest*, 6 Ga. App. 766, 65 S. E. 808; *McKinley v. Louisville &c. R. Co.*, 137 Ky. 845, 127 S. W. 483, 28 L. R. A. (N. S.) 611n; *Smith v. Atchison &c. R. Co.*, 122 Mo. App. 85, 97 S. W. 1007; *McQueery v. Metropolitan St. R. Co.*, 117 Mo. App. 225, 92 S. W. 912.

⁵² *Gallena v. Hot Springs &c. R. Co.*, 13 Fed. 116; *Fell v. Northern Pac. R. Co.*, 44 Fed. 248; *Kline v. Central Pac. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *Atchison &c. R. Co. v. Weber*, 33 Kans. 543, 6 Pac. 877, 52 Am. Rep. 543, 21 Am. & Eng. R. Cas. 418; *Kansas City &c. R. Co. v. Kelly*, 36 Kans. 655, 14 Pac. 172, 55 Am. Rep. 596; *Southern Kans. R. Co. v. Rice*, 38 Kans. 398, 16 Pac. 817, 5 Am. St. 766; *Holmes v. Wakefield*, 94 Mass. 580, 90 Am. Dec. 171; *Willett v. King*,

should exercise reasonable care to see that he is not expelled and abandoned in such a place and under such circumstances that he will be exposed to unnecessary peril.⁵⁸ In some states it is provided by statute that a passenger can be lawfully ejected only at a station or usual stopping place, and this has been

203 Mich. 295, 168 N. W. 986; Wyman v. Northern Pac. R. Co., 34 Minn. 210, 25 N. W. 349; State v. Kinney, 34 Minn. 311, 25 N. W. 705; Vicksburg &c. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537, 30 Am. & Eng. R. Cas. 587; Harkless v. Chicago &c. R. Co., 151 Mo. App. 463, 132 S. W. 29; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Healey v. City &c. R. Co., 28 Ohio St. 23; Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; Moore v. Atchison &c. R. Co., 26 Okla. 682, 110 Pac. 1059; Arnold v. Pennsylvania R. Co., 115 Pa. St. 135, 8 Atl. 213, 2 Am. St. 542; Ham v. Delaware &c. R. Co., 142 Pa. St. 617, 21 Atl. 1012; Hall v. South Carolina &c. R. Co., 28 S. Car. 261, 5 S. E. 623, 34 Am. & Eng. R. Cas. 311; Gulf &c. R. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495; Mills v. Seattle &c. R. Co., 50 Wash. 20, 96 Pac. 520, 19 L. R. A. (N. S.) 704 note. But compare Southern &c. R. Co. v. Sanford, 45 Kans. 372, 25 Pac. 891, 11 L. R. A. 432.

⁵⁸ Johnson v. Louisville &c. R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. 39; Louisville &c. R. Co. v. Johnson, 108 Ala. 62, 19 So. 51, 31 L. R. A. 372; St. Louis &c. R. Co. v. Dallas, 93 Ark. 209, 124 S. W. 247; Louisville &c. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186, 16 Am. & Eng. R. Cas. 390; Louis-

ville &c. R. Co. v. Ellis, 97 Ky. 330, 30 S. W. 979; Stringfield v. Louisville R. Co., 32 Ky. L. 578, 105 S. W. 1190; Conolly v. Crescent City R. Co., 41 La. Ann. 57, 5 So. 259, 6 So. 526, 3 L. R. A. 133n, 17 Am. St. 389; Mobile &c. R. Co. v. Jackson, 92 Miss. 517, 46 So. 142; Buckley v. Hudson Valley R. Co., 212 N. Y. 440, 106 N. E. 121, L. R. A. 1915C, 134n, Ann. Cas. 1915D, 143n (quoting text); Lee v. Atlantic Coast Line R. Co., 176 N. Car. 95, 97 S. E. 158; Texas &c. R. Co. v. McDonald, 2 Tex. App. (Civ. Cas.) 144; Texas Cent. R. Co. v. Rose (Tex. Civ. App.), 172 S. W. 756. See also Cincinnati &c. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241n, 16 Am. St. 334; Illinois Cent. R. Co. v. Sutton, 53 Ill. 397; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; Cincinnati &c. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241n, 60 Am. Rep. 572; Atchison &c. R. Co. v. Weber, 33 Kans. 543, 6 Pac. 877, 52 Am. Rep. 543; Eidson v. Southern R. Co. (Miss.), 23 So. 369; Jackson v. Alabama &c. R. Co., 76 Miss. 703, 25 So. 353; Guy v. New York &c. R. Co., 30 Hun (N. Y.) 399; Haug v. Great Northern R. Co., 8 N. Dak. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. 727; Cincinnati &c. R. Co. v. Kassen, 49 Ohio St. 230, 31

held to be the law in some jurisdictions, even in the absence of such a statute;⁵⁴ but the better rule is that, if there is no such statute, one whom the company has a right to eject may be expelled between stations as well as at a station.⁵⁵

§ 2488 (1637a). **Ejection—Resistance by passenger.**—We have elsewhere considered the liability of railroad companies

N. E. 282, 16 L. R. A. 674. But compare *Roseman v. Carolina Cent. R. Co.*, 112 N. Car. 709, 16 S. E. 766, 19 L. R. A. 327, 34 Am. St. 524; *Louisville &c. R. Co. v. Johnson*, 92 Ala. 204, 9 So. 269, 25 Am. St. 35n; *Louisville &c. R. Co. v. Hawkins*, 92 Ala. 241, 9 So. 271; *McClelland v. Louisville &c. R. Co.*, 94 Ind. 276; *Haley v. Chicago &c. R. Co.*, 21 Iowa 15; *Louisville &c. R. Co. v. Logan*, 88 Ky. 232, 10 S. W. 655, 3 L. R. A. 80, 21 Am. St. 332; *Tuttle v. Railway Co.*, 26 Ky. L. 152, 80 S. W. 802; *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. 386; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601; *Missouri Pac. R. Co. v. Evans*, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 476. These latter cases are not in conflict with the rule as we have stated it. They hold, and correctly, as we think, that if the passenger does not appear too drunk to take care of himself, or if his ejection in that state is not a proximate cause of his subsequent injury, or where he is put off at a proper place and wanders back on the track, or the like, the company is not liable.

⁵⁴ *St. Louis &c. R. Co. v. Branch*, 45 Ark. 524; *Kansas City &c. R. Co. v. Holden*, 66 Ark. 602, 53 S. W. 45, 47 (citing text); Illi-

nois Cent. R. Co. v. Lattimer, 128 Ill. 163, 21 N. E. 7; *Texas &c. R. Co. v. Casey*, 52 Tex. 112; *Stephen v. Smith*, 29 Vt. 160; *Boehm v. Duluth &c. R. Co.*, 81 Wis. 592, 65 N. W. 506 (holding that a statute authorized ejection of a passenger at a station or usual stopping place or near a dwelling impliedly forbids it at any other place). See also *Toledo &c. R. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277; *Durfee v. Union Pacific R. Co.*, 9 Utah 213, 33 Pac. 944; *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 596, 15 Atl. 411; *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 5 So. 633, 3 L. R. A. 733n, 23 Am. St. 506. Other cases involving the construction and effect of such statutes are *Randolph v. Quincy &c. R. Co.*, 129 Mo. App. 1, 107 S. W. 1029; *Petty v. St. Louis &c. R. Co.*, 149 Mo. App. 360, 130 S. W. 85; *Beck v. Quincy &c. R. Co.*, 129 Mo. App. 7, 108 S. W. 132; *Short v. St. Louis &c. R. Co.*, 150 Mo. App. 359, 130 S. W. 488; *Caher v. Grand Trunk R. Co.*, 75 N. H. 125, 71 Atl. 225; *Bullock v. Atlantic &c. R. Co.*, 152 N. Car. 66, 67 S. E. 60.

⁵⁵ *Magee v. Oregon &c. Co.*, 46 Fed. 734; *Burch v. Baltimore &c. R. Co.*, 3 App. Cas. (D. C.) 346, 26 L. R. A. 129, and note, where authorities on both sides are col-

for the wrongful acts of their employes, whether willful or otherwise,⁵⁶ and little remains to be said upon the subject in this connection. There is, however, it may be well to state, considerable conflict among the authorities as to whether a passenger may resist a wrongful attempt to eject him and the effect of such resistance upon the liability of the company. It is clear, we think, that a passenger has a right to resist an attempt to eject him from a rapidly moving train or under other circumstances where it will endanger his life,⁵⁷ but it is equally

lected; *Illinois &c. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276, 38 Ind. 116, 10 Am. Rep. 103; *Scott v. Cleveland &c. R. Co.*, 149 Ind. 125, 43 N. E. 133, 32 L. R. A. 154; *Brown v. Chicago &c. R. Co.*, 51 Iowa 235, 1 N. W. 487; *McClure v. Philadelphia &c. R. Co.*, 34 Md. 532, 6 Am. Rep. 345; *O'Brien v. Boston &c. R. Co.*, 81 Mass. 20, 77 Am. Dec. 347; *Great Western &c. R. Co. v. Miller*, 19 Mich. 305; *Wyman v. Northern R. Co.*, 34 Minn. 210, 25 N. W. 349; *Cincinnati &c. R. Co. v. Skillman*, 39 Ohio St. 444; *Moore v. Columbia &c. R. Co.*, 38 S. Car. 1, 16 S. E. 781; *Rudy v. Rio Grande &c. R. Co.*, 8 Utah 165, 30 Pac. 366. See also *McKinley v. Louisville &c. R. Co.*, 137 Ky. 845, 127 S. W. 483, 28 L. R. A. (N. S.) 611n.

⁵⁶ See ante, § 1805; post, § 2489. See also as to willful or wrongful ejection of a passenger by employes. *Terre Haute &c. R. Co. v. Fitzgerald*, 47 Ind. 79; *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. ed. 502; *Louisville &c. R. Co. v. Whitman*, 79 Ala. 328; *Kline v. Central Pac. R.*

Co., 37 Cal. 400, 99 Am. Dec. 282; *Chicago &c. R. Co. v. Bryan*, 90 Ill. 126; *Indianapolis &c. Tract. Co. v. Lockman*, 49 Ind. App. 143, 96 N. E. 970; *Moore v. Fitchburg &c. R. Co.*, 70 Mass. 465, 64 Am. Dec. 83; *Ramsden v. Boston &c. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Great Western &c. R. Co. v. Miller*, 19 Mich. 305; *Perkins v. Missouri &c. R. Co.*, 55 Mo. 201; *Eads v. Metropolitan &c. R. Co.*, 43 Mo. App. 536; *Hoffman v. New York &c. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365, 82 Am. Dec. 520. But compare *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256, 1 Am. & Eng. R. Cas. 461; *Mills v. Seattle &c. R. Co.*, 50 Wash. 20, 96 Pac. 520, 19 L. R. A. (N. S.) 704n; *Teel v. Coal &c. R. Co.*, 66 W. Va. 315, 66 S. E. 470.

⁵⁷ *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343, 80 Am. Dec. 286; *English v. Delaware &c. R. Co.*, 66 N. Y. 454, 23 Am. Rep. 69; *Indianapolis &c. Tract. Co. v. Lockman*, 49 Ind. App. 143, 96 N. E. 970; *Southern Kans. R. Co. v. Rice*, 38 Kans. 398, 16 Pac. 817, 5 Am. St. 766. In such a case it is reasonable to hold that he may recover

clear that if he is in the wrong and is sought to be expelled in a proper manner he can not recover for injuries invited by his resistance and caused by the exercise of reasonably necessary force to overcome that resistance.⁵⁸ If he is in the right some of the courts hold that he may resist expulsion and recover additional damages for injuries inflicted by the conductor in using force necessary to overcome his resistance,⁵⁹ but other courts hold that such resistance should not be encouraged and that he can recover no damages for increased injuries received on that account in addition to what he would otherwise have been entitled to recover.⁶⁰ One who enters a car expecting and

all damages sustained, although more force is used on account of his resistance.

⁵⁸ *Peavy v. Georgia &c. R. Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. 334, 37 Am. & Eng. R. Cas. 114; *Chicago &c. R. Co. v. Wilson*, 23 Ill. App. 63; *Chicago &c. R. Co. v. Willard*, 31 Ill. App. 435; *Railway Co. v. Daniels*, 90 Ill. App. 154; *Murphy v. Union R. Co.*, 118 Mass. 228; *Townsend v. New York &c. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *McCullen v. Railway Co.*, 68 App. Div. 269, 74 N. Y. S. 209; *Moore v. Columbia &c. R. Co.*, 38 S. Car. 1, 16 S. E. 781, 58 Am. & Eng. R. Cas. 493. See also *Arnold v. Atchison &c. R. Co.*, 81 Kans. 400, 105 Pac. 541; *Randell v. Chicago &c. R. Co.*, 102 Mo. App. 342, 76 S. W. 493, 495 (citing text).

⁵⁹ *Louisville &c. R. Co. v. Wolfe*, 128 Ind. 347, 27 N. E. 606, 25 Am. St. 436, 47 Am. & Eng. R. Cas. 630; *United States v. Kane*, 9 Sawy. (U. S. C. C.) 614. See also *New York &c. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. ed. 71; *Pittsburgh &c. R. Co. v. Russ*, 57 Fed. 822; *Lake Erie &c.*

R. Co. v. Acres, 108 Ind. 548, 9 N. E. 453, 28 Am. & Eng. R. Cas. 112; *Chicago &c. R. Co. v. Holdridge*, 118 Ind. 281, 20 N. E. 837; *Ellsworth v. Chicago &c. R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173; *Burnham v. Detroit &c. R. Co.*, 168 Mich. 55, 133 N. W. 952, Ann. Cas. 1913B, 1204n; *McDonald v. Central R. Co.*, 72 N. J. L. 280, 62 Atl. 405, 111 Am. St. 672; *English v. Delaware &c. Canal Co.*, 66 N. Y. 454, 23 Am. Rep. 69. See also notes in 34 L. R. A. (N. S.) 1060, and L. R. A. 1918D, 1032. In *Austro-American S. S. Co. v. Thomas*, 248 Fed. 231, L. R. A. 1918D, 873, the passenger was held entitled to recover for threatened expulsion in the hearing of others when the ticket was claimed to be worthless but was in fact good.

⁶⁰ *Brown v. Memphis &c. R. Co.*, 7 Fed. 51, 1 Am. & Eng. R. Cas. 247; *Hufford v. Grand Rapids &c. R. Co.*, 53 Mich. 118, 18 N. W. 580; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Atchison &c. R. Co. v. Gants*, 38 Kans. 608, 17 Pac. 54, 5 Am. Rep. 780; *Hall v. Memphis &c. R. Co.*,

desiring to be ejected in order that he may sue the company for damages can not recover for wounded feelings or pain of mind on being ejected.⁶¹

§ 2489 (1638). **Assaults and injuries by employes.**—It is well settled that railroad companies are liable not only for injuries to their passengers, who are without fault, by the negligent acts of their employes, but also for injuries willfully inflicted upon such passengers by their employes within the scope or line of their duty while engaged in executing the contract of carriage.⁶² But if the terms “scope of their employment” or

15 Fed. 57. See also *Crocker v. New London R. Co.*, 24 Conn. 249; *Norton v. Consolidated R. Co.*, 79 Conn. 109, 63 Atl. 1087, 118 Am. St. 132, 6 Ann. Cas. 943; *Chicago &c. R. Co. v. Griffin*, 68 Ill. 499; *Dervine v. Chicago City R. Co.*, 141 Ill. App. 583, affd. in 86 N. E. 689; *Southern Kans. R. Co. v. Rice*, 38 Kans. 398, 16 Pac. 817, 5 Am. St. 766, 34 Am. & Eng. R. Cas. 316, 320; *Willard v. St. Paul &c. Ry. Co.*, 116 Minn. 183, 133 N. W. 465; *Randell v. Chicago &c. R. Co.*, 102 Mo. App. 342, 76 S. W. 493; *Green v. United Rys. of St. Louis*, 200 Mo. App. 303, 206 S. W. 237; *Monnier v. New York &c. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. 619; *Peabody v. Oregon &c. R. Co.*, 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823n.

⁶¹ *Railway Co. v. Trimble*, 54 Ark. 354, 15 S. W. 899; *Cincinnati &c. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Kirk v. Seattle Elec. Co.*, 58 Wash. 283, 108 Pac. 604, 31 L. R. A. (N. S.) 991. As to measure of damages in ordinary cases where there is no excessive force, maliciousness, or the

like, see *Missouri &c. R. Co. v. Smith*, 6 Ind. Ter. 99, 89 S. W. 668; *St. Louis &c. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225. As to damages for humiliation and the like, see *St. Louis &c. R. Co. v. Brown*, 97 Ark. 505, 134 S. W. 1194; *Bleecker v. Colorado &c. R. Co.*, 50 Colo. 140, 114 Pac. 481, 33 L. R. A. (N. S.) 386 and note; *Morrill v. Minneapolis &c. R. Co.*, 103 Minn. 362, 115 N. W. 395, 123 Am. St. 341 and note. As to punitive damages generally, and when they are recoverable, see *Little Rock &c. R. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97 and note, 10 Ann. Cas. 273; *Seaboard Air Line R. v. O'Quin*, 124 Ga. 357, 52 S. E. 427, 2 L. R. A. (N. S.) 472; *Illinois Cent. R. Co. v. Reid*, 93 Miss. 458, 46 So. 146, 17 L. R. A. (N. S.) 344 and note; *Smith v. Southern R. Co.*, 88 S. Car. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708 and note; also note in L. R. A. 1915C 146; 6 *Thomp. Neg.* (2d ed), §§ 7180, 7181; *White's Supp.*, §§ 3290, 3291.

⁶² *Chamberlain v. Chandler*, 3 Mason (U. S. C. C.) 242; *New Jer-*

"line of their duty" are used in their narrowest sense, and this is the full measure and limit of their liability in such cases it would seem that, so far as the willful acts of their employes are concerned, their duty and liability to their passengers are not, practically, appreciably greater than they are to licensees or even mere trespassers, and that it would be fully as difficult for a passenger to recover damages from the company when assaulted by one of its employes as when assaulted by a fellow passenger or a stranger upon the train. On the other hand, if a railroad company is to be held liable for a willful injury to a passenger by a servant outside the scope of his authority, and at all events, it may be plausibly argued that this would make it an insurer of the perfection of its employes, and render it liable for what it could not be deemed to have even impliedly authorized. There is much apparent conflict among the authorities upon this subject, but we think some of it is due to the use of the term "scope of employment" or "line of duty" in a different sense in different cases, or to a failure to place the decision upon the correct ground. It is not merely a question of negligence in such cases, nor is it strictly a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its

sey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 1041, 30 L. ed. 1049; Western &c. R. Co. v. Turner, 72 Ga. 292, 53 Am. Rep. 842; North Chicago R. Co. v. Gastka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481; Jeffersonville &c. R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; American Express Co. v. Patterson, 73 Ind. 430; Wabash R. Co. v. Savage, 110 Ind. 156, 9 N. E. 85, and authorities cited on page 87; Louisville &c. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Moore v. Fitchburg R. Co., 70 Mass. 465, 64 Am. Dec. 83; Ramsden v. Boston &c. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Bry-

ant v. Rich, 106 Mass. 108, 8 Am. Rep. 311; Harrold v. Winona &c. R. Co., 47 Minn. 17, 49 N. W. 389; Wee. v. Panama &c. R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Palmeri v. Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. 632, and note; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520n; Milwaukee &c. R. Co. v. Finney, 10 Wis. 388. See also Bledsoe v. West, 186 Mo. App. 460, 171 S. W. 622; notes in 3 L. R. A. (N. S.) 605, 4 L. R. A. (N. S.) 485, 17 L. R. A. (N. S.) 763, 23 L. R. A. (N. S.) 289, 33 L. R. A. (N. S.) 386, 131 Am. St. 964.

passengers as long as that relation subsists, and a breach of that duty on its part whether caused by the wilful act of an employe or not. A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants and shall not be willfully insulted and harmed by them, and if it commits the discharge of this duty to an employe it may well be held to do so at its peril, notwithstanding the exercise of care on its part in selecting its servants. Either the company or the passengers must take the risk of infirmities of temper, maliciousness and misconduct of the employes whom the company has placed upon the train and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is, therefore, but just to make the company, rather than the passengers, take this risk, and to hold it responsible.⁶³ This leads us to the conclusion that a railroad company is liable for an injury willfully inflicted upon a passenger by its employes while engaged in performing a duty which the carrier owes to the passenger, or in executing the contract, although the company is guilty of no negligence in selecting them and such act was not strictly within the scope of their employment or line of their duty in the sense that it was done for the carrier or arose out of the performance of their particular duty.⁶⁴ In a

⁶³ *Haver v. Central R. Co.*, 62 N. J. L. 282, 41 Atl. 916, 918, 43 L. R. A. 84, 72 Am. St. 647 (quoting text); *Birmingham R. &c. Co. v. Baird*, 130 Ala. 334, 30 So. 456, 461, 54 L. R. A. 752, 755, 89 Am. St. 43 (also quoting text). See also *Baltimore &c. R. Co. v. Davis*, 44 Ind. App. 377, 379, 89 N. E. 403; *Chesapeake &c. R. Co. v. Francisco*, 149 Ky. 307, 148 S. W. 46, 42 L. R. A. (N. S.) 83n; *O'Brien v. Transit Co.*, 185 Mo. 263, 84 S. W. 939, 105 Am. St. 592; *Winston v. Lusk*, 186

Mo. App. 381, 172 S. W. 76; *Moller v. Brooklyn Heights R. Co.*, 124 App. Div. 537, 108 N. Y. S. 960; *Daniel v. Petersburg R. Co.*, 117 N. Car. 512, 23 S. E. 327, 4 L. R. A. (N. S.) 485 and note; note to *Blomsness v. Puget Sound Elec. R. Co.*, 47 Wash. 620, 92 Pac. 414, 17 L. R. A. (N. S.) 763n.

⁶⁴ *New Orleans &c. R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109, 112, 35 L. ed. 919; *Pendleton v. Kinsley*, 3 Cliff. (U. S. C. C.) 416; *Savannah &c. R. Co. v. Bryan*, 86

broader sense, however, it may be said that it is within the scope of their employment or line of their duty, for employes, especially conductors and brakemen, to refrain from wilfully

Ga. 312, 12 S. E. 301, 22 Am. St. 464; *Chicago &c. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Indianapolis &c. R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; *Winnegar's Admr. v. Central Pass. R. Co.*, 85 Ky. 547, 4 S. W. 237; *Sherley v. Billings*, 71 Ky. 147, 8 Am. Rep. 451; *Wise v. South Covington &c. R. Co.*, 17 Ky. L. 1359, 34 S. W. 894; *Landreaux v. Bell*, 5 La. (O. S.) 434; note to *Ware v. Baratania &c. Co.*, 15 La. 169, 35 Am. Dec. 189, 201 (citing *McKinley v. Chicago &c. R. Co.*, 44 Iowa 314, 24 Am. Rep. 748; *Bass v. Chicago &c. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. ed. 502; *Baltimore &c. R. Co. v. Blocher*, 27 Md. 277; *Healey v. City &c. R. Co.*, 28 Ohio St. 23, and other cases); note to *Richmond &c. R. Co. v. Jefferson*, 32 Am. St. 87, 95, and authorities cited in last preceding note. *Williams v. Pullman &c. Co.*, 40 La. Ann. 87, 3 S. W. 631, 8 Am. St. 512; *Goddard v. Grand Trunk R. Co.*, 57 Maine 202, 2 Am. Rep. 39; *Hanson v. European &c. R. Co.*, 62 Maine 84, 16 Am. Rep. 404; *Baltimore &c. R. Co. v. Barger*, 89 Md. 23, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. 319; *Eads v. Metropolitan R. Co.*, 43 Mo. App. 536; *Stewart v. Brooklyn &c. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185; *Smith v. Manhattan R. Co.*, 45 N. Y. St. 865, 18 N. Y. S. 759; *Springer Transp.*

Co. v. Smith, 16 Lea (Tenn.) 498, 1 S. W. 280; *Dillingham v. Anthony*, 73 Tex. 47, 11 S. W. 139, 15 Am. St. 753; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. 827. See also *McMahon v. Chicago City R. Co.*, 239 Ill. 334, 88 N. E. 223; *St. Louis &c. R. Co. v. Dowgiallo*, 82 Ark. 289, 101 S. W. 412 (quoting text); *St. Louis &c. Ry. Co. v. Jackson*, 118 Ark. 391, 177 S. W. 33, L. R. A. 1915E, 668 and note; *Citizens' St. R. Co. v. Clark*, 33 Ind. App. 190, 71 N. E. 53, 104 Am. St. 249; *Garvik v. Burlington &c. R. Co.*, 124 Iowa 691, 100 N. W. 498; *Railway Co. v. Divinney*, 66 Kans. 776, 71 Pac. 855; *Johnson v. Detroit R. Co.*, 130 Mich. 453, 90 N. W. 274; *Flynn v. St. Louis &c. Co.*, 113 Mo. App. 185, 87 S. W. 560; *Taillon v. Mears*, 29 Mont. 161, 74 Pac. 421, 425 (citing text); *Forrester v. Southern Pac. R. Co.*, 36 Nev. 247, 134 Pac. 753, 48 L. R. A. (N. S.) 1n (citing text); *Haver v. Central R. Co.*, 62 N. J. L. 282, 41 Atl. 916, 918, 43 L. R. A. 84, 72 Am. St. 647 (citing text); *White v. Norfolk &c. R. Co.*, 115 N. Car. 631, 20 S. E. 191, 44 Am. St. 489; *Gulf &c. R. Co. v. Luther*, 40 Tex. Civ. App. 517, 90 S. W. 44, 47 (quoting text). We can best show the distinction we have attempted to draw by an illustration. Suppose a conductor, in ejecting a passenger for good cause should maliciously use unnecessary force, or

injuring passengers, and some courts have, therefore, held the company liable upon the ground that employes to whom the carrier entrusts the performance of its duty to passengers continue in the line of their employment until their relation as servants of the master is dissolved, and that, while the specified duty of an employe in such a case may be very limited, "the scope of the employment is as broad as the obligation the master has assumed."⁶⁵ There are expressions in many cases to the effect that the act, in order to render the company liable, must be within the "scope of the employment" or the "line of

should strike or abuse him in an altercation over the sufficiency of a ticket which the passenger had presented. In such a case the conductor would be acting within the scope of his employment or in the line of his duty in the narrowest sense. But suppose two passengers should be quietly discussing politics and the conductor, hearing them, should take issue with one of them and willfully assault him because they disagreed upon that subject. In such a case the conductor would not be acting within the scope of his employment or line of his duty in the narrowest sense, yet, we think the railroad company would clearly be liable under the authorities we have cited.

⁶⁵ See, for instance, *Lakin v. Oregon &c. R. Co.*, 15 Ore. 220, 15 Pac. 641; *Great Western R. Co. v. Miller*, 19 Mich. 305. See also *Western &c. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842; *New Jersey &c. Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. ed. 1049; *Brunswick R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Chicago &c. R. Co. v. Williams*, 55 Ill. 185, 8

Am. Rep. 641; *Indianapolis &c. R. Co. v. Anthony*, 43 Ind. 183; *Terre Haute &c. R. Co. v. Fitzgerald*, 47 Ind. 79; *Pittsburgh &c. R. Co. v. Theobald*, 51 Ind. 246; *Coleman v. New York &c. R. Co.*, 106 Mass. 160; *Conger v. St. Paul &c. R. Co.*, 45 Minn. 207, 47 N. W. 788; *Malecek v. Tower Grove &c. R. Co.*, 57 Mo. 17; *Belknap v. Boston &c. R. Co.*, 49 N. H. 358; *Rounds v. Delaware &c. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Dwinelle v. New York &c. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. 611; *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78; *Blankenbaker v. Chicago &c. Ry. Co.*, 40 S. Dak. 588, 168 N. W. 744; *Houston &c. R. Co. v. Washington* (Tex. Civ. App.), 30 S. W. 719; *Hinckley v. Chicago &c. R. Co.*, 38 Wis. 194; *Hayne v. Union St. R. Co.*, 189 Mass. 551, 76 N. E. 219, 3 L. R. A. (N. S.) 605 and note, 109 Am. St. 655. In this last case the company was held liable for injury to a passenger caused by a conductor of one car throwing a missile, in sport, at the conductor of another car.

the employe's duty," but from the conclusion reached in nearly all of such cases we think it clear that the court used these terms in their broadest sense, as explained in the first case cited in the last note, and did not intend to apply the same rule to passengers as to strangers and to limit the liability of the company to cases in which the employe was acting in furtherance of the master's business, or in the line of his duty in such a sense that the master might be deemed to have authorized it, nor to cases in which the company was negligent in employing the servant.⁶⁶ The rule we approve is, however, denied by some courts and text writers, who maintain that a railroad company is not an insurer against the willful assaults of its employes any more than it is an insurer of their safety in other matters; that it is liable only for negligence, and that it is not negligence when a servant who has been carefully selected, but is nevertheless human and mortal, "does that in the exercise of his own volition and to serve his own purposes, which the railway has not expressly nor impliedly authorized him to do in its behalf."⁶⁷ Under the rule which we have approved railroad

⁶⁶ For cases in which it is said, or intimated that the act must be within the line of the servant's duty or scope of his employment, but in which these terms were evidently used in the sense indicated in the text, see *Louisville &c. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149; *Heenrich v. Pullman &c. Co.*, 20 Fed. 100, 18 Am. & Eng. R. Cas. 379; *Smith v. Louisville &c. R. Co.*, 124 Ind. 394, 24 N. E. 753; *Louisville &c. R. Co. v. Kendall*, 138 Ind. 313, 36 N. E. 415, and cases cited in last preceding note; *Johnson v. Chicago &c. R. Co.*, 58 Iowa 348, 12 N. W. 329, 8 Am. & Eng. R. Cas. 206; *Ramsden v. Boston &c. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Mulligan v. New York &c. R. Co.*, 129 N. Y. 506, 29

N. E. 952, 14 L. R. A. 791n, 26 Am. St. 539, 53 Am. & Eng. R. Cas. 47; *Fick v. Chicago &c. R. Co.*, 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878, 34 Am. & Eng. R. Cas. 378 (holding that assault by ticket agent was within scope of his employment, notwithstanding finding of jury to contrary).

⁶⁷ *Evansville &c. R. Co. v. Baum*, 26 Ind. 70; *Louisville &c. R. Co. v. Douglass*, 69 Miss. 723, 11 So. 933, 30 Am. St. 582; *McKeon v. Citizens' R. Co.*, 42 Mo. 79 (overruled in *Spohn v. Missouri &c. R. Co.*, 87 Mo. 74, 101 Mo. 417, 14 S. W. 880); *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418 (limited in other New York cases); *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373;

companies have been held liable where a brakeman, although not authorized to clean out cars, willfully drenched a passenger with water while so doing,⁶⁸ where the conductor forcibly kissed a female passenger,⁶⁹ where a brakeman committed a rape upon a woman passenger,⁷⁰ where a brakeman, accused of theft by a passenger, struck him in the face,⁷¹ for insulting and abusive language wrongfully used by a conductor or street car driver,⁷²

Poulton v. London &c. R. Co., L. R. 2 Q. B. 534; *Patterson's Ry. Acc. Law*, 112, 117; *Hutchinson Carriers* (3d ed.), §§ 1098, 1099. Mr. Patterson says the company will be liable, however, if it subsequently ratifies the act. *Patterson's Ry. Acc. Law*, 113, citing *Bass v. Chicago &c. R. Co.*, 39 Wis. 636; *Gasway v. Atlanta &c. R. Co.*, 58 Ga. 216. But it seems to us that he is hardly consistent in this, the act not being for the benefit of the company nor in the furtherance of its business in any way. See *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634n, 15 Am. St. 753; *Eastern &c. R. Co. v. Broom*, 6 Exch. 314, 15 Jur. 297; *Goff v. Great Northern R. Co.*, 3 El. & El. 672, 30 L. J. Q. B. 148, *Cooley Torts*, 127.

⁶⁸ *Terre Haute &c. R. Co. v. Jackson*, 81 Ind. 19. See also *Norfolk &c. R. Co. v. Brame*, 109 Va. 422, 63 S. E. 1018.

⁶⁹ *Craker v. Chicago &c. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504. And when the conductor grasped a woman passenger by the arm and smiled and winked at her. *Birmingham R. &c. Co. v. Parker*, 161 Ala. 248, 50 So. 55. So, in other cases of indecent assaults upon female passengers or improper

conduct towards them by a conductor or other employe in charge. *Louisville &c. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530, 7 Am. St. 600; *Campbell v. Pullman &c. Car Co.*, 42 Fed. 484; *Neito v. Clark*, 1 Cliff. (U. S. C. C.) 145; *St. Louis &c. R. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741. See also *Garvik v. Burlington &c. R. Co.*, 131 Iowa 415, 108 N. W. 327, 117 Am. St. 432; *International &c. R. Co. v. Hugen*, 45 Tex. Civ. App. 326, 100 S. W. 1000; *Texas &c. R. Co. v. Dean*, 98 Tex. 517, 85 S. W. 1138, 70 L. R. A. 943; *San Antonio Trac. Co. v. Davis* (Tex. Civ. App.), 101 S. W. 554; *St. Louis &c. R. Co. v. Granger* (Tex. Civ. App.), 100 S. W. 987.

⁷⁰ *Garvik v. Burlington &c. R. Co.*, 131 Iowa 415, 108 N. W. 327, 117 Am. St. 432.

⁷¹ *Chicago &c. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33n, 8 Am. & Eng. R. Cas. 354.

⁷² *Bryan v. Chicago &c. R. Co.*, 63 Iowa 464, 19 N. W. 295, 16 Am. & Eng. R. Cas. 335; *Lafitte v. New Orleans &c. R. Co.*, 43 La. Ann. 34, 8 So. 701, 12 L. R. A. 337; *Wise v. South Covington &c. R. Co.*, 17 Ky. L. 1359, 34 S. W. 894; *Richberger v. American Exp. Co.*, 73 Miss. 161, 18 So. 922, 31 L. R. A.

and, in some cases, for assaults by its employes even where the passenger was not upon the train, but the relation of carrier and passenger nevertheless existed at the time,⁷⁸ as, for instance, where a railroad gate-keeper assaulted a passenger who was on

390, 55 Am. St. 522; *Atlanta &c. R. Co. v. Condor*, 75 Ga. 51. See also *Knoxville Tract. Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549; *Texas &c. R. Co. v. Tarkington*, 27 Tex. Civ. App. 353, 66 S. W. 137; *Cole v. Atlanta &c. R. Co.*, 102 Ga. 474, 31 S. E. 107. In *Coleman v. Yazoo &c. R. Co.*, 90 Miss. 629, 43 So. 473, it is said that a conductor has a right to defend himself from an attack by a passenger but not to strike the passenger with a pistol because of the mere use of abusive language.

⁷⁸ *Peeples v. Brunswick &c. R. Co.*, 60 Ga. 281; *McKinley v. Chicago &c. R. Co.*, 44 Iowa 314, 24 Am. Rep. 748; *Wise v. South Covington &c. R. Co.*, 17 Ky. L. 1359, 34 S. W. R. 894; *McKernan v. Railway Co.*, 54 N. Y. Super. Ct. 354; *Blomsness v. Puget Sound Elec. R. Co.*, 47 Wash. 620, 92 Pac. 414, 17 L. R. A. (N. S.) 763 and note; *Fick v. Chicago &c. R. Co.*, 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878; *Smith v. Southeastern R. Co.*, 39 L. J. C. P. 346; *Walker v. Southeastern R. Co.*, 39 L. J. C. P. 346. But the more limited and ordinary application of the doctrine of respondeat superior may prevent liability for wilful acts outside the scope of employment when the relation of carrier and passenger has not begun or has wholly ceased. *Andrews v. Yazoo R. Co.*, 86 Miss.

129, 38 So. 773; *Railroad Co. v. Randolph*, 65 Ill. App. 208. Compare also *Zeccardi v. Yonkers R. Co.*, 190 N. Y. 389, 83 N. E. 31, 17 L. R. A. (N. S.) 770; and see *Jackson v. Old Colony St. R. Co.*, 206 Mass. 477, 92 N. E. 725, 30 L. R. A. (N. S.) 1046n, 19 Ann. Cas. 615; and *Berryman v. Pennsylvania R. Co.*, 228 Pa. St. 621, 71 Atl. 1011, 30 L. R. A. (N. S.) 1049. See as to the question of liability for malicious prosecution or false imprisonment, the following recent cases: *Milton v. Missouri Pac. R. Co.*, 193 Mo. 46, 91 S. W. 949; *St. Louis &c. R. Co. v. Lukey*, 119 Ark. 28, 175 S. W. 403, L. R. A. 1915E, 320 and note; *Wright v. Georgia &c. R. Co.*, 66 Fla. 510, 63 So. 909; *Atchison &c. R. Co. v. Henry*, 55 Kans. 715, 41 Pac. 952, 29 L. R. A. 465; *Patterson v. Maysville R. Co.*, 25 Ky. L. 1750, 78 S. W. 870; *Schmidt v. New Orleans R. Co.*, 116 La. Ann. 311, 40 So. 714; *New York &c. R. Co. v. Maldron*, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502n; *Mulligan v. New York R. Co.*, 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 781n, 26 Am. St. 539; *Duggan v. Baltimore &c. R. Co.*, 159 Pa. St. 248, 28 Atl. 186, 39 Am. St. 672; *Texas &c. R. Co. v. Dean*, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943; *Gulf &c. R. Co. v. Conder*, 23 Tex. Civ. App. 488, 58 S. W. 58.

his way to the train,⁷⁴ and where a ticket agent assaulted a passenger in an altercation over change for the amount paid in buying a ticket.⁷⁵ On the other hand, it has been held that a railroad company is not liable for an assault with a hatchet upon a passenger by a baggage master growing out of a personal altercation,⁷⁶ nor for an assault by its driver upon a passenger after he had left the car and was on the way to report the driver to the superintendent of the company.⁷⁷ Other cases holding that the carrier was not liable under the particular circumstances, or stating in general terms that the act must be within the scope of the employment in order to make the carrier liable, are cited below.⁷⁸ The com-

⁷⁴ *Indianapolis &c. R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; *Dickerman v. St. Paul &c. Co.*, 44 Minn. 433, 46 N. W. 907, 45 Am. & Eng. R. Cas. 596; *Busch v. Interborough Rapid Trans. Co.*, 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460. See also *Watkins v. Pennsylvania R. Co.*, 10 Mack. (21 D. C.) 1; *McFarlan v. Pennsylvania R. Co.*, 199 Pa. St. 408, 49 Atl. 270. But compare *Priest v. Hudson River R. Co.*, 65 N. Y. 589. See generally *Gray v. Boston &c. R. Co.*, 168 Mass. 20, 46 N. E. 397, with which compare *Goodloe v. Memphis &c. R. Co.*, 107 Ala. 233, 18 So. 166, 29 L. R. A. 729, 54 Am. St. 67n.

⁷⁵ *Bledsoe v. West*, 186 Mo. App. 460, 171 S. W. 622; *Winston v. Lusk*, 186 Mo. App. 381, 172 S. W. 76; *Fick v. Chicago &c. R. Co.*, 68 Wis. 469, 32 N. W. 527, 60 Am. R. 878n. See also *Daniel v. Petersburg R. Co.*, 117 N. Car. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485 and note.

⁷⁶ *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373. But see *Daniel v. Petersburg*

R. Co., 117 N. Car. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485. And compare *Lee Line Steamers v. Robinson*, 218 Fed. 559.

⁷⁷ *Central R. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709, 9 Am. St. 425. See also *Peavy v. Georgia R. &c. Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. 334; *Chicago &c. R. Co. v. Stratton*, 111 Ill. App. 142; *Hanson v. Urbana &c. St. R. Co.*, 75 Ill. App. 474; *Palmer v. Winston &c. R. Etc. Co.*, 131 N. Car. 250, 42 S. E. 604. This however, was decided upon the theory that the relation of carrier and passenger had ceased. But in *Savannah &c. R. Co. v. Bryan*, 86 Ga. 312, 12 S. E. 307, 22 Am. St. 464, it was held that the company was liable under a similar state of facts. See also *O'Brien v. Transit Co.*, 185 Mo. 263, 84 S. W. 939, 105 Am. St. 592; *McQuerry v. Metropolitan St. R. Co.*, 117 Mo. App. 255, 92 S. W. 912; *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263, 84 S. W. 939, 110 S. W. 705, 105 Am. St. 592.

⁷⁸ *Chicago City R. Co. v. Cooper*, 128 Ill. App. 528; *Philadelphia &c.*

pany is not liable where the passenger is in fault and brings the injury upon himself, as for instance, where he wrongfully provokes and renders it apparently necessary,⁷⁹ or is rightfully ejected by the use of no more force than is necessary. Nor is it liable if he is injured by pure accident, as, for instance, where an employe accidentally slips and falls against him.⁸⁰ So, where an intoxicated passenger on being requested by the brakeman to give up a pistol which he was brandishing, placed it

R. Co. v. Crawford, 112 Md. 508, 77 Atl. 278; Jackson v. Old Colony St. R. Co., 206 Mass. 477, 92 N. E. 725, 30 L. R. A. (N. S.) 1046n, 19 Ann. Cas. 615; Houston &c. R. Co. v. Bush, 104 Tex. 26, 133 S. W. 245, 32 L. R. A. (N. S.) 1201n; Goodwin v. Cincinnati Tract. Co., 175 Fed. 61. See also Hedger v. Chicago City Ry. Co., 207 Ill. App. 26; Abt v. Chicago Rys. Co., 207 Ill. App. 314.

⁷⁹ New Orleans &c. R. Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. ed. 919; Harrison v. Fink, 42 Fed. 787; O'Brien v. Transit Co., 185 Mo. 263, 84 S. W. 939, 105 Am. St. 592; Scott v. Central &c. R. Co., 53 Hun 414, 6 N. Y. S. 382; Flynn v. Central Park &c. R. Co., 49 N. Y. Super. Ct. 81; Ricketts v. Chesapeake &c. R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. 901. See also City Elec. R. Co. v. Shropshire, 101 Ga. 33, 28 S. E. 508; Arnold v. Atchison &c. R. Co., 81 Kans. 530, 106 Pac. 42; Dallas Consol. &c. R. Co. v. Pettit, 47 Tex. Civ. App. 354, 105 S. W. 42; Houston Elec. Co. v. Park (Tex. Civ. App.), 135 S. W. 229; Rohrbach v. Pullman's Palace Car Co.,

166 Fed. 797. But compare Birmingham R. Co. v. Mullen, 138 Ala. 614, 35 So. 701; East Tenn. &c. R. Co. v. Fleetwood, 90 Ga. 23, 15 S. E. 778; Chicago &c. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33n; Coggins v. Chicago &c. R. Co., 18 Ill. App. 620; Baltimore &c. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. 319; Haman v. Omaha &c. R. Co., 35 Nebr. 74, 52 N. W. 830; Galveston &c. R. Co. v. La Prelle, 27 Tex. Civ. App. 496, 65 S. W. 488.

⁸⁰ Skinner v. Atchison &c. R. Co., 39 Fed. 188. See also Goodloe v. Railroad Co., 107 Ala. 233, 18 So. 166, 29 L. R. A. 729, 54 Am. St. 67; Long v. Chicago &c. R. Co., 48 Kans. 28, 28 Pac. 977, 15 L. R. A. 319, 30 Am. St. 271; Nichols v. Boston Elev. Ry. Co., 231 Mass. 299, 120 N. E. 847. But company was held liable where porter negligently closed door on passenger's fingers. St. Louis &c. R. Co. v. Neely, 45 Tex. Civ. App. 611, 101 S. W. 481. See also Romine v. Evansville &c. R. Co., 24 Ind. App. 230, 56 N. E. 245; Ward v. Kansas City So. R. Co., 189 Mo. App. 305, 175 S. W. 296.

under his wife on the car set, and the brakeman reached under her for it, this was held not to constitute an assault on her.⁸¹

§ 2490 (1639). Injuries caused by other passengers and third persons.—Although railroad companies are not, perhaps, bound to protect their passengers from injuries by third persons and other passengers to the same extent that they are bound to protect them from injuries by their employes, yet it is their duty to use proper care and vigilance to protect them from injuries by such persons that might reasonably have been foreseen and anticipated.⁸² As a railroad company is in duty bound to use care and vigilance to protect its passengers who have placed themselves under its control, and as it has the right and power to eject disorderly persons, it is liable to a passenger who, without fault on his part, is assaulted and injured by a stranger or a fellow passenger, if it or its employes in charge of the train could reasonably have foreseen and prevented it.⁸³ Thus, where,

⁸¹ *Friar v. Orange &c. R. Co.*, 45 Tex. Civ. App. 564, 101 S. W. 274.

⁸² See ante, § 2407; also, *Savannah &c. R. Co. v. Boyle*, 115 Ga. 836, 42 S. E. 242, 243, 59 L. R. A. 104 (quoting text); *Kinney v. Louisville & N. R. Co.*, 99 Ky. 59, 34 S. W. 1066 (highest practicable care); *Jansen v. Minneapolis &c. R. Co.*, 112 Minn. 496, 128 N. W. 826, 32 L. R. A. (N. S.) 1206 and note; *Hoff v. Public Service Ry. Co.*, 91 N. J. L. 641, 103 Atl. 209 (must exercise high degree of care to prevent assaults and injuries from other passengers and strangers); *Gulf &c. Ry. Co. v. Besser* (Tex. Civ. App.), 200 S. W. 263; *Washington Ry. &c. Co. v. Perry*, 47 App. D. C. 90.

⁸³ *King v. Ohio &c. R. Co.*, 22 Fed. 413, 18 Am. & Eng. R. Cas. 386; *Culberson v. Empire &c. Co.*, 156 Ala. 416, 47 So. 237; *Richmond*

&c. R. Co. v. Jefferson, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 517, 22 Am. St. 87 and note; *Chicago &c. R. Co. v. Pillbury*, 123 Ill. 9, 14 N. E. 22, 5 Am. St. 483, 31 Am. & Eng. R. Cas. 24; *Atchison &c. R. Co. v. Weber*, 33 Kans. 543, 6 Pac. 877, 52 Am. Rep. 543; *New Miss.* 200, 24 Am. Rep. 689; *Illinois Cent. R. Co. v. Minor*, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627; *Britton v. Atlanta &c. R. Co.*, 88 N. Car. 536, 43 Am. Rep. 740, 18 Am. & Eng. R. Cas. 391; *Pittsburgh &c. R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224; *Pittsburgh &c. R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424. See also *Spangler v. St. Joseph &c. R. Co.*, 68 Kans. 46, 74 Pac. 607, 63 L. R. A. 634, 104 Am. St. 391; *West Memphis Packet Co. v. White*, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427; *Indianapolis*

an intoxicated and disorderly or dangerous person is knowingly admitted to the train,⁸⁴ or the conductor and other employes fail to take any steps to remove a passenger who becomes disorderly and dangerous, or to otherwise protect other passengers from him when they could do so,⁸⁵ the company will usually

St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909; Meyer v. St. Louis &c. R. Co., 54 Fed. 116; Dufur v. Boston &c. R. Co., 75 Vt. 165, 53 Atl. 1068. note in 2 L. R. A. (N. S.) 105 (citing text); and note in 55 L. R. A. 713. "There is an implied obligation, growing out of the contract between the carrier and the passenger that the former shall afford to the latter reasonable protection and immunity from the insults, violence and wanton interference from intruders, fellow-passengers, and the carrier and his servants." Kinney v. Louisville &c. R. Co., 99 Ky. 59, 34 S. W. 1066; Winnegar v. Central &c. R. Co., 85 Ky. 547, 4 S. W. 237; Sherley v. Billings, 71 Ky. 147, 8 Am. Rep. 451; Goddard v. Grand Trunk R. Co., 57 Maine 202, 2 Am. Rep. 39. But compare Royston v. Illinois Cent. R. Co., 67 Miss. 376, 7 So. 320. In Flint v. Norwich &c. Transp. Co. 34 Conn. 554, the company was held liable for an injury to a passenger caused by the discharge of a gun, which was dropped by soldiers engaged in scuffling. See also Anderson v. South Carolina &c. R. Co., 81 S. Car. 1, 61 S. E. 1096; West Memphis Packet Co. v. White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427. So, where a person called to assist the conductor in ejecting

a passenger uses excessive force. International &c. R. Co. v. Miller, 9 Tex. Civ. App. 104, 28 S. W. 233; Murphy v. Western &c. R. Co., 23 Fed. 637; Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590; So, where a passenger on a platform is injured by a mail pouch thrown by a postal clerk. Carpenter v. Boston &c. R. Co., 97 N. Y. 494, 49 Am. Rep. 540; Snow v. Fitchburg R. Co., 136 Mass. 552, 49 Am. Rep. 40. In Franklin v. Air Line R. Co., 74 S. Car. 332, 54 S. E. 578, a domestic lessor company was held liable for an assault on a passenger by a fellow passenger on the car of the lessee company operating the road.

⁸⁴ Hendricks v. Sixth Ave. R. Co., 12 Jones & S. (N. Y.) 8; Meyer v. St. Louis &c. R. Co., 54 Fed. 116

⁸⁵ Wright v. Chicago &c. R. Co., 4 Colo. App. 102, 35 Pac. 196; Flannery v. Baltimore &c. R. Co., 4 Mackey (D. C.), 111; Holly v. Atlanta &c. R. Co., 61 Ga. 215, 34 Am. Rep. 97; Richmond &c. R. Co. v. Jefferson, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. 87; Evansville &c. R. Co. v. Darting, 6 Ind. App. 375, 33 N. E. 636; Lucy v. Chicago &c. R. Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551; Pittsburgh &c. R. Co., v. Hinds, 53 Pa. St. 512, 91 Am. Dec. 224. See also McMahon v.

be liable for injuries caused by him to such other passengers. But if the company and its employes have no knowledge of the dangerous character or condition of the person who commits the injury and could not reasonably have foreseen and anticipated it, the company is not liable,⁸⁶ especially where its employes do all they can to prevent injury after discovering the sud-

Interborough Rapid Trans. Co., 59 Misc. 242, 110 N. Y. S. 876; Nachser v. Interborough Rapid Trans. Co., 125 N. Y. S. 767, 69 Misc. 346; Bedsole v. Atlantic &c. R. Co., 151 N. Car. 152, 65 S. E. 925.

⁸⁶ Batton v. South &c. R. Co., 77 Ala. 591, 54 Am. Rep. 80 (female passenger insulted by intruder at station); Alabama City &c. R. Co. v. Sampley, 169 Ala. 372, 53 So. 142; Snyder v. Colorado &c. R. Co., 36 Colo. 288, 85 Pac. 686, 8 L. R. A. (N. S.) 781, 118 Am. St. 110; Savannah &c. R. Co. v. Boyle, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104; Felton v. Chicago &c. R. Co., 69 Iowa 577, 29 N. W. 618 (passenger thrown out of car by fellow-passenger); Kinney v. Louisville &c. R. Co., 99 Ky. 59, 34 S. W. 1066; Illinois Cent. R. Co. v. Gunterman, 135 Ky. 438, 122 S. W. 514; Louisville &c. R. Co. v. McEwan, 17 Ky. L. 406, 31 S. W. 465; Tall v. Baltimore &c. Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120; Spohn v. Missouri Pac. R. Co., 87 Mo. 80; Jackson v. Missouri Pac. R. Co., 104 Mo. 448, 16 S. W. 413; Krone v. Southwestern &c. R. Co., 97 Mo. App. 609, 71 S. W. 712; Bevard v. Lincoln Traction Co., 74 Nebr. 802, 105 N. W. 635, 3 L. R. A. (N. S.) 318 and note; Keeley v. Erie R. Co., 47 How. Pr. (N. Y.) 256; Putnam v. Broadway

&c. R. Co., 55 N. Y. 108, 14 Am. Rep. 190; Mulligan v. New York &c. R. Co., 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. 539; Pride v. Piedmont &c. R. Co., 97 N. Car. 594, 97 S. E. 418; Brehony v. Pottsville Un. Tract. Co., 218 Pa. St. 123, 66 Atl. 1006; Widener v. Philadelphia Rapid Trans. Co., 224 Pa. St. 171, 73 Atl. 209; Wood v. Philadelphia Rapid Transit Co., 260 Pa. 481, 104 Atl. 69; Franklin v. Atlanta &c. R. Co., 74 S. Car. 332, 54 S. E. 578; Galveston &c. R. Co. v. Long, 13 Tex. Civ. App. 664, 36 S. W. 485; Thweatt v. Houston &c. R. Co., 31 Tex. Civ. App. 227, 71 S. W. 976; Texas &c. R. Co. v. Storey 37 Tex. Civ. App. 156, 83 S. W. 852; Connell's Exr. v. Chesapeake &c. R. Co., 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. 786 (passenger murdered by intruder at night); Pounder v. Northeastern R. Co., L. R. (1892) 1 Q. B. 385, 390; Smith v. Great Eastern &c. R. Co., L. R. 2 C. P. 4. Rule applied to relieve company from acts of strikers in Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. 519; See also Cobb v. Great Western R. Co., (1894) App. Cas. 419, 63 L. J. Q. B. 629. But compare Chicago &c. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St.

den and unexpected danger.⁸⁷ The rule is laid down by a federal court in a recent case as follows: "The liability or nonliability of the carrier of passengers for hire for an injury inflicted upon a passenger carried, by reason of a third person making an unprovoked assault upon him, depends upon the presence or absence of evidence showing the employes of the carrier either knew, or by the exercise of due care should have known, from all the attendant facts and circumstances of the particular case, that injury to the passenger carried was threatened or impending and which injury, by the exercise of that high degree of care which the law requires of a carrier of passengers for their safety and protection, thus being foreseen, might have been guarded against."⁸⁸ Thus, where a passenger is slightly intoxicated, but apparently peaceable and well behaved, the company is not liable to another passenger suddenly and unexpectedly injured by him merely because it received him upon its train or did not eject him before he became disorderly.⁸⁹ So, where

483; *Wright v. Chicago &c. R. Co.*, 4 Colo. App. 102, 35 Pac. 196; *Bosworth v. Union R. Co.*, 25 R. I. 202, 55 Atl. 490. A railroad company is not bound to anticipate that a discharged employe will turn a switch and wreck train out of revenge and the mere fact that it fails to get the key from him on discharging him will not render it liable. *East Tennessee &c. R. Co. v. Kane*, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315.

⁸⁷ *Mullan v. Wisconsin Cent. R. Co.*, 46 Minn. 474, 49 N. W. 249; *McGuinn v. Forbes*, 37 Fed. 639; *Kinney v. Louisville &c. R. Co.*, 99 Ky. 59, 34 S. W. 1066.

⁸⁸ *Brown v. Chicago &c. R. Co.*, 139 Fed. 972, holding that the company was not liable where the conductor ejected an intoxicated passenger, and the latter, after being ejected, picked up a stone

and threw it at the conductor but hit the passenger. But compare *Spangler v. St. Joseph &c. R. Co.*, 68 Kans. 46, 74 Pac. 607, 63 L. R. A. 634, 104 Am. St. 391; *Penny v. Atlantic Coast Line R. Co.*, 133 N. Car. 221, 45 S. E. 563, 63 L. R. A. 497.

⁸⁹ *Pittsburgh &c. R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68; *Kinney v. Louisville &c. R. Co.*, 99 Ky. 59, 34 S. W. 1066; *Lige v. Chicago &c. R. Co.*, 275 Mo. 249, 204 S. W. 508; *Thompson v. Manhattan R. Co.*, 75 Hun (N. Y.), 548, 27 N. Y. S. 608; *Brehony v. Pottsville Un. Trac. Co.*, 218 Pa. St. 123, 66 Atl. 1006; *Galveston &c. R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485. The mere fact that the conductor was present does not necessarily render the railroad company liable. *Springfield &c. R. Co. v. Flynn*, 55 Ill.

a passenger in boarding a train at a station was knocked down and robbed by some unknown person, it was held that the company was not liable.⁹⁰ But, in another case, the carrier was held liable for the robbery of a passenger as he was leaving the car.⁹¹ A railroad company is not necessarily liable for injuries to passenger caused by his being jolted off of the steps of the car by other passengers,⁹² nor for injuries caused by a stranger hastily shutting a door in his face,⁹³ but it is liable in a proper case for injuries to passengers caused by a crowd at terminal gates, stations and on cars, where it has reason to expect the same and makes no provision to guard against danger

App. 600. See also *Gulf &c. R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709. But see *Houston &c. R. Co. v. Phillio*, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. 868.

⁹⁰ *Sachrowitz v. Atchison &c. R. Co.*, 37 Kans. 212, 15 Pac. 242, 34 Am. & Eng. R. Cas. 382. It was claimed in this case that the act was done by a brakeman, or other servant of the company, and the case is instructive upon the subject of identification, the court holding that it was insufficient. See also *Texas &c. R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846. Compare also *Chancey v. Norfolk &c. R. Co.*, 174 N. Car. 351, 93 S. E. 834, L. R. A. 1918A, 1070 and note, to the effect that failure to have light or permitting car to be crowded is not proximate cause of assault on one passenger by another. And see Ann. Cas. 1918E, 680.

⁹¹ *Repp v. Indianapolis &c. Trac. Co.* (Ind. App.), 109 N. E. 441. Here, however, the passenger made loud demands for protection and the conductor, in whose view

and hearing the robbery took place, refused to do anything to protect the passenger or prevent the robbery.

⁹² *Ellinger v. Philadelphia &c. R. Co.*, 153 Pa. St. 213, 25 Atl. 1132, 34 Am. St. 697; *Jarmy v. Duluth St. R. Co.*, 55 Minn. 271, 56 N. W. 813; *Joliet St. R. Co. v. McCarthy*, 42 Ill. App. 49; *Randall v. Frankford &c. R. Co.*, 139 Pa. St. 464, 22 Atl. 639; *Buck v. Manhattan &c. R. Co.*, 15 Daly (N. Y.) 550. See also *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306, 125 N. Y. 299, 26 N. E. 327; *Felton v. Chicago &c. R. Co.*, 69 Iowa 577, 29 N. W. 618; *MacGilvray v. Boston &c. R. Co.*, 229 Mass. 65, 118 N. E. 166, 4 A. L. R. 283; *Ritchie v. Boston El. R. Co.* (Mass.), 131 N. E. 67.

⁹³ *Graeff v. Philadelphia &c. R. Co.*, 161 Pa. St. 230, 28 Atl. 1107, 23 L. R. A. 606, 41 Am. St. 885; *Hayman v. Pennsylvania R. Co.*, 118 Pa. St. 508, 11 Atl. 815. See also to same effect *Gray v. Louisville R. Co.*, 184 Ky. 182, 211 S. W. 560.

therefrom.⁹⁴ And it is also liable for injuries inflicted upon a passenger by a dog which it permits in its coach set apart for passengers.⁹⁵

§ 2491. Injuries caused by third persons—Missiles.—As we have seen it is the duty of the carrier to use proper care to protect its passengers from injuries by third persons, and it may be held liable for injuries caused its passengers by its negligence in failing to do so.⁹⁶ But, it is not liable, ordinarily where it had no notice and no reason to anticipate the danger.⁹⁷ Thus, in a number of cases, it has been held that the carrier is not liable for missiles thrown into the car by persons outside when there was no reason for the carrier to anticipate such

⁹⁴ Taylor v. Pennsylvania R. Co., 50 Fed. 755; Lynn v. Southern Pac. R. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710 and note; Lott v. New Orleans &c. R. Co., 37 La. Ann. 337, 55 Am. Rep. 500; Treat v. Boston &c. R. Co., 131 Mass. 371; Grubb v. Kansas City R. Co. (Mo. App.), 230 S. W. 675; Merwin v. Manhattan R. Co., 49 Hun 608, 1 N. Y. S. 267; Sheridan v. Brooklyn City R. Co., 36 N. Y. 39, 93 Am. Dec. 490; Neslie v. Second &c. St. R. Co., 113 Pa. St. 300, 6 Atl. 72. See also Evansville &c. R. Co. v. Duncan, 28 Ind. 441, 92 Am. Dec. 322. In Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909, it is held that "where a street railway, owning a park reached by its lines and maintaining attractions for the public there, has knowledge that there is a conspiracy on the part of certain persons to assault any colored persons visiting the park, and knows of acts of violence committed pursuant to such design, and transports colored per-

sons there without warning them of the danger, and they are assaulted pursuant to the conspiracy, the company's employes making no attempt to interfere, the railway company is liable for the injuries."

⁹⁵ Westcott v. Seattle &c. R. Co., 41 Wash. 618, 84 Pac. 588, 4 L. R. A. (N. S.) 947. See also Barrett v. Malden &c. R. Co., 3 Allen (Mass.) 101; Lord Derby, The, 17 Fed. 265. But compare Trinity &c. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

⁹⁶ See ante, §§ 2407, 2409.

⁹⁷ Irwin v. Louisville &c. R. Co., 161 Ala. 489, 50 So. 62, 135 Am. St. 153; Southern R. Co. v. Hanby, 183 Ala. 255, 62 So. 871; Savannah &c. R. Co. v. Boyle, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104; Thweatt v. Houston &c. R. Co., 31 Tex. Civ. App. 227, 71 S. W. 976, 13 Am. Neg. Rep. 452; Segal v. St. Louis &c. R. Co., 35 Tex. Civ. App. 517, 80 S. W. 233; Missouri &c. R. Co. v. Smith 63 Tex. Civ. App. 510, 133 S. W. 482.

action.⁹⁸ And in a recent case in Kentucky it was held that mere failure of the conductor of a street car, which stopped for passengers at a place where rowdies were making an attack on intending passengers, to start the car as soon as the passengers were on board, did not, even though the passengers had requested him to start it at once, render the company liable for injury to a passenger by a missile thrown into the car, where the conductor could not there tell who were passengers and who were not and the delay was caused by his endeavor to do so and to remove the trespassers so that the car could be removed without endangering persons on the steps and platform.⁹⁹

§ 2492 (1640). Injuries received in sleeping cars.—We have elsewhere called attention to the peculiar position occupied by sleeping car companies.¹ The contract of a passenger for carriage is with the railroad company rather than with the sleeping

⁹⁸ *Irwin v. Louisville &c. R. Co.*, 161 Ala. 489, 50 So. 62, 135 Am. St. 154; *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. 519; *Woas v. St. Louis Trans. Co.*, 198 Mo. 664, 96 S. W. 1017, 7 L. R. A. (N. S.) 231; *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982, 3 Ann. Cas. 1087 (missile thrown by striker or sympathizers). See also *Ormandroyd v. Fitchburg &c. St. R. Co.*, 193 Mass. 130, 78 N. E. 739, 118 Am. St. 457.

⁹⁹ *Louisville R. Co. v. Dott*, 161 Ky. 759, 171 S. W. 438, L. R. A. 1915C, 681. But see where carrier has reason to anticipate the injury. *Southern R. Co. v. Haynes*, 186 Ala. 60, 65 So. 339; *Seawell v.*

Carolina &c. R. Co., 132 N. Car. 856, 44 S. E. 610; *Texas &c. R. Co. v. Dick*, 26 Tex. Civ. App. 256, 63 S. W. 895; *McCardell v. Gulf &c. R. Co.* (Tex. Civ. App.), 102 S. W. 941. As to injuries from sparks and cinders see *Shine v. New York &c. R. Co.*, 236 Mass. 419, 128 N. E. 713, 11 A. L. R. 1075, and note on p. 1076 et seq.

¹ Ante, § 2450. Conductor employed by Pullman Co. and having nothing to do with railroad company's running of train is held not an employee or passenger of the railroad company which being transported as such conductor under contract between two companies in *Cato v. Southern R. Co.* (Ga. App.), 107 S. E. 98.

car company² and the former is liable for injuries to its passengers in a sleeping car caused by its negligence or breach of duty which it owes them as a carrier of passengers. The employes of the sleeping car company, in so far as their duties relate to the carriage or transportation of passengers are regarded as the employes of the railroad company, where there is no contract which changes the rule and which is or ought to be known to the passenger, so that the railroad company is liable for their negligence.³ Thus, railroad companies have been held liable where berths fell upon passengers, owing to the negligence of the sleeping car employes,⁴ and even for assaults committed upon them by sleeping car porters.⁵ But the sleeping car company may also be liable for the negligence or wrongful acts of its employes,⁶ in the scope of their employment or line

² *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258.

³ *Williams v. Pullman &c. Co.*, 40 La. Ann. 417, 4 So. 85, 8 Am. St. 538. See also *Denver &c. R. Co. v. Derry*, 47 Colo. 584, 108 Pac. 172, 175, 27 L. R. A. (N. S.) 761, (citing text); *McKeon v. Chicago &c. R. Co.*, 94 Wis. 477, 69 N. W. 175, 35 L. R. A. 252, 59 Am. St. 909; authorities cited in following notes; also, ante, §§ 2453, 2461. And compare *Rogers v. Philadelphia &c. Ry. Co.*, 263 Pa. 429, 106 Atl. 734.

⁴ *Pennsylvania R. Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Railroad Co. v. Walrath*, 38 Ohio St. 461, 43 Am. Rep. 433; *Northern Pac. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866.

⁵ *Dwinelle v. New York Cent. &c. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 L. R. A.

611; *Thorpe v. New York Cent. &c. R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325; *Williams v. Pullman &c. Co.*, 40 La. Ann. 417, 4 So. 85, 8 Am. St. 538. See also, ante, §§ 2461, 2462.

⁶ *Heenrich v. Pullman &c. Co.*, 20 Fed. 100; *Campbell v. Pullman &c. Co.*, 42 Fed. 484; *Meyer v. St. Louis &c. R. Co.*, 54 Fed. 116; *Mann Boudoir Car Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289 and note; *Hall v. Pullman Co.*, 253 Fed. 297; *Pullman P. C. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 14 S. W. 993, 13 L. R. A. 215, 23 Am. St. 356. See also *Airly v. Pullman P. C. Co.*, 50 La. Ann. 648, 23 So. 512. But compare *Williams v. Pullman &c. Co.*, 40 La. Ann. 87, 3 So. 631, 8 Am. St. 512; *Pullman &c. Co. v. Ehrman*, 65 Miss. 383, 4 So. 113.

of duty to it, and, as we have elsewhere said, we believe there are some negligent acts or omissions for which it alone will be liable,⁷ just as there are some for which the railroad is liable. So, it is held in a recent case that a sleeping car company, though not a common carrier, is responsible to its passengers for the discharge of certain general duties involving the exercise of ordinary and reasonable care, among which is the duty to provide a properly-warmed and comfortable car, and that a violation of this duty which proximately causes a cold and permanent injury to a passenger's eyes "may be made the subject-matter of an action either ex contractu or ex delicto."⁸ But neither the sleeping car company nor the railroad is liable for an injury which is not proximately caused by the negligence of either. In other words, neither is an insurer of the safety of passengers. And, in another recent case, it was held that where an intruder entered the car at night for the purpose of robbery and killed a passenger there was no liability in the absence of any knowledge of danger on the part of the employes or any circum-

⁷ See ante, §§ 2453, 2456, 2461.

⁸ *Hughes v. Pullman Palace Car Co.*, 74 Fed. 499. See also *Nevin v. Pullman &c. Co.*, 106 Ill. 222, 46 Am. Rep. 688, 11 Am. & Eng. R. Cas. 92; *Pullman &c. Co. v. Booth* (Tex. Civ. App.), 28 S. W. 719; *Marcott v. Minneapolis &c. R.*, 147 Wis. 216, 133 N. W. 37. But compare *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, and *Pullman &c. Co. v. Bales*, 80 Tex. 211, 15 S. W. 785, 47 Am. & Eng. R. Cas. 416. In this last case it was held that the company was not liable where its servants rudely pulled aside the curtain and exposed the plaintiff and his wife undressed in the same berth where they had no

right to both occupy one berth together. So, where a passenger on an ordinary car, with out right entered a sleeping car, to induce the steward to sell him liquor in violation of law, it was held that the sleeping car company was not liable for an assault on him by the steward. *Cassedy v. Pullman &c. Co.* (Miss.), 17 So. 373. But compare *Pullman &c. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Campbell v. Pullman &c. Co.*, 42 Fed. 484, and *Pullman Co. v. Riley* (Ala.), 59 So. 761, in all of which the company was held liable for indecent assault, or other assaults, on passengers by the porter.

stances to arouse their suspicion.⁹ But this decision has been criticised by other courts.¹⁰

§ 2493 (1641). **Injuries received at stations.**—We have elsewhere treated of the limited duty of railroad companies to trespassers and licensees at station, and have shown that a higher duty is due to those who come upon the invitation of the company to do business with it or to assist passengers in arriv-

⁹ *Connell's Exr. v. Chesapeake &c. R. Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. 786. Among other things, the court said: "Experience teaches us that, when property is exposed to theft, it is apt to be stolen; but murder is of infrequent occurrence. When, therefore, a sleeping-car company receives a passenger, and he retires to rest, it may well be assumed to anticipate and be required to guard and protect him against a crime which is likely to occur whenever the temptation and the opportunity are presented. It can not be expected to guard and protect him against a crime so horrid, and happily so rare, as that of murder. There is no casual connection between the negligence pleaded and the injury sustained. In a peaceful community, in a law-abiding and Christian land, a car of the defendant company is invaded in the night-time by an assassin, and an innocent man falls a victim to his murderous assault. Can it be said that, in leaving a door ajar, in permitting a stranger or passenger to enter, the defendants were guilty of negligence, when to hold them

negligent would be to say that they should have expected the tragedy which gave rise to this action? To do so would be to require of them more than human foresight as to the minds and motives of men, and make them, indeed, insurers of the safety of passengers, while under their care, against all dangers, however remotely connected with their act of omission or commission." The court cited, among other cases, *Pittsburgh &c. R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224; *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. ed. 1070; *Batton v. South. &c. R. Co.*, 77 Ala. 591, 54 Am. Rep. 80; *Putnam v. Broadway R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190; *Britton v. Atlanta &c. R. Co.*, 88 N. Car. 536, 43 Am. Rep. 749; *Pounder v. Northeastern R. Co.*, L. R. (1892), 1 Q. B. 390. See also *Davis v. Chicago &c. R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. 935, 33 L. R. A. 654.

¹⁰ *Calder v. Southern R. Co.*, 89 S. Car. 287, 71 S. E. 841, Ann. Cas. 1913A, 894; *Hill v. Pullman Co.*, 188 Fed. 497.

ing and departing.¹¹ Here we shall consider the duty of the company to passengers with respect to its stations and platforms and its liability for injuries received by them at such places. It is the duty of a railroad company to exercise at least reasonable care to keep its stations, platforms and approaches in such a condition that passengers who have occasion to use them for the purpose for which they are designed can do so in safety, and a passenger who is injured by a breach of this duty, without contributory negligence on his part, may maintain an action for damages against the company.¹² And it has been held no defense that the station is used in conjunction with another railroad company.¹³ Many recent cases, in most of which the

¹¹ See ante, § 1794. See also note to *Hill v. Louisville &c. R. Co.*, 124 Ga. 243, in 3 L. R. A. (N. S.) 432.

¹² *Railroad Co. v. Hanning*, 15 Wall. (U. S.) 649, 21 L. ed. 220; *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. ed. 325; *Green v. Pennsylvania R. Co.*, 36 Fed. 66; *Texas &c. R. Co. v. Orr*, 46 Ark. 182; *Louisville &c. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Pennsylvania R. Co. v. Marion*, 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. 330; *McDonald v. Chicago &c. R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *Maxfield v. Maine Cent. R. Co.*, 100 Maine 79, 60 Atl. 710; *Sweeny v. Old Colony R. Co.*, 92 Mass. 368, 87 Am. Dec. 644; *Keefe v. Boston &c. R. Co.*, 142 Mass. 251, 7 N. E. 874; *Dodge v. Boston &c. Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83 and note, 12 Am. St. 541; *Savagean v. Boston &c. R. Co.*, 210 Mass. 164, 96 N. E. 67; *Collins v. Toledo &c. R. Co.*, 80 Mich. 390, 45 N. W. 178; *Waller v. Missouri &c. R. Co.*, 59 Mo. App. 410;

Hoffman v. New York &c. R. Co., 75 N. Y. 605; *Kelley v. Manhattan R. Co.*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74 and note; *Abbott v. Oregon R. Co.*, 46 Ore. 549, 80 Pac. 1012, 114 Am. St. 885; *Texas &c. R. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034; *Johnson v. Texas Cent. R. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433; *Alexandria &c. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289; *Longmore v. Great Western R. Co.*, 19 C. B. N. S. 183; 3 *Thomp. Neg.* (2d ed.) § 2678, et seq. See also *Ft. Worth &c. Ry. Co. v. Brown* (Tex. Civ. App.), 205 S. W. 378. We think, as elsewhere stated, that reasonable care is all that is required; ante, § 2404. See also *Davis v. South Side El. R. Co.*, 292 Ill. 378, 127 N. E. 66, 10 A. L. R. 254, and note on p. 259 et seq. showing that this is the majority rule.

¹³ *Louisville &c. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193. See also *Skottowe v. Oregon &c. R. Co.*, 22 Ore. 430, 30 Pac. 222, 16 L. R. A. 593; *Cotant v. Boone &c. R. Co.*, 125 Iowa 46,

question of negligence and contributory negligence were left to the jury, illustrate the general rule and its application to various conditions and circumstances.¹⁴ Thus, railroad companies have been held liable for injuries to passengers by reason of broken planks or other similar defects in their platforms,¹⁵ by reason of the platform being placed higher than the platform of the coach so that passengers were required to get in and out through the baggage car,¹⁶ and by reason of the platform being

99 N. W. 115, 69 L. R. A. 982; *Leverett v. Shreveport R. Co.*, 110 La. Ann. 399, 34 So. 579; *Frazer v. New York &c. R. Co.*, 180 Mass. 427, 62 N. E. 731; *Penfield v. Cleveland &c. R. Co.*, 26 App. Div. 413, 50 N. Y. S. 79; *Houston &c. R. Co. v. McCarty*, 40 Tex. Civ. App. 364, 89 S. W. 805; *Owen v. Washington R. Co.*, 29 Wash. 207, 69 Pac. 757. Or that the company is a mere lessee. *Montgomery &c. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72.

¹⁴ *Harrington v. Boston Elec. Ry. Co.*, 229 Mass. 421, 118 N. E. 880; *Chalker v. Detroit &c. Ry. Co.* 207 Mich. 138, 173 N. W. 532; *Boyle v. Waters*, 199 Mich. 478, 166 N. W. 114; *Heffron v. New York Cent. &c. R. Co.*, 233 N. Y. 473, 119 N. E. 1024; *Dashew v. Interborough Rapid Transit Co.*, 175 N. Y. S. 875; *Hoffman v. Lehigh Valley R. Co.*, 177 N. Y. S. 140; *Himstreet v. Chicago &c. Ry. Co.*, 167 Wis. 71, 166 N. W. 665.

¹⁵ *Toledo &c. R. Co. v. Grush*, 67 Ill. 262, 16 Am. Rep. 618; *Louisville &c. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414, 61 N. E. 936; *Knight v. Portland &c. R. Co.*, 56

Maine 234, 96 Am. Dec. 449; *Crowe v. Railroad Co.*, 142 Mich. 692, 106 N. W. 395; *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 42 Am. St. 516; *Liscomb v. New Jersey &c. Railroad &c. Co.*, 6 Lans. (N. Y.) 75; *Ft. Worth &c. R. Co. v. Davis*, 4 Tex. Civ. App. 351, 23 S. W. 737 (sharp railroad spike in platform); *Barker v. Ohio R. Co.*, 51 W. Va. 423, 41 S. E. 148, 80 Am. St. 808. See also *St. Louis &c. R. Co. v. Caldwell*, 93 Ark. 286, 124 S. W. 1034; *Hanna v. St. Louis &c. R. Co.*, 93 Ark. 205, 124 S. W. 514; *Gascoigne v. Metropolitan &c. R. Co.*, 239 Ill. 18, 87 N. E. 883; *Maxfield v. Maine Cent. R. Co.*, 100 Maine 79, 60 Atl. 710 (slippery platform); *Chalker v. Detroit &c. Ry. Co.* 207 Mich. 138, 173 N. W. 532. But compare *Pittsburgh &c. R. Co. v. Harris*, 38 Ind. App. 77, 77 N. E. 1051; *Railway Co. v. Hall*, 100 Fed. 760; *Waterbury v. Chicago R. Co.*, 104 Iowa 32, 73 N. W. 341; *Chicago &c. R. Co. v. Smith*, 59 Ill. App. 242, affirmed in 162 Ill. 185; *Newcomb v. New York &c. R. Co.*, 182 Mo. 687, 81 S. W. 1069.

¹⁶ *Turner v. Vicksburg &c. R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514. See also *Collins v. Toledo*

narrow and too near the track.¹⁷ So, where it has reason to anticipate a crowd, the carrier should provide a sufficient number of employes and make proper arrangements for the prevention of injury by reason thereof to passengers or intending passengers on the platform or at the station.¹⁸ And, where passengers are

&c. R. Co., 80 Mich. 390, 45 N. W. 178; Rathgebe v. Pennsylvania R. Co., 179 Pa. St. 31, 36 Atl. 160 (dangerous slope); Toledo &c. R. Co. v. Wingate, 143 Ind. 125, 37 N. E. 274; Foy v. Railway Co., 18 C. B. (N. S.) 225; Illinois &c. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290.

¹⁷ Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Union Pac. R. Co. v. Sue, 25 Nebr. 772, 41 N. W. 801; Lake Shore &c. R. Co. v. Ward, 135 Ill. 511, 26 N. E. 520; Hurlbert v. New York &c. R. Co., 40 N. Y. 145. See also Young v. New York &c. R. Co., 171 Mass. 33, 50 N. E. 455, 41 L. R. A. 193. But compare Dotson v. Erie Railroad Co., 68 N. J. L. 679, 54 Atl. 827; Matthews v. Pennsylvania Railroad Co., 148 Pa. St. 491, 24 Atl. 67; Railroad Co. v. Dupont, 128 Fed. 840. So, it has been held that it may be negligence to require a passenger to alight on a small box. Missouri Pac. R. Co. v. Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368. But a passenger who trips over the feet of a baggage master engaged in unloading baggage in the usual way, where there is ten feet of unobstructed platform in which to pass, can not recover. Connor v. Concord &c. R. Co., 67 N. H. 311, 30 Atl. 1121. Otherwise where the baggageman carelessly runs a truck over him while on the platform.

Chicago &c. R. Co. v. Woolridge, 32 Ill. App. 237. See also as to obstruction, Falls v. San Francisco &c. R. Co., 97 Cal. 114, 31 Pac. 901; Matthieson v. Burlington R. Co., 125 Iowa 90, 100 N. W. 51; Sargent v. St. Louis &c. R. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460; Denver &c. R. Co. v. Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121; Baker v. Clark, 99 Fed. 911; Atchinson &c. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. 321. In Cousineau v. Muskegon Traction &c. Co., 145 Mich. 314, 108 N. W. 720, it was held that whether a street railway company conducting an amusement park, at which after the close of the entertainment one, who had taken her place in the front rank of several thousand persons waiting for cars, was pushed under a car, was guilty of negligence in not making provision by way of railings, barriers, and policemen to furnish protection from the dangers incident to such a crowd, was a question for the jury, as was also the question of contributory negligence, and that it could not be said as matter of law that she was guilty of contributory negligence. See also Taylor v. Railroad Co., 50 Fed. 755; McGearty v. Manhattan R. Co., 15 App. Div. (N. Y.) 2, 43 N. Y. S. 1086.

¹⁸ Dixon v. Great Falls &c. R.

received and discharged after dark it is the duty of the company to light its station or platforms, and it is liable to a passenger who is injured without fault on his part by reason of its negligent failure to do so.¹⁹ A railroad company is not, however, bound to have a platform at a mere road crossing at which trains stop on signal for the mere convenience of those desiring passage,²⁰ nor to have a platform on each side of the track,²¹ and

Co., 38 App. D. C. 591, Ann. Cas. 1913C, 571 and note; *Ruhlen v. Boston &c. R. Co.*, 193 Mass. 341, 79 N. E. 815, 118 Am. St. 516, 7 L. R. A. (N. S.) 729; *Cousineau v. Muskegon Tract. &c. Co.*, 152 Mich. 48, 115 N. W. 987; *Dawson v. New York &c. Bridge*, 31 App. Div. 537, 52 N. Y. S. 133; *Pennsylvania R. Co. v. Stockton*, 184 Fed. 422. But compare *Cannon v. Midland &c. R. Co.*, 6 L. R. Ir. 199.

¹⁹ *Grimes v. Pennsylvania Co.*, 36 Fed. 72; *Alabama &c. R. Co. v. Arnold*, 84 Ala. 159, 4 So. 359, 5 Am. St. 354; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329; *Wallace v. Wilmington &c. R. Co.*, 8 Hous. (Del.) 529, 18 Atl. 818; *Reynolds v. Texas &c. R. Co.*, 37 La. Ann. 694; *Moses v. Louisville &c. R. Co.*, 39 La. Ann. 649, 2 So. 567, 4 Am. St. 231; *Buenemann v. St. Paul &c. R. Co.*, 32 Minn. 390, 20 N. W. 379; *Abbott v. Oregon R. Co.*, 46 Ore. 549, 80 Pac. 1012, 1014 (citing text); *Stewart v. International &c. R. Co.*, 53 Tex. 289, 37 Am. Rep. 753; *Beard v. Connecticut &c. R. Co.*, 48 Vt. 101; *Alexandria &c. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289; *Quaife v. Chicago &c. R. Co.*, 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821; *Nicholson v. Lancashire &c. R. Co.*, 3 H. & C. 534. See also *Pere Marquette R. Co. v. Strange*, 171 Ind.

160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041 and note. But where the company furnished all the light that experience had shown to be necessary, it was held not to be liable in a recent case. *Lafflin v. Buffalo &c. R. Co.*, 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433. Reasonable care in lighting is all that is necessary. *Hiatt v. Des Moines &c. R. Co.*, 96 Iowa 164, 64 N. W. 766.

²⁰ *Alabama &c. R. Co. v. Stacy*, 68 Miss. 463, 9 So. 349; *Cincinnati &c. R. Co. v. Peters*, 80 Ind. 168, 6 Am. & Eng. R. Cas. 126. But compare *Pineus v. Atlantic &c. R. Co.*, 140 N. Car. 450, 53 S. E. 297, 111 Am. St. 856. Nor at the end of a new and incomplete road, where the passenger is aware of its incomplete conditions. *Chicago &c. R. Co. v. Frazer*, 55 Kans. 582, 40 Pac. 923.

²¹ *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440. But when a passenger, without fault, got off on the opposite side from the platform, and was struck by a passing train, the railroad company was held liable. *Van Ostran v. New York &c. R. Co.*, 35 Hun (N. Y.) 590, 104 N. Y. 683; *McQuilken v. Central Pac. R. Co.*, 64 Cal. 463, 2 Pac. 46. But see, ante, § 2472, note 25.

if it has a reasonably safe and suitable platform it is not liable for a purely accidental injury to a passenger thereon.²² So, of course, if the passenger is guilty of negligence, which is a proximate cause of his injury, he can not recover.²³ A passenger is not necessarily negligent in going to his train in the usual way in the dark or in unintentionally getting out of the proper way in the dark in seeking a safe place,²⁴ but if he recklessly and unnecessarily wanders about in the dark and walks off of the plat-

²² *Stokes v. Suffolk &c. R. Co.*, 107 N. Car. 178, 11 S. E. 991. All that is required is ordinary and reasonable care on its part. Ante, § 2404. See also *St. Louis &c. R. Co. v. Woods*, 96 Ark. 311, 131 S. W. 869, 33 L. R. A. (N. S.) 855 and note reviewing many cases; *Chase v. Atchison &c. R. Co.*, 134 Mo. App. 655, 114 S. W. 1141. But compare *Brackett v. Southern Ry.* 88 S. Car. 447, 70 S. E. 1026. Ann. Cas. 1912C, 1212. The company is not negligent in merely having a reasonable space between the platform and the car, and the question is generally for the jury but it may be so little on the one hand or so great on the other that, at least when coupled with other elements in the latter case, the question of negligence may become one of law. See for review of authorities note to *MacGilvray v. Boston El. R. Co.*, 229 Mass. 65, 118 N. E. 166, in 4 A. L. R. 283, 286 et seq.

²³ *Little Rock &c. R. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 506; *Railway Co. v. Cox*, 60 Ark. 106, 20 S. W. 38; *Illinois &c. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322;

Forsyth v. Boston &c. R. Co., 103 Mass. 510; *Gunderman v. Missouri &c. R. Co.*, 58 Mo. App. 370; *Reneker v. South Carolina R. Co.*, 20 S. Car. 219, 18 Am. & Eng. R. Cas. 149. But the defect must be such as would suggest danger to a man of ordinary understanding and reasonable prudence, and a passenger is not obliged to make a close inspection, such as the company or its servants might be required to make. *Ohio &c. R. Co. v. Stansberry*, 132 Ind. 533, 32 N. E. 218.

²⁴ *Wallace v. Wilmington &c. R. Co.*, 8 Hous. (Del.) 529, 18 Atl. 818; *Moses v. Louisville &c. R. Co.*, 39 La. Ann. 649, 2 So. 567, 4 Am. St. 231; *Missouri Pac. R. Co. v. Neiswanger*, 41 Kans. 621, 21 Pac. 582, 13 Am. St. 304; *Louisville &c. R. Co. v. Treadway*, 142 Ind. 475, 40 N. E. 807, 41 N. E. 794; *Texas &c. R. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034. See also *Kansas City &c. R. Co. v. Watson*, 102 Ark. 499, 144 S. W. 922; *Kentucky &c. Co. v. McKinney*, 9 Ind. App. 213, 36 N. E. 448; *Crowe v. Michigan Cent. R. Co.*, 142 Mich. 692, 106 N. W. 395; *Houston &c. R. Co. v. McCarty*, 40 Tex. Civ. App. 364, 89 S. W. 805.

form, or the like²⁵ or goes through a dark passage or down a dark stairway in making his exit, when other passages or ways, plainly intended for that purpose, are properly lighted and open to his sight, he can not recover for an injury received in consequence thereof.²⁶ So, where a passenger, in going to a train fell over lumber which he knew was upon the platform but had forgotten about, he was held guilty of contributory negligence.²⁷ The duty of railroad companies to exercise ordinary care to keep their stations reasonably safe for passengers extends to water-closets and similar accommodations intended for their use,²⁸ and it has also been held it is the duty of such companies to provide and maintain a comfortable room in which passengers may stay while waiting for their trains.²⁹ But if

²⁵ *Reed v. Axtell*, 84 Va. 231, 4 S. E. 587; *Sturgis v. Detroit &c. R. Co.*, 72 Mich. 619, 40 N. W. 914; *Gulf &c. R. Co. v. Hodges* (Tex. Civ. App.), 24 S. W. 563. See also *Abbott v. Oregon R. Co.*, 46 Ore. 549, 80 Pac. 1012, 114 Am. St. 885; *Gunderman v. Missouri &c. R. Co.*, 58 Mo. App. 370; *Lemery v. Great Northern R. Co.*, 83 Minn. 47, 85 N. W. 908; *Emery v. Chicago &c. R. Co.*, 77 Minn. 465, 80 N. W. 627; *Missouri &c. R. Co. v. Turley*, 85 Fed. 369.

²⁶ *Bennett v. New York &c. R. Co.*, 57 Conn. 422, 18 Atl. 668. See also *Illinois Cent. R. Co. v. Sanderson*, 175 Ky. 11, 192 S. W. 869, L. R. A. 1917D, 890 and note; *Forsyth v. Boston &c. R. Co.*, 103 Mass. 510.

²⁷ *Wood v. Richmond &c. R. Co.*, 100 Ala. 660, 13 So. 552. See also *Chicago &c. R. Co. v. Mahara*, 47 Ill. App. 208.

²⁸ *McKone v. Michigan &c. R. Co.*, 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596; *Missouri Pac. R.*

Co. v. Neiswanger, 41 Kans. 621, 21 Pac. 582, 13 Am. St. 304; *Jordan v. New York &c. R. Co.*, 165 Mass. 346, 43 N. E. 111, 32 L. R. A. 101, 52 Am. St. 522. See also *Illinois &c. R. Co. v. Griffin*, 80 Fed. 278 (baggage room).

²⁹ *McDonald v. Chicago &c. R. Co.*, 26 Iowa 124, 96 Am. Dec. 114. See also *Draper v. Evansville &c. R. Co.*, 165 Ind. 117, 120, 74 N. E. 889, 6 Ann. Cas. 569; *Chicago &c. R. Co. v. Stephens*, 218 Fed. 535. As to the liability of the company for illness or other injuries caused by exposure in such a case, see *St. Louis &c. R. Co. v. Hook*, 83 Ark. 584, 104 S. W. 217; *Boothby v. Grand Trunk R. Co.*, 66 N. H. 342, 34 Atl. 157; *Brackett v. Southern Ry.*, 88 S. Car. 447, 70 S. E. 1062, Ann. Cas. 1912C, 1212n; *Texas &c. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720; *Texas &c. R. Co. v. Pierce*, 10 Tex. Civ. App. 429, 30 S. W. 1122; *St. Louis &c. Ry. Co. v. Foster* (Tex. Civ. App.), 112 S. W. 797.

a railroad company has exercised ordinary and reasonable care, we think it is not liable for failing to guard against accidents that could not reasonably have been anticipated,⁸⁰ and a passenger is certainly not justified in voluntarily incurring an obvious danger merely to avoid a temporary inconvenience.⁸¹

§ 2494 (1641a). Injuries to health of interurban passengers from exposure to cold in stalled cars.—A recent decision passes upon the question of the duty of an interurban railroad company to procure shelter for its passengers outside the car where the car is stopped by some cause for which the company is not responsible—as by snow drifts in the particular case—and the stranded passengers run the risk of injury to their health by remaining in the car. The conclusion of the court is that the conductor is under no legal obligation to find more comfortable shelter for his passengers outside the car.⁸² The reasons for this conclusion are thus set out by the court: “The contract of the defendant in this case was to carry the passenger safely to her point of destination, and so to conduct the operation of its cars as not to injure her by any wilful act or negligence on the part of its employes. The defendant could not be held to be guilty of negligence in failing to further operate its car after it had been stopped by the snow, having exhausted all its power in the effort to move the car from time to time against the accumulation of the snow. It was not, then, guilty of negligence in not carrying the plaintiff to her destination; and, having carried her as far as it could by the exercise of its power with the appliances at its disposal, it had done all that could be required to carry out its legal duty in her behalf. It would, indeed, have been an act of humanity and kindness on the part

⁸⁰ *Crafter v. Metropolitan &c. R. Co.*, L. R. 1 C. P. 300; *Cornman v. Eastern &c. R. Co.*, 4 H. & N. 781. See also ante, § 2404; *Brooks v. Old Colony R. Co.*, 168 Mass. 164, 46 N. E. 566; *Legge v. New York &c. R. Co.*, 197 Mass. 88, 83 N. E. 367, 23 L. R. A. (N.

S.) 633; *Kirby v. Canal Co.*, 20 App. Div. 473, 46 N. Y. S. 777.

⁸¹ *Adams v. Lancashire &c. R. Co.*, L. R. 4 C. P. 739. See also *Louisville &c. R. Co. v. Turner*, 137 Ky. 730, 126 S. W. 372, 136 Am. St. 317.

⁸² *Prosper v. Rhode Island &c. R. Co.*, 28 R. I. 367, 67 Atl. 522.

of the conductor, as of any other person seeing the plaintiff helpless and exposed to injury from cold and snow, to have helped her to a place of safety, if possible; and the duty of so doing, resting in moral rather than in legal obligation, would have been a personal one, resting upon the conductor or the motorman as an individual, and not as an agent or servant of the defendant corporation, in the same way and to the same extent that it would have rested upon any individual, had the plaintiff seen fit to leave the car and endeavor to struggle through the snow to a place of safety. The duty of assistance or rescue in distress in such case rests, not in contract, or in legal obligation, but in moral obligation growing out of human relations, and therefore is not a proper ground of action for damages."³³

§ 2495 (1642). **Contributory negligence.**—We have already treated different phases of the subject of contributory negligence so fully in considering injuries received by passengers under particular circumstances that little remains to be said. As a general rule a passenger, like every one else, is bound to exercise ordinary and reasonable care to avoid or prevent injury to himself, and if his failure to do so proximately causes or contributes to his injury, he can not recover, ³⁴ unless the injury was will-

³³ *Prosper v. Rhode Island &c. R. Co.* 28 R. I. 367, 67 Atl. 522, 11 L. R. A. (N. S.) 1142. See also *Tyler v. Texas &c. R. Co.* (Tex. Civ. App.), 79 S. W. 1075. But compare *Cormack v. New York &c. R. Co.*, 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209; *Texas &c. R. Co. v. Bigger*, 239 U. S. 330, 36 Sup. Ct. 127, 60 L. ed. 310. And see generally as to duty to passengers after a wreck or the like, *Turk v. Norfolk &c. R. Co.* (W. Va.), 84 S. E. 569, L. R. A. 1915E, 145 and note. And as to duty to heat cars and the like, see also *South Covington &c. St. R. Co. v. Covington*,

235 U. S. 537, 35 Sup. Ct. 158, 59 L. ed. 350, L. R. A. 1915F, 792; *Louisville &c. R. Co. v. Fisher*, 155 Fed. 68, 11 L. R. A. (N. S.) 926 and note; *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769; *Louisville &c. R. Co. v. Scalf*, 33 Ky. L. 721, 110 S. W. 862, 26 L. R. A. (N. S.) 263 and note. *Zoccolillo v. Oregon Short Line R. Co.* (Utah), 177 Pac. 201.

³⁴ *MacLeod v. Graven*, 73 Fed. 627; *Jeffersonville &c. R. Co. v. Hendricks*, 26 Ind. 228; *Wahl v. Shoulder*, 14 Ind. App. 665, 43 N. E. 458; *Price v. St. Louis &c. R. Co.*, 72 Mo. 414; *Pennsylvania R. Co.*

fully inflicted under such circumstances as to make the company responsible. Whether he exercised such care or not is usually a question for the jury to determine,⁸⁵ but, as we have seen, his conduct may be such as to constitute negligence per se or make a prima facie case of contributory negligence against him, and it is a general rule that if the facts are undisputed and but one reasonable inference can be drawn therefrom the court should draw it and take the case away from the jury.⁸⁶ On the other

v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; Burns v. Johnstown &c. R. Co., 213 Pa. St. 143, 62 Atl. 564, 2 L. R. A. (N. S.) 1191; notes to Freer v. Cameron, 55 Am. Dec. 663 (4 Rich. L. (S. Car.) 228), and Hartfield v. Roper, 34 Am. Dec. 273 (21 Wend. N. Y. 615); Hunter v. Atlantic Coast Line R. Co., 72 S. Car. 336, 51 S. E. 860, 110 Am. St. 605; Fisher v. West Virginia &c. R. Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69; 3 Thomp. Neg., § 2922, et seq. This general rule is so well settled and has been so often referred to and its application so fully shown in the preceding sections of this chapter, that the citation of the numerous authorities is here unnecessary. But see Parks v. St. Louis &c. R. Co., 178 Mo. 108, 77 S. W. 70, 101 Am. St. 425 and note. For other illustrative cases of contributory negligence see Blair v. Chicago &c. R. Co., 205 Ill. App. 160 (standing on platform in violation of regulations); McDermott v. Louisville &c. R. Co., 182 Ky. 22, 206 S. W. 6 (intoxicated passenger who failed to exercise ordinary care); Twersky v. Pennsylvania R. Co., 261 Pa. 6, 104 Atl. 63 (passenger alighting and walking too close to passenger in front to see

open space between car and platform); St. Louis &c. Ry. Co. v. Quinette, 251 Fed. 773 (passenger alighting at water tank instead of regular station).

⁸⁵ Georgia &c. R. Co. v. Watkins, 97 Ga. 381, 24 S. E. 34; Baltimore &c. R. Co. v. Mullen, 217 Ill. 203, 75 N. E. 474, 2 L. R. A. (N. S.) 115; Indianapolis &c. Trac. Co. v. Hardwick (Ind. App.), 123 N. E. 249; Young v. Boston &c. St. R. Co., 213 Mass. 267, 100 N. E. 541, Ann. Cas. 1914A, 635n; King v. Yazoo &c. R. Co., 87 Miss. 270, 39 So. 810; Eichorn v. Missouri &c. R. Co., 130 Mo. 575, 32 S. W. 993; Omaha &c. R. Co. v. Crow, 47 Nebr. 84, 66 N. W. 21; Ward v. International R. Co., 206 N. Y. 83, 99 N. E. 262, Ann. Cas. 1914A, 1170 and note; Hinshaw v. Raleigh &c. R. Co., 118 N. Car. 1047, 24 S. E. 426; Brodie v. Carolina &c. R. Co., 46 S. Car. 203, 24 S. E. 180; Missouri &c. R. Co. v. Meyers (Tex. Civ. App.), 35 S. W. 421; ante, § 2472, notes 18, 19 and 22.

⁸⁶ Elliott's Gen. Pr., §§ 437, 887, 889; ante, §§ 2471, 2477, 2480, 2481. See also 3 Elliott Ev., § 2501; Murphy v. Pere Marquette R. Co., 183 Mich. 435, 150 N. W. 122, 126 (citing text).

hand, as we have also shown, if his negligence had nothing to do with causing the injury, or did not proximately contribute thereto, he can not be defeated upon the ground of contributory negligence,³⁷ and this is also true where he does an act not obviously dangerous under the direction of employes upon whose knowledge and directions he has a right to rely, notwithstanding such act, if performed without such directions, or if known to him to be dangerous, might have been negligent.³⁸ So, where he is placed in imminent peril by the negligence of the company he may recover, in a proper case, for injuries received in attempting to escape or avoid it, if he exercised ordinary and reasonable care under the circumstances as they reasonably appeared to him at the time, although in acting upon the spur of the moment and under excitement he did not do what was best, or would not have been injured if he had done nothing but to remain quiet.³⁹

³⁷ See 3 *Thomp. Neg.* (2d ed.), § 2926; *Richmond St. R. Co. v. Beverley*, 43 Ind. App. 105, 84 N. E. 558, 85 N. E. 721; *Yazoo &c. R. Co. v. Byrd*, 89 Miss. 308, 42 So. 286; *Chesapeake &c. R. Co. v. Wills*, 111 Va. 32, 68 S. E. 395, 32 L. R. A. (N. S.) 280. And there are some cases where he may be entitled to recover under the last clear chance doctrine. *Montgomery &c. R. Co. v. Stewart*, 91 Ala. 421, 8 So. 708; *Price v. St. Louis &c. R. Co.*, 72 Mo. 414; *McGrim v. Columbus Ry. &c. Co.*, 4 Ohio App. 398.

³⁸ See post, § 2497; *Dieckmann v. Chicago &c. R. Co.*, 145 Iowa 250, 121 N. W. 676; *Owens v. Atlantic &c. R. Co.*, 152 N. Car. 436, 67 S. E. 993.

³⁹ *South Covington &c. R. Co. v. Ware*, 84 Ky. 267, 1 S. W. 493; *Big Sandy &c. R. Co. v. Blankenship*, 133 Ky. 438, 118 S. W. 316, 23 L. R.

A. (N. S.) 345, 19 Ann. Cas. 264 (jumping from car when collision about to occur); *Odom v. St. Louis &c. R. Co.*, 45 La. Ann. 1201, 14 So. 734; *Shannon v. Boston &c. R. Co.*, 78 Maine 52, 2 Atl. 678; *Steverman v. Boston El. R. Co.*, 205 Mass. 508, 91 N. E. 919; *Wilson v. Northern &c. R. Co.*, 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410; *Bischoff v. People's R. Co.*, 121 Mo. 216, 25 S. W. 908; *St. Joseph &c. R. Co. v. Hedge*, 44 Nebr. 448, 62 N. W. 887; *Cuyler v. Decker*, 20 Hun (N. Y.) 173; *Fulghum v. Atlantic &c. R. Co.*, 158 N. Car. 555, 74 S. E. 584, 39 L. R. A. (N. S.) 558; *Iron R. Co. v. Mowery*, 36 Ohio St. 418; *Dimmey v. Wheeling &c. R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292; 3 *Thomp. Neg.* (2d ed.), §§ 2927, 2928, ante, § 2465. But the fear or peril must be caused by the negligence or wrong of the company and not by the

§ 2496 (1642a). **Contributory negligence—Illustrative cases.**—Many cases illustrating the application of the doctrine of contributory negligence where passengers are injured, have already been referred to in other sections in this chapter, and especially in the last preceding section; but it may be well to consider a few additional cases upon the same subject and to review some of the recent decisions. In one of them we find the following statement relative to the general subject: "It is elementary, and in this state well settled, that the duties of carriers and passengers are reciprocal. If carriers are held to the highest degree of care for the safety of passengers, passengers ought to be held to the exercise of ordinary care to protect themselves. More specifically, while railroad companies as a general rule are required to provide means of access to and egress from their trains and stations which can be used without danger, a passenger who leaves a train at a place which is not a regular station is held to the duty of exercising diligence in observing the surroundings, in order that he may reasonably determine whether the train has arrived at the place where the company intended him to alight. He must take the responsibility of everyday incidents of travel, including the stoppage of cars required by statute at railway junctions, and must govern himself accordingly, even if he has been advised by the conductor that the next stop will be the place at which the passenger expects to leave the train. The mere fact that the train stops at

passenger himself. *Austin &c. R. Co. v. Beatty*, 73 Tex. 592, 11 S. W. 858; *Reary v. Louisville &c. R. Co.*, 40 La. Ann. 32, 3 So. 390, 8 Am. St. 497; *Woolery v. Louisville &c. R. Co.*, 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; *Chicago &c. R. Co. v. Felton*, 125 Ill. 458, 17 N. E. 765. See also *Buel v. New York &c. R. Co.*, 31 N. Y. 314, 318, 88 Am. Dec. 271; *St. Louis &c. R. Co. v. Murray*, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. 32; 3 *Thomp. Neg.* (2d ed.), § 2929;

Williamson v. St. Louis &c. Co., 202 Mo. 345, 100 S. W. 1072. The rule stated in the text has often been applied where there is an explosion in an electric car, and a panic caused thereby or the like. *Chicago Un. Trac. Co. v. Newmiller*, 116 Ill. App. 625; *Louisville &c. Trac. Co. v. Worrell*, 44 Ind. App. 480, 86 N. E. 78. See also as to panic, *Toronto R. Co. v. Fleming*, 47 Can. Sup. Ct. 612, Ann. Cas. 1913D, 904 and note.

such a junction does not justify him in concluding that it is at the place of his intended departure, nor justify him in disregarding the indications of the actual environment that the train had not arrived at such place. If the surroundings and indications of the place at which a passenger, after such notice by the conductor, does in fact alight, are such that they preclude a reasonable belief on his part that he is getting out where the company intended him to leave the train, and such that no ordinarily prudent person, possessing average sense of sight and using it, could suppose that the train had arrived at that place, a passenger who, notwithstanding, leaves the train at a wrong place, and is hurt in consequence, is prevented by his own contributory negligence from recovering damages."⁴⁰ The plaintiff was held guilty of negligence. In another recent case it is said that while it is not the duty of an interurban railroad company "operating a car which, for the accommodation of passengers was stopped at any highway crossing where they desired to alight, to provide a passenger platform at each of such crossings, it was its duty to exercise at least reasonable care to enable plaintiff to alight with as little danger as practicable, and if the car was stopped, and plaintiff invited to alight, at a place more hazardous than that at which the car might conveniently have been stopped, then the defendant was negligent;" and that "a passenger on an interurban car, which is stopped for him to alight at a highway crossing, may reasonably assume that the car has been stopped in a portion of the highway where he is invited to alight, unless warned of danger, and is not conclusively negligent in accepting the invitation to alight at a place which is in fact unsafe."⁴¹ The court held that both questions were for the jury. So, where

⁴⁰ *Smith v. Georgia &c. R. Co.*, 88 Ala. 538, 7 So. 119, 7 L. R. A. 323, 16 Am. St. 63; *Richmond &c. R. Co. v. Smith*, 92 Ala. 237, 9 So. 223; *East &c. R. Co. v. Holmes*, 97 Ala. 332, 336, 12 So. 286; *Minock v. Detroit &c. R. Co.*, 97 Mich. 425, 56 N. W. 780; *Farrell v. Great Northern R. Co.*, 100 Minn. 361, 111 N. W. 388, citing *Mitchell v. Grand*

Trunk R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; *Davis v. Lehigh V. R. Co.*, 64 Hun 492, 19 N. Y. S. 516, 5 Am. Neg. Cases 529. And see *Lewis v. London &c. R. Co.*, L. R. 9 Q. B. D. 66.

⁴¹ *McGovern v. Interurban R. Co.*, 136 Iowa 13, 111 N. W. 412, 125 Am. St. 215.

a passenger was injured by stepping from a train before it reached the station, it was held that the question whether he was guilty of contributory negligence in doing so, when the night was dark and rainy, the street lights out, and the brakeman had just announced the station without warning the passengers that the stop was not the station, his conduct, together with the movements of the other passengers, indicating that the station had been reached, was for the jury, though he knew that trains in entering the city, made a stop before reaching the station.⁴² In an action for injuries to a passenger while attempting to board a train in motion, defended on the ground of contributory negligence, it was held that the carrier was entitled to an instruction that if the passenger boarded a moving train, and knew that it was dangerous and that it was negligence on his part to make the attempt, and that negligence proximately contributed to the injuries, a verdict for the carrier should be rendered.⁴³ But where the evidence showed that it was the duty of the defendant railroad company's employees to assist passengers off the train, and no employee was present for that purpose, it was held that the mere fact that plaintiff's wife took her child and a suit case along at the time of leaving the train did not raise the issue of contributory negligence, so as to require a charge thereon.⁴⁴

§ 2497 (1643). Effect of directions by trainmen to occupy dangerous position.—A passenger who might otherwise have been defeated upon the ground of contributory negligence may sometimes recover because he acted under the directions of the conductor. There is some conflict among the authorities as to how far a passenger is justified in acting upon an invitation or order of a trainman, but is clear that he may do so if the trainman is authorized, either expressly or impliedly, to give the invitation or order and the act is not such as the passenger ought to know is dangerous or in violation of the company's rules, and

⁴² *Wolf v. Chicago &c. R. Co.*, 131 Wis. 335, 111 N. W. 514. *Trigo* (Tex. Civ. App.), 101 S. W. 254.

⁴³ *San Antonio &c. R. Co. v.* ⁴⁴ *Missouri &c. R. Co. v. Corse* (Tex. Civ. App.), 101 S. W. 522.

it is equally clear that where he knows that the act is in violation of the rules of the company and will place him in imminent peril he is not justified in taking the risk and can not hold the company liable if he is injured in so doing, even though he acted upon the advice or under the directions of the conductor or other trainmen. The conflict exists in the disputed territory between these two extremes. The solution of the problem may sometimes depend upon the authority, or apparent authority of the employe, to give the permission or order or to waive a rule of the company, or it may depend upon the nature of the act, that is, whether it is so dangerous that a reasonably prudent man would not, in the exercise of ordinary care, perform it even with the permission or under the direction of the employe. Where the directions of the employe are within the scope of his authority and obedience to them will not expose a passenger to known or apparent danger which a prudent man would not incur, the passenger is justified in acting upon them and is not necessarily guilty of contributory negligence, although he may be injured in so doing.⁴⁵ But if the danger is obvious and such as a

⁴⁵ *Indianapolis &c. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *St. Louis &c. R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *St. Louis &c. R. Co. v. Person*, 49 Ark. 182, 4 S. W. 755; *Clayton v. Philadelphia &c. R. Co.* (Del.), 106 Atl. 577; *Central R. Co. v. Smith*, 69 Ga. 268; *Louisville &c. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149; *Cincinnati &c. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 2 Am. St. 144; *Louisville &c. R. Co. v. Bisch*, 120 Ind. 549, 22 N. E. 662; *Louisville &c. R. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107; *Lake Shore &c. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. 510; *Baltimore &c. R. Co. v. Mullen*, 217 Ill. 203, 75 N. E. 474, 2 L. R. A. (N. S.) 115 and note; *Balti-*

more &c. R. Co. v. Kane, 69 Md. 11, 13 Atl. 387, 9 Am. St. 387; *McCaslin v. Lake Shore &c. R. Co.*, 93 Mich. 553, 53 N. W. 724; *Laub v. Chicago &c. R. Co.*, 118 Mo. App. 448, 94 S. W. 550; *City R. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. 798; *Filer v. New York &c. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Bucher v. New York &c. R. Co.*, 98 N. Y. 128; *Lent v. New York &c. R. Co.*, 120 N. Y. 467, 24 N. E. 653; *Philadelphia &c. R. Co. v. Boyer*, 97 Pa. St. 91; *Larson v. Chicago &c. R. Co.*, 31 S. Dak. 512, 141 N. W. 353; *Kansas &c. R. Co. v. Dorough*, 72 Tex. 108, 10 S. W. 711; *Irish v. Northern &c. R. Co.*, 4 Wash. 48, 29 Pac. 845, 31 Am. St. 899; *Fowler v. Baltimore &c. R. Co.*, 18 W. Va. 579; *Killmeyer v.*

reasonably prudent man would not incur under the circumstances the passenger must not assume the risk, for he will be guilty of negligence if he does so, especially if he acts on the mere permission of the employe, or if he knows, or ought to know, that the employe has no authority to give the direction or that the act is in violation of a rule of the company intended for the safety of passengers.⁴⁶ This, we think, is the true distinction,

Wheeling Tract. Co., 72 W. Va. 148, 77 S. E. 908, 48 L. R. A. (N. S.) 683, 686, Ann. Cas. 1915C, 1220n (quoting text); Pool v. Chicago &c. R. Co., 53 Wis. 657, 11 N. W. 15, 56 Wis. 227, 14 N. W. 46; 3 Thomp. Neg. (2d ed.), §§ 2931, 2932. See also Newcomb v. New York &c. R. Co., 182 Mo. 687, 81 S. W. 1069; St. Louis &c. R. Co. v. White, 99 Tex. 359, 89 S. W. 746, 2 L. R. A. (N. S.) 110, 122 Am. St. 631n, 13 Ann. Cas. 965.

⁴⁶ Railroad Co. v. Jones, 95 U. S. 439, 24 L. R. A. 506; South. &c. R. Co. v. Schaufler, 75 Ala. 136; Florida Southern R. Co. v. Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. 17 and note; Chicago &c. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60; Cincinnati &c. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, 123, 2 Am. St. 144; Cincinnati &c. R. Co. v. McClain, 148 Ind. 188, 44 N. E. 306; Lindsey v. Chicago &c. R. Co., 64 Iowa 407, 20 N. W. 737; Vimont v. Chicago &c. R. Co., 71 Iowa 58, 32 N. W. 100; Herman v. Chicago &c. R. Co., 79 Iowa 161, 44 N. W. 298; Hickey v. Boston &c. R. Co., 14 Allen (Mass.) 429; Powers v. Boston &c. R. Co., 153 Mass. 188, 26 N. E. 446; Bardwell v. Mobile &c. R. Co., 63 Miss. 574, 56 Am. Rep.

842; Aufdenberg v. St. Louis &c. R. Co., 132 Mo. 565, 34 S. W. 485; Hunter v. Cooperstown &c. R. Co., 112 N. Y. 371, 19 N. E. 820, 2 L. R. A. 832, 8 Am. St. 752; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. 701; St. Louis &c. R. Co. v. Rice, 9 Tex. Civ. App. 509, 29 S. W. 525; Richmond &c. R. Co. v. Morris, 31 Grat. (Va.) 200; ante, § 2472, note 28. See also Waterbury v. New York &c. R. Co., 17 Fed. 671, and note on page 690, et seq.; Little Rock &c. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; Chicago &c. R. Co. v. Koehler, 47 Ill. App. 147; Cincinnati &c. R. Co. v. Peters, 80 Ind. 168; Lake Shore &c. R. Co. v. Pinchin, 112 Ind. 592, 13 N. E. 677; Atchison &c. R. Co. v. Lindley, 42 Kans. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. 515; Fletcher v. Boston &c. R. Co., 187 Mass. 463, 73 N. E. 552, 105 Am. St. 414; International &c. R. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236. In Hunter v. Atlantic Coast Line R. Co., 72 S. Car. 336, 51 S. E. 860, 110 Am. St. 605, a passenger who, on a dark night went to the rear car in search of water and stepped off of the back

although there are many authorities which go very far towards exonerating a passenger when he obeys the directions of an employe, even where it is obviously dangerous to do so, or is in violation of the rules of the company.⁴⁷

§ 2498 (1644). **Burden of proof.**—⁴⁸As in other cases, one who sues a railroad company for personal injuries received while on its train as a passenger has, of course, the burden of proving all the material facts necessary to constitute his cause of action, including negligence on the part of the company.⁴⁹ But negligence may often be inferred from circumstances and proof of the accident and injury may sometimes not only justify such an inference, but may also give rise to a presumption of negligence on the part of the company and make a *prima facie* case against it so far as proof of its negligence is necessary.⁵⁰ It is sometimes said the fact that a passenger is injured on a carrier's train raises a presumption of negligence on its part and makes a *prima facie* case, so far as such negligence is concerned sufficient to cast the burden upon the carrier to show that it was not

platform, was held precluded from recovery by his own negligence, although he passed by the conductor and porter in so doing.

⁴⁷ *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. ed. 502; *Georgia &c. R. Co. v. McCurdy*, 45 Ga. 288, 12 Am. Rep. 577; *Galloway v. Chicago &c. R. Co.*, 87 Iowa 458, 54 N. W. 447; *Hanson v. Mansfield R. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *Jones v. Chicago &c. R. Co.*, 43 Minn. 279, 45 N. W. 444; *Lambeth v. North Carolina &c. R. Co.*, 66 N. Car. 494, 8 Am. Rep. 508; *Irish v. Northern Pac. R. Co.*, 4 Wash. 48, 29 Pac. 845, 31 Am. St. 899; ante, § 2479, note 84.

⁴⁸ This section is cited in *Toler v. Northern Pac. R. Co.*, 94 Wash. 360, 162 Pac. 538, 540.

⁴⁹ *Chicago &c. R. Co. v. Felton*, 125 Ill. 458, 17 N. E. 765; *Terre Haute &c. R. Co. v. Sheeks*, 155 Ind. 74, 94, 56 N. E. 434; *Hardwick v. Georgia &c. R. Co.*, 85 Ga. 507, 11 S. E. 832; *Benedict v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; *Palmer v. Winona &c. Co.*, 78 Minn. 138, 80 N. W. 869; *Holbrook v. Utica &c. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9, 88 Am. Dec. 418; *Herstine v. Lehigh Valley &c. R. Co.*, 151 Pa. St. 244, 25 Atl. 104; *Cotton v. Wood*, 8 Com. B. (N. S.) 568; 3 Elliott Ev., §§ 1895-1901.

⁵⁰ See 3 Elliott Ev., §§ 1902, 1903, 2498, 2502; *Terre Haute &c. R. Co. v. Sheeks*, 155 Ind. 74, 94, 56 N. E. 434 (citing text).

guilty of negligence, and to entitle the plaintiff to recover, if free from contributory negligence, unless it rebuts such presumption.⁵¹ But in most of the cases in which such a broad statement of the rule was made it was unnecessary to state it in such general terms and the facts were such as to show that the injury could not well have been inflicted but for the negligence of the company, or the like. We think it clear that if the plaintiff, by his own evidence, shows that the accident was caused, or probably caused, by the act of God, or some other unavoidable cause not within the control of the company, the burden is not cast upon it although the plaintiff may have been injured while a passenger on its train.⁵² So, where a missile

⁵¹ *Saltonstall v. Stockton, Taney* (U. S. C. C.) 11, affirmed in *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, 10 L. ed. 115; *George v. St. Louis &c. R. Co.*, 34 Ark. 613; *Louisville &c. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902, limited in *Georgia Pac. R. Co. v. Love*, 91 Ala. 432, 8 So. 714, 24 Am. St. 927; *Carter v. Kansas City &c. R. Co.*, 42 Fed. 37; *Yeoman's v. Contra Costa &c. Co.*, 44 Cal. 71; *Baltimore &c. R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175, 176, 31 L. R. A. 313, and cases cited; *Galena &c. R. Co. v. Yarwood*, 17 Ill. 509, 65 Am. Dec. 682; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533 (distinguished and qualified in several Pennsylvania cases hereafter cited); *Zemp v. Wilmington &c. R. Co.*, 9 Rich. L. (S. Car.) 84, 64 Am. Dec. 763. See also *Louisville &c. R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591; *Williams v. Spokane &c. R. Co.*, 39 Wash. 77, 80 Pac. 1100; *Elgin &c. Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436; *Steele v. Southern R. Co.*, 55 S. Car. 389, 33 S. E. 509, 74 Am. St. 756; *Doolittle*

v. Southern R. Co., 62 S. Car. 130, 40 S. E. 133.

⁵² *Smith v. St. Paul &c. R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Gillespie v. St. Louis &c. R. Co.*, 6 Mo. App. 554; *McClary v. Sioux City &c. R. Co.*, 3 Nebr. 44; *Norfolk &c. R. Co. v. Marshall*, 90 Va. 836, 20 S. E. 823; *Roanoke R. &c. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 19 L. R. A. (N. S.) 316, 128 Am. St. 971; *Anderson v. Northern Pac. R. Co.* 88 Wash. 139, 152 Pac. 1001. See also *Hughes v. Atlantic City &c. R. Co.*, 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916A 927, and note. Nor, according to a recent decision, where the accident or injury, unexplained by attendant circumstances, might as plausibly have resulted from negligence on the part of the passenger as the carrier. *Price v. St. Louis &c. R. Co.*, 75 Ark. 479, 88 S. W. 575, 578, 112 Am. St. 79. See also *Pennsylvania R. Co. v. McCaffrey*, 149 Fed. 404; *Cincinnati &c. R. Co. v. Bravard*, 38 Ind. App. 422, 76 N. E. 899; *Rhea v. Minneapolis St. R. Co.*, 111 Minn. 271, 126 N. W. 823;

came through the window and struck a passenger, and there was no showing as to where it came from, it was held that there was no presumption of negligence on the part of the company.⁵³ In another case the injury was caused by a rock becoming detached from a hillside above and beyond the railroad cut and falling upon the train, and it was held that there was no presumption of negligence on the part of the company and that the burden of proving it remained upon the plaintiff.⁵⁴ Again, suppose the plaintiff merely shows that he had his arm broken while a passenger on the defendant's train, and then rests his case. This might have happened entirely because of his own fault, or that of some one outside of the car and not under the

Knuckey v. Butte Elec. R. Co., 41 Mont. 314, 109 Pac. 979. And pleading specific facts and a particular cause of injury may, at least in many jurisdictions, prevent the application of the *res ipsa loquitur* doctrine even though it might have been applicable under a general charge of negligence. *Midland Valley R. Co. v. Conner*, 217 Fed. 956; *Feldman v. Chicago City R. Co.*, 289 Ill. 25, 124 N. E. 334, 6 A. L. R. 1291. *Gardner v. Metropolitan St. R. Co.*, 233 Mo. 389, 122 S. W. 1068, 18 Ann. Cas. 1166. But compare *Roberts v. Sierra R. Co.*, 14 Cal. App. 180, 199, 111 Pac. 519, 527; *Southern R. Co. v. Adams*, 52 Ind. App. 322, 100 N. E. 773. Other authorities on both sides of this question are cited in the notes to *Biddle v. Riley*, L. R. A. 1915F, 992, and *Walters v. Seattle &c. R. Co.*, 24 L. R. A. (N. S.) 788.

⁵³ *Pennsylvania R. Co. v. MacKinney*, 124 Pa. St. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. 601; *Thomas v. Philadelphia &c. R. Co.*, 148 Pa. St. 180, 23 Atl. 989, 15 L.

R. A. 416. See also *Spencer v. Chicago &c. R. Co.*, 105 Wis. 311, 81 N. W. 407; *Woas v. St. Louis Transit Co.*, 198 Mo. 664, 96 S. W. 1017, 7 L. R. A. (N. S.) 231; ante § 2491. But in *Elgin &c. Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436, where there was a collision caused by negligent failure of the company to keep its switch locked or guarded, the company was held liable, although a mischievous boy, finding the switch unlocked and unguarded, had turned or thrown it so as to bring about the collision.

⁵⁴ *Fleming v. Pittsburgh &c. R. Co.*, 158 Pa. St. 130, 27 Atl. 858, 22 L. R. A. 351, 38 Am. St. 835, and note, distinguishing *Gleeson v. Virginia &c. R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458. See also *Le Deau v. Northern Pac. R. Co.*, 19 Idaho 711, 115 Pac. 502, Ann. Cas. 1912C, 438n, 34 L. R. A. (N. S.) 725; *Topping v. Great Northern R. Co.*, 81 Wash. 166, 142 Pac. 425, L. R. A. 1915F, 1174.

control of the company, or it might have been caused by the negligence of the company.⁵⁵ Mere proof of the injury without showing any collision, derailment, or other cause or circumstances certainly raises no presumption of negligence on the part of company. "If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carrier," the presumption of negligence will generally arise. "On the other hand, if the witness who proves this injury swears that at the moment when it happened he heard the report of a gun outside of the car and found a bullet in the fractured limb, the presumption would be against negligence of the carrier. * * * The presumption arises from the cause of the injury, or from other circumstances attending it, and not from the injury itself."⁵⁶ So the mere

⁵⁵ In a recent case, where a passenger was injured by the sudden closing of a car door against his hand as he rested it on the door frame, the court inclined to the view that the *res ipsa loquitur* doctrine did not apply, but held that even if it did, any presumption of negligence was overcome by evidence that the door catch was in good repair and the train carefully operated. *Goss v. Northern Pac. R. Co.*, 48 Ore. 439, 87 Pac. 149. See also *Murphy v. Atlanta &c. R. Co.*, 89 Ga. 832, 15 S. E. 774. So where a car window fell, it was held that mere proof of the injury raised no presumption of negligence on the part of the carrier. *Faulkner v. Boston &c. R. Co.*, 187 Mass. 254, 72 N. E. 976. See also *Boucher v. Boston &c. R. Co.*, 76 N. H. 91, 79 Atl. 993, Ann. Cas. 1912B, 847, 34 L. R. A. (N. S.) 728; *Strembel v. Brooklyn Heights R. Co.*, 110 App. Div. (N. Y.) 23, 96 N. Y. S. 903. But com-

pare *Cleveland &c. R. Co. v. Hadley*, 170 Ind. 204, 84 N. E. 13, 82 N. E. 1025, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1.

⁵⁶ *Holbrook v. Utica &c. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502. See also *Roanoke R. &c. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 128 Am. St. 971, 19 L. R. A. (N. S.) 316. And compare *Elliott v. Wilmington City R. Co.*, 6 Pen. (Del.) 570, 73 Atl. 1040; *Missouri &c. R. Co. v. Stone*, 58 Tex. Civ. App. 480, 125 S. W. 587. And compare to same effect *Sullivan v. Capital Trac. Co.*, 34 App. D. C. 358; *McKiltrick v. Greenville Trac. Co.*, 88 S. Car. 91, 70 S. E. 414; *Wright v. Sioux Falls Trac. System*, 28 S. Dak. 379, 133 N. W. 696. In *Brown v. Yazoo &c. R. Co.*, 88 Miss. 687, 41 So. 383, the injured passenger, who was the only witness in the case, testified that the car he was in, and three others, suddenly left the track and turned over and caused the injury to him, and the

fact that a passenger is injured in boarding or alighting from a train does not raise a presumption of negligence on the part of the company and cast the burden upon it, where it is not shown that the train suddenly moved, or other circumstances are not shown which will afford a basis for such a presumption.⁵⁷ Many other illustrations might be given, if necessary, to show that mere proof of injury to a passenger is not always sufficient to raise a presumption of negligence on the part of the company and shift the burden of proof.⁵⁸ It is, therefore, too broad a statement of the rule to say that, in all cases, a presumption of negligence on the part of the carrier arises from the mere happening of an accident or an injury to a passenger regardless of the circumstances and nature of the accident.⁵⁹ The true rule would seem to be that when the injury and circumstances attending

court held that this showed some defect in the rails or wheels and required the carrier to explain in order to escape liability.

⁵⁷ Delaware &c. R. Co. v. Napheys, 90 Pa. St. 135, 1 Am. & Eng. R. Cas. 52; Dennis v. Pittsburg &c. R. Co., 165 Pa. St. 624, 31 Atl. 52; Mitchell v. Chicago &c. R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566, 12 Am. & Eng. R. Cas. 163; Chicago &c. R. Co. v. Trotter, 60 Miss. 442; Railroad Co. v. Mitchell, 11 Heisk. (Tenn.) 400. See also Huckaby v. St. Louis &c. R. Co., 119 Ark. 179, 177 S. W. 923; Steele v. Pacific Elec. R. Co., 168 Cal. 375, 143 Pac. 718; File v. Wilmington City R. Co., 7 Penn. Del. 463, 80 Atl. 623; Bradley v. Ft. Wayne &c. R. Co., 94 Mich. 35, 53 N. W. 915; Etson v. Ft. Wayne &c. R. Co., 110 Mich. 494, 68 N. W. 298; Knuckey v. Butte Elec. R. Co., 41 Mont. 314, 109 Pac. 979.

⁵⁸ Irvine v. Delaware &c. R. Co., 184 Fed. 664; Norfolk &c. R. Co.

v. Birchett, 252 Fed. 512. O'Keefe v. Kansas City &c. R. Co., 93 Kans. 262, 144 Pac. 214. Thus, it is held that there is no presumption of negligence on the part of the company where a passenger stumbles over baggage in the aisle. Stimson v. Milwaukee &c. R. Co., 75 Wis. 381, 44 N. W. 748. See also Morris v. New York Cent. &c. R. Co., 106 N. Y. 678, 13 N. E. 455; Blew v. Phila. Rapid Trans. Co., 227 Pa. St. 319, 76 Atl. 17; Farley v. Philadelphia &c. R. Co., 132 Pa. St. 58, 18 Atl. 1090. So, we suppose that no such presumption necessarily arises where he is hurt in a personal controversy with another passenger, or by an assault of a mob, "road agents," or the like.

⁵⁹ Birmingham &c. R. Co. v. Hale, 90 Ala. 8, 8 So. 86, 24 Am. St. 748, and note; Le Barron v. East Boston Ferry Co., 93 Mass. 312, 87 Am. Dec. 717; Faulkner v. Boston &c. R. Co., 187 Mass. 254, 72 N. E. 976; Stern v. Michigan Cent.

it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, without contributory negligence on the part of the passenger, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden of going forward and producing evidence in order to escape liability is then cast upon the company to show that its negligence did not cause the injury.⁶⁰ In a recent

R. Co., 76 Mich. 591, 43 N. W. 587; Yarnell v. Kansas City &c. R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; Dougherty v. Missouri Pac. R. Co., 9 Mo. App. 478; Curtis v. Rochester &c. Co., 18 N. Y. 534, 75 Am. Dec. 258 (approved and followed in Transportation Co. v. Downer, 11 Wall. (U. S.) 129, 20 L. ed. 160); Holbrook v. Utica &c. R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Federal Street &c. R. Co. v. Gibson, 96 Pa. St. 83; Long v. Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 460, 14 L. R. A. 741, 30 Am. St. 732, and note; Herstine v. Lehigh Valley R. Co., 151 Pa. St. 244, 25 Atl. 104; Saunders v. Chicago &c. R. Co., 6 S. Dak. 40, 60 N. W. 148; Railroad Co. v. Mitchell, 11 Heisk. (Tenn.) 400; San Antonio &c. R. Co. v. Robinson, 73 Texas 277, 11 S. W. 327; Hawkins v. Front Street &c. Co., 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. 72; Allen v. Northern Pac. R. Co., 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; Daniel v. Metropolitan R. Co., L. R. 3 C. P. 216, 591, L. R. 5 H. L. 45; Welfare v. London &c. R. Co., L. R. 4 Q. B. 693; note to Farish

v. Reigle, 62 Am. Dec. 666, 681, 685. See Davis v. Chicago &c. R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. 935; Saunders v. Chicago &c. R. Co., 6 S. Dak. 40, 60 N. W. 148. See also Central R. Co. v. Brown, 165 Ala. 493, 51 So. 565; Donovan v. Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; Reiss v. Wilmington City R. Co. (Del.), 67 Atl. 153; Paynter v. Bridgeton &c. Tract. Co., 67 N. J. L. 619, 52 Atl. 367; Rist v. Philadelphia Rapid Trans. Co., 236 Pa. St. 218, 84 Atl. 687; Brown v. Atlantic &c. R. Co., 83 S. Car. 53, 64 S. E. 1012; Wright v. Sioux Falls Tract. System, 28 S. Dak. 379, 133 N. W. 696.

⁶⁰ Price v. St. Louis &c. R. Co., 75 Ark. 479, 88 S. W. 575, 578, 112 Am. St. 79 (quoting text); Biddle v. Riley 118 Ark. 206, 176 S. W. 134, L. R. A. 1015F, 992, 999 (quoting text); Norfolk &c. Ry. Co. v. Rhodes, 109 Va. 176, 63 S. E. 445, 447 (citing text); Allen v. Northern Pac. R. Co., 35 Wash. 221, 77 Pac. 204, 206, 66 L. R. A. 804 (quoting text); Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 82 Pac. 995, 997, 2 L. R. A. (N. S.) 836, 111 Am. St. 990

case, however, it was held that, although the derailment of a train, at a place where the train and the track are entirely under the control of the company, raises the presumption of negligence, yet it does not devolve upon the company the duty of showing by a preponderance of the evidence that the accident was not the result of its own negligence, and it is entitled to a verdict if the evidence upon that issue, including and giving effect to the

(quoting text). The text is also quoted in *Choctaw &c. R. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768, 771. And in *Muskogee Elec. Trac. Co. v. McIntire*, 37 Okla. 684, 133 Pac. 213, L. R. A. 1916C, 351, 354. See also *Benedict v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478, from which a long quotation will be found in 3 Elliott Ev., § 1903. It is in this sense only, we think, that such presumption causes the burden to shift. See *Chicago Union Trac. Co. v. Mee*, 218 Ill. 9, 75 N. E. 800, 2 L. R. A. (N. S.) 725, 4 Ann. Cas. 7; *Cleveland &c. R. Co. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, 16 L. R. A. (N. S.) 527, and note reviewing authorities and discussing the question; *Carroll v. Boston El. R. Co.*, 200 Mass. 527, 86 N. E. 793; *St. Louis &c. R. Co. v. Parks*, 97 Tex. 131, 134, 76 S. W. 740. As to the presumption from derailments and collisions, see ante, §§ 2482, 2483. For other cases where presumption has been held to arise, see the elaborate notes to *Barnowski v. Helson*, 15 L. R. A. 33; to *Farish v. Reigle*, 62 Am. Dec. 666, 682, et seq.; to *Philadelphia &c. R. Co. v. Anderson*, 20 Am. St. 483, 490, et seq. Also *Birmingham Light &c. Co. v. Coleman*, 181 Ala. 478, 61 So. 890; *Irvine v. Delaware &c. R. Co.*,

184 Fed. 664; *Lee Line Steamers v. Robinson*, 218 Fed. 669, L. R. A. 1917C, 358, 364, and cases there cited in opinion and note. Giving way of bridge or track: *Bedford &c. R. Co. v. Rainbolt*, 99 Ind. 551; *Louisville &c. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. 60; *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280. Falling object in car: *White v. Boston &c. R. Co.*, 144 Mass. 404, 11 N. E. 552; *Railroad Co. v. Walrath*, 38 Ohio St. 461, 43 Am. Rep. 433. Collision with animal or obstruction on track: *Sullivan v. Philadelphia &c. R. Co.*, 30 Pa. St. 234, 72 Am. Dec. 698; *Louisville &c. R. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58; *Louisville &c. R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591. Injury by servant: *Memphis &c. R. Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Kentucky &c. R. Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338. Breaking of axle or wheel: *Toledo &c. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Hegeman v. Western R. Co.*, 16 Barb. (N. Y.) 353, 356; *Baltimore &c. R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; *Edgerton v. New York &c. R. Co.*, 39 N. Y. 227. Explosion: *Robinson v. New York Cent. R. Co.*, 20 Blatchf. (U. S.

presumption, is equally balanced.⁶¹ Where a train, just as it stopped, gave a lurch to one side, which caused a car door to shut on the fingers of a passenger who stood in the open doorway, it was held that it was not sufficient to show negligence.⁶² And where it was shown that the derailment by which a passenger was injured was caused by a cyclone it was held that the presumption of negligence did not obtain and the burden was on the plaintiff to prove negligence.⁶³ Some courts also

C. C.) 338; *Spear v. Philadelphia &c. R. Co.*, 119 Pa. St. 61, 12 Atl. 824; *Illinois &c. R. Co. v. Houck*, 72 Ill. 285. This list is not intended to be exhaustive. Other examples and cases will be found in the notes to which we have above referred; also in elaborate note in 113 Am. St. 986. The text is also quoted in *Lewinn v. Murphy* 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D 433; and *Toler v. Northern Pac. R. Co.*, 94 Wash. 360, 162 Pac. 538, 541.

⁶¹ *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. 103. And we think that the better rule is that the burden of proof, in the strict sense of ultimately establishing the negligence of the carrier under all the evidence, does not shift. See *Lincoln Traction Co. v. Shepherd*, 74 Nebr. 369, 104 N. W. 882, 107 N. W. 764; *Kay v. Metropolitan St. R. Co.*, 163 N. Y. 447, 57 N. E. 751; note to *Black v. Boston El. R. Co.* (187 Mass. 172), 68 L. R. A. 799, where the earlier cases are reviewed; and note to *Cleveland &c. R. Co. v. Hadley* 170 Ind. 204, 82 N. E. 1025, in 16 L. R. A. (N. S.) 527, where later cases are reviewed. 1 Elliott Ev. §§ 139, 140. See also

on the general subject *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, Ann. Cas. 1914D, 905; *Hughes v. Atlantic City &c. R. Co.*, 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916A, 927, and note.

⁶² *Graf v. West Jersey &c. R. Co.* (N. J.), 62 Atl. 333 (but it appeared that there was nothing unusual about the motion), distinguishing *Field v. Delaware &c. R. Co.*, 69 N. J. L. 433, 55 Atl. 241, and *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30, 44 Atl. 845. See also *Norfolk &c. Ry. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445, 447 (citing text).

⁶³ *Denver &c. R. Co. v. Pilgrim*, 9 Colo. App. 86, 47 Pac. 657; *Turner v. Haar*, 114 Mo. 347, 21 S. W. 739; *American Brewing Assn. v. Talbot*, 141 Mo. 681, 42 S. W. 679, 64 Am. St. 538; *Gillespie v. St. Louis &c. R. Co.*, 6 Mo. App. 558; *McClary v. Sioux &c. R. Co.*, 3 Nebr. 44, 19 Am. Rep. 631; *Lamb v. Camden &c. Co.*, 46 N. Y. 279, 7 Am. Rep. 330; *Norfolk &c. R. Co. v. Marshall*, 90 Va. 836, 20 S. E. 823; *Galveston &c. R. Co. v. Crier*, 45 Tex. Civ. App. 434, 100 S. W. 1177, citing *Memphis &c. R. Co. v. Reeves*, 10 Wall. (U. S.) 176, 19 L. ed. 909.

hold that the carrier is exonerated where it purchased the appliance containing a latent defect causing the injury from a reputable manufacturer, gave it the usual inspection, and had good reason to believe it sound and safe;⁶⁴ but most of the courts deny or qualify this doctrine in passenger cases.⁶⁵ We have elsewhere called attention to the diversity of opinion that exists upon the question as to the burden of proving contributory negligence or freedom therefrom, and we shall not attempt to review the cases in this connection.⁶⁶

§ 2499 (1645). Contracts limiting liability.—We have elsewhere considered the question of the right of common carriers of things to limit their liability,⁶⁷ and have incidentally treated the subject of limiting liability in connection with the rights and liabilities of sleeping car companies,⁶⁸ as well as in connection with the subject of passes,⁶⁹ and what has been said applies generally to the questions which it is our immediate purpose to consider. As we have heretofore shown, the authorities unquestionably require the conclusion that where the railroad company is under a duty to carry and it undertakes to carry for hire or reward it can not contract for exemption from negligence.⁷⁰ We have elsewhere

⁶⁴ *Richardson v. Great Eastern Ry. Co.*, 1 L. R. C. P. Div. 342; *Frelsen v. Southern Pac. R. Co.*, 42 La. Ann. 673, 7 So. 800; *Grand Rapids &c. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321. See also *Toledo &c. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Grand Rapids &c. R. Co. v. Boyd*, 65 Ind. 526; *Houston &c. R. Co. v. Summers* (Tex. Civ. App.), 49 S. W. 1106.

⁶⁵ *Siemsen v. Oakland &c. R. Co.*, 134 Cal. 494, 66 Pac. 672; *Hege-man v. Western R. Corp.*, 16 Barb. 356, 13 N. Y. 26, 64 Am. Dec. 517; *Alden v. New York &c. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401n; *Burns v. Cork &c. Ry. Co.*, 13 Irish C. L. R. (N. S.) 543. See also *Morgan*

v. Chesapeake &c. R. Co., 127 Ky. 433, 105 S. W. 961, 15 L. R. A. (N. S.) 790, 16 Ann. Cas. 608; *Dibbert v. Metropolitan Inv. Co.*, 158 Wis. 69, 147 N. W. 3, 148 N. W. 1095, Ann. Cas. 1916E, 924n; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141.

⁶⁶ See authorities in note to *Farish v. Reigle*, 62 Am. Dec. 666, 686; 1 *Thomp. Neg.* (2d ed.), §§ 364-371, 406-421.

⁶⁷ Ante, chapter lxx.

⁶⁸ Ante, § 2465.

⁶⁹ Ante, § 2435.

⁷⁰ In addition to the authorities cited in the sections referred to in the preceding notes see *Louisville &c. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Mobile &c. R. Co. v.*

expressed our opinion that where a purely gratuitous pass is bestowed upon the traveler, no consideration, direct or indirect, being paid, a contract exempting the company from liability is valid.⁷¹ Our reason for this conclusion is that one who receives a pass as a matter of bounty, benevolence or favor must take it upon the terms upon which it is donated.⁷² The phase of the

Hopkins, 41 Ala. 486, 94 Am. Dec. 607; *Indiana &c. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339; *Ohio &c. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Pittsburgh &c. R. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 303 (citing text); *Rose v. Des Moines &c. R. Co.*, 39 Iowa 246; *Jacobus v. St. Paul &c. R. Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Wagner v. Missouri &c. Co.*, 97 Mo. 512, 3 L. R. A. 156; *Cleveland &c. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526; *Gulf &c. R. Co. v. McGown*, 65 Tex. 643. See also *Cronan v. New York &c. R. Co.*, 82 Conn. 511, 74 Atl. 881; *Cleveland &c. R. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710; *Davis v. Chesapeake &c. R. Co.*, 29 Ky. L. 53, 92 S. W. 339, 5 L. R. A. (N. S.) 458; *John v. Northern Pac. R. Co.*, 42 Mont. 18, 111 Pac. 632, 32 L. R. A. (N. S.) 85; *St. Louis &c. R. Co. v. Dysart*, 62 Tex. Civ. App. 7, 130 S. W. 1047.

⁷¹ We think that the cases which hold that where a free pass is given a stipulation exempting from liability is invalid erroneously confuse cases where there is a duty to carry with cases where there is no such duty. It seems to us clear that as there is no duty to carry without compensation the reason for the rule invalidating

stipulations utterly fails, in cases where no compensation of any kind is provided for or paid. See *American Law Review*, March, April, 1892; also *Smith v. Atchison &c. R. Co.*, 194 Fed. 79; *Mallott v. Weston*, 51 Ind. App. 572, 98 N. E. 127. The New York rule is different from that held by the American courts generally. *Poucher v. New York &c. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Bissell v. New York &c. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Wells v. New York &c. R. Co.*, 24 N. Y. 181; *Brewer v. New York &c. R. Co.*, 124 N. Y. 59, 26 N. E. 324, 21 Am. St. 647. As to the English rule see *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Gallin v. London &c. R. Co.*, 10 Q. B. 212; *Alexander v. Toronto &c. R. Co.*, 33 U. C. Q. B. 474.

⁷² Ante, § 2435. See also *Muldoon v. Seattle &c. R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. 901; *Gardner v. New Haven &c. R. Co.*, 51 Conn. 143, 50 Am. Rep. 12; *Griswold v. New York &c. R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Western &c. Co. v. Bishop*, 50 Ga. 465; *Illinois &c. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Rogers v. Kennebec &c. Co.*, 86 Maine 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby v. Boston &c. R. Co.*, 150 Mass. 365,

question which remains for consideration is as to whether the company can effectively stipulate for exemption in cases where it is not under an obligation to carry. In our judgment an effective and valid contract relieving the company from liability may be made in cases where that obligation does not exist. If the obligation does not exist then the company has a free right of election and it may determine on what terms it will undertake to render service. If it is not under a duty it is free to contract, and if free to contract there is no reason why it may not prescribe such terms as the person with whom it contracts is willing to accept. The unfettered right to contract implies the right

23 N. E. 205, 5 L. R. A. 846; *Kinney v. Central &c. R. Co.*, 34 N. J. L. 513, 3 Am. Rep. 265; *Missouri &c. R. Co. v. Zuber*, 76 Okla. 146, 184 Pac. 452; *Muldoon v. Seattle &c. R. Co.*, 10 Wash. 311, 39 Pac. 995, 45 Am. St. 787; *Annas v. Milwaukee &c. R. Co.*, 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848. In the case of *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348, it was held in a strongly reasoned opinion that a contract between the messenger of an express company and a railroad company limiting the liability of the latter company for injuries received by messengers of the former company is valid. We think the conclusion affirmed in the case to which we have referred is clearly right. See also *Pittsburgh &c. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. 503. Employes riding on a gratuitous pass are not passengers, and a contract limiting liability is valid. *Texas &c. Co. v. Smith*, 67 Fed. 524; *Chicago &c. R. Co. v. Keefe*, 47 Ill. 108; *Abend v.*

Terre Haute &c. R. Co., 111 Ill. 202, 53 Am. Rep. 616; *Ohio &c. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 279; *McQueen v. Central &c. R. Co.*, 30 Kans. 689, 1 Pac. 139; *O'Brien v. Boston &c. R. Co.*, 138 Mass. 387, 52 Am. Rep. 279; *New York &c. R. Co. v. Burns*, 51 N. J. L. 340, 17 Atl. 630; *Manville v. Cleveland &c. R. Co.*, 11 Ohio St. 424; *Kumber v. Junction &c. R. Co.*, 33 Ohio St. 150; *Howland v. Milwaukee &c. R. Co.*, 54 Wis. 226, 11 N. W. 529; ante, § 2387. But see *Pool v. Chicago &c. R. Co.*, 56 Wis. 227, 14 N. W. 46; *State v. Western &c. R. Co.*, 63 Md. 433; *Washburn v. Nashville &c. R. Co.*, 3 Head (Tenn.), 638, 75 Am. Dec. 784. In *Cleveland &c. R. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710, it is held that a contract releasing liability is a release of liability to an employe of the party so contracting with the carrier hauling a private car, under the Indiana act of 1901. Compare, however, *Baltimore &c. R. Co. v. Huskins*, 183 Ind. 614, 109 N. E. 764; *Indianapolis &c. Tract. Co. v. Isgrig*, 181 Ind. 211, 104 N. E. 60.

to agree upon the terms of the contract. There is, it is obvious, an essential difference between cases where there is a duty to carry and cases where there is no such duty, for the existence of the duty restrains the right of contract, but where there is no such duty the right of contract is practically unfettered. In the one case the undertaking to carry is a matter of favor or accommodation rather than of duty,⁷³ in the other the undertaking to carry is obligatory. It seems entirely fair and just that if an accommodation or favor is desired, which the carrier is at liberty to grant or withhold, the parties should be permitted to make their own agreement and prescribe the terms of their contract.⁷⁴ The case is very different where the carrier is under a duty, since it would not then have liberty of action, but where there is no obligatory duty we can see no reason why it may not, by contract, designate the terms and conditions upon which it will perform the desired service.⁷⁵ As we have seen, the adjudged cases hold that express messengers are passengers,⁷⁶ and while it may be true that express messengers are in a limited sense passengers,

⁷³ This distinction is recognized in the cases which discriminate between the duties of public and private carriers. Ante, § 2102. *Robertson v. Old Colony &c. R. Co.*, 156 Mass. 525, 31 N. E. 650, 32 Am. St. 482; *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. ed. 627; *Griswold v. New York &c. R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Bates v. Old Colony R. Co.*, 147 Mass. 255, 17 N. E. 633.

⁷⁴ *Cleveland &c. R. Co. v. Henry*, 170 Ind. 94, 99, 100, 83 N. E. 710; *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. 652; *Bates v. Old Colony R. Co.*, 147 Mass. 255, 17 N. E. 633; *Muldoon v. Seattle &c. R. Co.*, 10 Wash. 311, 38 Pac. 995, 45 Am. St. 787; *Quimby v. Bos-*

ton &c. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846.

⁷⁵ We think the statement in the text is supported by the reasoning in the case of *Hartford &c. Co. v. Chicago &c.*, 70 Fed. 201, where it was held that in its character of lessor a railroad company might effectively stipulate for exemption from negligence. The opinion in the case referred to discriminates very clearly between cases where the obligation of the company as a carrier requires it to perform service and cases where the acts are not done or required to be done in the capacity of a public carrier.

⁷⁶ Ante, §§ 2387, 2431. See also *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Yeomans v. Contra Costa &c. Co.*, 44 Cal. 71.

yet we think that they can not be regarded as passengers in the broad sense in which persons who pay fare as ordinary travelers journeying from place to place are passengers, for there is a duty to carry such persons, but according to the decisions in the Express Cases, a public carrier is not under a duty to carry for express companies. A railroad company may, as we have elsewhere shown, make special contracts with express companies and may grant to one express company exclusive privileges.⁷⁷ As a railroad company is not bound as a public carrier to carry the goods or employes of an express company, it may, upon the principle we have stated, make a valid contract, exempting it from liability for injuries to express messengers.⁷⁸ There must, however, according to the decisions, be a contract containing appropriate stipulations, and the contract must be assented to by the messenger.⁷⁹ We believe the true doctrine to be that a person who is not entitled to take passage under the rule of law which imposes upon a railroad company the obligation to accept and carry passengers is bound by the stipulations of a contract which he freely enters into in order to obtain passage under special circumstances and conditions, and that, having asked or obtained passage under such circumstances and conditions,

⁷⁷ *St. Louis &c. R. Co. v. Southern Express Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 29 L. ed. 791. See *Sargent v. Boston &c. R. Co.*, 115 Mass. 416; ante, § 2098.

⁷⁸ *Baltimore &c. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; *Chicago &c. R. Co. v. O'Brien*, 132 Fed. 593; *Kelly v. Malott*, 135 Fed. 74; *Blank v. Illinois Cent. R. Co.*, 182 Ill. 332, 55 N. E. 332; *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. 652; *Peterson v. Chicago &c. R. Co.*, 119 Wis. 197, 96 N. W. 532, 100 Am.

St. 879. See also *Perry v. Phila. &c. R. Co.*, 1 Boyce (24 Del.) 399, 77 Atl. 725; *Baltimore &c. R. Co. v. Duke*, 38 App. (D. C.) 164.

⁷⁹ *Kenney v. New York &c. Co.*, 125 N. Y. 422, 26 N. E. 626, 7 N. Y. S. 225; *Brewer v. New York &c. R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. 647. See as to effect of accepting ticket or pass containing conditions, *Rogers v. Kennebec &c. Co.*, 86 Maine 261, 29 Atl. 1069, 25 L. R. A. 491; *Fonseca v. Cunard Steamship*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. 660; *Hill v. Boston &c. R. Co.*, 144 Mass. 284, 10 N. E. 836.

and not under the law, he can not successfully invoke the assistance of the law to enable him to avoid his contract.⁸⁰

§ 2500 (1645a). **Miscellaneous.**—In addition to the cases considered in the preceding sections in this chapter we note a few additional decisions relative to the general subject. Where a conductor, while ejecting a drunken passenger, who had used abusive language toward him struck the passenger with a pistol and thus caused it to discharge and injure a bystander, and the conductor was not acting in self defense, it was held that the company was liable to such bystander.⁸¹ So, where a ticket

⁸⁰ The reasoning of Stiles, J., on *Muldoon v. Seattle &c. R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. 901, 58 Am. & Eng. R. Cas. 546, is very clear and satisfactory and fully supports the text. See also *Chicago &c. R. Co., v. Hamler*, 215 Ill. 525, 74 N. E. 705, 106 Am. St. 187; *Baltimore &c. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560; *Russell v. Pittsburg &c. R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. 214. But see contra, *Johnson v. Fargo*, 184 N. Y. 379, 77 N. E. 388; *Davis v. Chesapeake &c. R. Co.*, 29 Ky. L. 53, 92 S. W. 339. See also as to news agents, *Starr v. Railway Co.*, 67 Minn. 18, 69 N. W. 632; *Texas &c. R. Co. v. Fenwick*, 34 Tex. Civ. App. 222, 78 S. W. 548; but compare *Griswold v. New York &c. R. Co.*, 53 Conn. 371, 55 Am. Rep. 115; *Alexander v. Railway Co.*, 33 Up. Can. 474. See also on the general subject, ante, § 2435. As we have said we do not believe that a person is a passenger in such a sense as to entitle him to exact the performance of

the extraordinary duty which a public carrier owes to passengers unless he is on the train and at a place where, under the law, passengers as such have a right to be carried. Ante, §§ 2391, 2392, 2394. *Union &c. R. Co. v. Nichols*, 8 Kans. 505, 12 Am. Rep. 475; *Fleming v. Brooklyn &c. R. Co.*, 1 Abb. New Cas. 433; *Snyder v. Hannibal &c. R. Co.*, 60 Mo. 413; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251. See *McGee v. Missouri &c. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. 706; *Lake Shore &c. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. 510; *St. Joseph &c. R. Co. v. Wheeler*, 35 Kans. 185, 10 Pac. 461; *International &c. R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635, 2 Am. St. 521. In *Wagner v. Missouri &c. R. Co.*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156, there is stated a doctrine which opposes that which we favor but in that case two of the judges, Ray and Sherwood, JJ., dissented.

⁸¹ *Coleman v. Yazoo &c. R. Co.*, 90 Miss. 629, 43 So. 473.

agent, infected with smallpox, knowingly exposed himself to the plaintiff, who purchased a ticket from him and thus communicated it to the plaintiff and his wife, the company was held liable.⁸² Again, where there was evidence that a passenger was injured by pushing of a crowd at a station and that there was usually a large crowd in the station at that time of day, and that there had been on many previous occasions the same struggle to get on the car as occurred at the time of the accident, and that the carrier ought to have anticipated the happening of the accident, and ought to have taken reasonable precautions to guard against such injuries, the refusal to charge that there was no evidence of negligence of the carrier was proper.⁸³ Where a passenger was injured by cinders escaping from the engine and getting into his eyes, it was held that evidence that sparks and cinders from the size of a pin head to that of a pea escaped from the engine and injured plaintiff, who was riding in the tenth car from the engine, made a prima facie case of negligence against defendant, either in not furnishing and maintaining sufficient spark arresters or in the manner of handling the engine.⁸⁴ In still another case, it was held that a railroad company was liable for an injury to a passenger, who was weak because of a recent operation, due to the negligence of its servants in delaying its train without reasonable cause for three hours, and in failing to notify the passenger of the delay or to exercise proper care for her safety or comfort, though such negligence would not have injured an ordinary passenger, and the company or its agents had no knowledge of the passenger's condition.⁸⁵ So, where a passenger on a street car had told the

⁸² *Missouri &c. R. Co. v. Raney*, 44 Tex. Civ. App. 517, 99 S. W. 589.

⁸³ *Kuhlen v. Boston &c. R. Co.*, 193 Mass. 341, 79 N. E. 815. See also note in Ann. Cas. 1913C, 574.

⁸⁴ *St. Louis &c. R. Co. v. Parks* 40 Tex. Civ. App. 480, 90 S. W. 343. See also *Louisville &c. R. Co. v. Roberts*, 187 Ky. 192, 218 S. W. 713, 9 A. L. R. 94; *Malone v. St.*

Louis &c. Ry. Co., 202 Mo. App. 489, 213 S. W. 864. But compare *Shine v. New York &c. R. Co.*, 236 Mass. 419, 128 N. E. 713, 11 A. L. R. 1075, and note. The company should have proper spark arresters but is not obliged to screen car windows. *Batte v. St. Louis &c. Ry. Co.*, 131 Ark. 568, 199 S. W. 907.

⁸⁵ *Gulf &c. R. Co. v. Redeker* 45 Tex. Civ. App. 312, 100 S. W.

conductor that he desired to alight at a certain street, but was carried by it, and the conductor then refused to back the car or to permit the passenger to remain on the car until it returned to the desired street, and instructed the passenger to walk to a certain light, which he pointed out, and then turn in a certain direction, stating that such course would take him to his destination, and the passenger, while following such directions walked upon a trestle and fell through it, whereby he was injured, not having known, owing to the darkness, that he was on a trestle when he fell it was held that the carrier was liable, as it was its duty to see that the passenger got safely to the desired street.⁸⁶ And where an interurban car was stopped at a highway crossing, and a passenger invited to alight at a place more hazardous than that at which the car might conveniently have been stopped, the railroad was held negligent.⁸⁷ But where the plaintiff got on defendant's train without a ticket to go to a place which he knew was not a stopping place, and the auditor who collected his fare, upon being informed by the conductor that the train did not stop at that station, told plaintiff of his mistake, and gave him an opportunity to get off at the next station one mile before reaching the one to which he wished to go, it was held that defendant was under no obligation to stop its trains at a place which was not a stopping place to allow plaintiff to alight.⁸⁸ And where a passenger finding that the ticket agent was not in his office, boarded a train without a ticket, and an employe in charge of the train requested him to alight and procure a ticket, but the agent, on being asked for one, directed him to board the train which was then in motion, it was held that the absence of the agent from his office was not the proximate cause of an injury sustained by the passenger while at-

362. See also *Croom v. Chicago &c. R. Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. 557, ante, § 2384, n. 36. And compare *St. Louis &c. Ry. Co. v. Rutherford* (Tex. Civ. App.), 184 S. W. 700.

⁸⁶ *Kentucky &c. Bridge Co. v.*

Buckler 125 Ky. 24, 100 S. W. 328, 128 Am. St. 234.

⁸⁷ *McGovern v. Interurban R. Co.*, 136 Iowa 13, 111 N. W. 412, 125 Am. St. 215.

⁸⁸ *St. Louis &c. R. Co. v. Townsend* 45 Tex. Civ. App. 616, 101 S. W. 455.

tempting to board the moving train.⁸⁹ In another interesting case lately decided it was held that an action would lie against a street railway company for an injury caused to a passenger in leaping from a car in which an electrical explosion had occurred, flames issuing in the part of the car where she was, and such explosions being of frequent occurrence and tending to excite and frighten passengers, though there was no evidence that other passengers had been excited or frightened; it being common knowledge that such explosions would tend to frighten passengers situated as she was, and it appearing that the motor-man leaped from the car before plaintiff did; and it was held that she was not guilty of contributory negligence although she had taken a seat on the front platform.⁹⁰ But in another recent case it was held that a railroad company is not liable for injury to a passenger waiting on a station platform for a train, by a brake bar becoming detached from a passing freight car and being hurled against him, where it is shown that such car was inspected a few hours before and found to be in good order.⁹¹

⁸⁹ *San Antonio &c. R. Co. v. Trigo* (Tex. Civ. App.), 101 S. W. 254.

⁹⁰ *Williamson v. St. Louis &c. Co.*, 202 Mo. 345, 100 S. W. 1072.

⁹¹ *Bradley v. Lake Shore &c. R. Co.*, 238 Pa. St. 315, 86 Atl. 200, 44 L. R. A. (N. S.) 1148. But compare *Louisville &c. R. Co. v. Reynolds*, 24 Ky. L. 1402, 71 S. W. 516 (passenger at station injured by coal thrown upon him, company held liable). As to injuries from objects thrown from the train or from cinders and the like, see generally, notes in 6 L. R. A. (N. S.) 581, 18 L. R. A. (N. S.)

241, and 42 L. R. A. (N. S.) 90. The mere presence of a cuspidor in the smoking compartment of a car is not negligence, and the carrier is not liable for injury to a passenger stumbling over it in the absence of evidence of negligence in leaving it concealed in the passageway or the like. *Hawkins v. Louisville &c. R. Co.*, 180 Ky. 295, 202 S. W. 632. See also *Bassell v. Hines*, 269 Fed. 231, 12 A. L. R. 1361, and authorities there cited in opinion and note *Rittle v. St. Paul City R. Co.* (Minn.), 183 N. W. 146, and cases there cited in opinion.

CHAPTER LXXIX.

BAGGAGE.

Sec.	Sec.
2505. Definition.	2518. Baggage checks.
2506. What things are personal baggage.	2519. Baggage on one train and owner on another.
2507. When a question for the jury and when for the court.	2520. Baggage on street cars.
2508. Merchandise as baggage.	2521. Rule where baggage is received by mistake.
2509. Papers, books and documents.	2522. Baggage shipped over connecting roads.
2510. Excess of baggage.	2523. Connecting roads—Joint agent—Custom.
2511. Baggage of infant traveling with parent without paying fare.	2524. Delivery by company—Duty of owner.
2512. When company is liable as a common carrier.	2525. Liability for loss, injury or delay.
2513. When company is liable as a warehouseman.	2526. Limiting liability.
2514. Gratuitous bailee.	2527. Carrier's lien on baggage.
2515. Baggage of ejected passenger.	2528. Measure of damage for loss or delay in transportation of baggage.
2516. Delivery to the company.	2529. Hepburn Act—Carmack and Cummins Amendments.
2517. Rule where passenger retains custody of baggage.	

§ 2505 (1646). **Definition.**—It is somewhat difficult to give an accurate definition of the term baggage. In its broadest sense it denotes those things which a passenger takes with him

on his journey, either for his use while in transit or to accomplish the ultimate purpose of his journey, and may include not only things taken for the personal convenience of the passenger, but also merchandise knowingly received and carried along with the passenger as baggage. In its strictest sense it may be defined as meaning those things which passengers of the same class usually or fittingly carry with them for their personal use or convenience on similar journeys.¹ Mr. Lawson, in a carefully written article in the *Central Law Journal*, gives the

¹ Chief Justice Cockburn, in the leading case of *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612, gives this definition: "We hold the true rule to be, that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be included as personal baggage. This would include, not only articles of apparel, whether for use or ornament, but also the gun case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the takings of which have arisen from the fact of his journeying. On the other hand, the term 'ordinary baggage' being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the

purpose of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary baggage, unless accepted as such by the carrier." See also *Oakes v. Northern Pac. R. Co.*, 20 Ore. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. 126; *Yazoo &c. R. Co. v. Blackmar*, 85 Miss. 7, 37 So. 500, 67 L. R. A. 646, 107 Am. St. 265; *Parmelee v. Fisher*, 22 Ill. 212, 74 Am. Dec. 138; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586, 41 Am. Dec. 767n; *Bouvier's Law Dict.* title "Baggage"; *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531. In *Choctaw &c. R. Co. v. Zwirtz*, 13 Okla. 411, 73 Pac. 941, it is held that, under the Oklahoma statute, baggage means only such articles as are intended for the use of the passenger while traveling, or for his personal equipment, and does not include merchandise or articles intended for business.

following definition: "‘Baggage’ means such goods and chattels as the convenience, or comfort, the taste, the pleasure, or the protection of passengers generally makes it fit and proper for the passenger in question to take with him for his personal use, according to the habits or wants of the class to which he belongs, either with reference to the period of the transit or the ultimate purpose of the journey."² The definitions which we have given will suffice to indicate what baggage is in a general way. The difficult question in cases concerning baggage is not so much what is the definition of baggage in the abstract as what falls within the term baggage, and in the sections following we will consider what things are regarded as personal baggage and what articles of merchandise are properly regarded as baggage in particular cases.

§ 2506 (1647). **What things are personal baggage.**—Broadly stated, the rule is that those things are personal baggage which a passenger carries with him for his personal use and convenience on his journey, and during his stay at the place to which he may be going.³ The difficulty is to determine what

² "A legal definition of Baggage," 38 Cent. L. J. 5, 6. See also *Little Rock &c. R. Co. v. Record*, 74 Ark. 125, 85 S. W. 421, 109 Am. St. 67 (citing text); *Chicago &c. R. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726; *Hasbrouck v. New York &c. R. Co.* 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, 543, Ann. Cas. 1912D, 1150 (citing text).

³ *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Metz v. California &c. R. Co.*, 85 Cal. 329, 24 Pac. 610, 20 Am. St. 228; *Jordan v. Fall River R. Co.*, 59 Mass. 69, 51 Am. Dec. 44; *New Orleans &c. R. Co. v. Moore*, 40 Miss. 39; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767n; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85,

14 Am. Rep. 716; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612. The rule stated in the text is, perhaps, in one respect, a little too narrow, for as we shall hereafter see the articles need not always be for the personal use of himself; he may sometimes be allowed to carry things for members of his family. See *Kansas City &c. Ry. Co. v. Skinner*, 88 Ark. 189, 113 S. W. 1019, 21 L. R. A. (N. S.) 850; *Jones v. Cincinnati &c. R. Co.*, 184 Ill. App. 287; *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773, 113 Am. St. 533; *Brick v. Atlantic &c. R. Co.*, 145 N. Car. 203, 58 S. E. 1073, 122 Am. St. 440, 13 Ann. Cas. 328.

things are regarded as personal baggage within the rule which we have just stated. In determining whether or not any particular article is baggage many things are to be considered, such as the station which the person who owns the baggage occupies in life, the length and duration of his journey, the period of his stay at the place to which he may be traveling, the purpose of his journey and often the business in which the person may be engaged.⁴ We have not attempted to enumerate all the things which may enter as elements in determining the question of what may or may not be personal baggage. We name only a few of the more important elements, enough to illustrate the rule that the surrounding circumstances attending the passenger largely determine the question of what he is entitled to carry as baggage.⁵ The station which the passenger occupies in life, is, according to the cases, very material, for what would be regarded as baggage of a person occupying a high position in life might not be so regarded where the passenger was from the

⁴ See *Kansas City &c. R. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. 111; *Yazoo &c. R. Co. v. Blackmar*, 85 Miss. 7, 37 So. 500, 67 L. R. A. 646, 107 Am. St. 265; *Kneieriem v. New York &c. R. Co.*, 109 App. Div. (N. Y.) 709, 96 N. Y. S. 602; *Hasbrouck v. New York &c. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, 543, Ann. Cas. 1912D, 1150 (citing text and holding a small amount of money to be used in emergency and jewels to be worn at a reception to be given at end of journey to be baggage); *Railroad Co. v. Baldwin*, 113 Tenn. 205, 81 S. W. 599.

⁵ In *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460, the court, in considering what was and what was not personal baggage, said: "When we settle down with Judge Story

upon the proposition that by baggage is to be understood 'such articles of necessity or personal convenience as are usually carried by passengers for their personal use,' we are still without a rule for determining what articles are included in baggage. For such things as would be necessary to one man would not be necessary to another; articles which would be held but ordinary conveniences by A, might be considered incumbrances by B. One man, from choice or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs, perhaps, a pormanteau, a change of linen, and an indifferent razor; whilst another, from habit, position and education, is unhappy without all the appliances of comfort which surround him at home. The quantity and character of bag-

lower walks of life.⁶ The purpose of the journey often determines very largely the question of what is or is not personal baggage, and so does the length of the journey or proposed stay.⁷ The business in which the person is engaged is also important for what would be regarded as personal baggage for a person engaged in one line of business would not for a person in an entirely different line of business.⁸ It is not necessary that the articles, in order to be considered baggage, should be used on the journey; if they are such as are reasonably necessary for the passenger either while in transit or temporarily staying at a particular place, they will be considered as baggage.⁹ The

gage must depend very much upon the conditions in life of the traveler—his calling, his habits, his tastes, the length or shortness of his journey, and whether he travels alone or with a family. If we agree further with Judge Story and say that the articles of necessity or of convenience must be such as are usually carried by travelers for their personal use, we are still at fault, because there is in no state of this Union, nor in any part of any one state, any settled usage as to the baggage which travelers carry with them for their personal use. The quantity and character of baggage found to accompany passengers are as various as are the countenances of travelers." See *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262, 20 L. ed. 423; *Mauritz v. New York &c. Co.*, 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; note in 97 Am. St. 347.

⁶ *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Merrill v. Grinnell*, 30 N. Y. 594. See *Phelps v. London R. Co.*, 19 C. B. (N. S.) 321; *Coward v. East*

Tenn. R. Co., 16 Lea (Tenn.), 225, 57 Am. Rep. 226.

⁷ *Hannibal Railroad v. Swift*, 12 Wall. (U. S.) 262, 20 L. ed. 423; *Merrill v. Grinnell*, 30 N. Y. 594. See also *Missouri &c. R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317. In *House v. Chicago &c. R. Co.*, 30 S. Dak. 321, 138 N. W. 809, Ann. Cas. 1915C, 1045. The purpose of the journey and the prevailing custom are said to be the two most important considerations in determining what is baggage.

⁸ See *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716; *Kansas City &c. R. Co. v. Morrison*, 34 Kans 502, 9 Pac. 225, 55 Am. Rep. 252, and authorities cited in the following section.

⁹ *Dexter v. Syracuse &c. R. Co.*, 42 N. Y. 326, 1 Am. Rep. 527; *Toledo &c. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221; *Texas &c. R. Co. v. Lawrence* 42 Tex. Civ. App. 318, 95 S. W. 663, 664 (quoting text); *Hopkins v. Westcott*, 6 Blatchf. (U. S. C. C.) 64, *infra* notes 2, 3.

general rule is, that a passenger is only entitled to carry his own things or those of some member of his family as baggage;¹⁰ articles belonging to a stranger will not be considered baggage.¹¹ It is impossible to notice all the different articles which have been held to be or not to be personal baggage. Among the things which have been held to be personal baggage are sufficient money for the purposes of the passenger's journey,¹² cloth-

¹⁰ *Curtis v. Delaware &c. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271; *Dexter v. Syracuse &c. R. Co.*, 42 N. Y. 326, 1 Am. Rep. 527; *Jones v. Priester*, 1 Tex. App. (Civ. cases) 326. See also *Milwaukee Mirror &c. Works v. Chicago &c. R. Co.*, 148 Wis. 173, 134 N. W. 379, 38 L. R. A. (N. S.) 383. That he may recover for loss of articles carried as part of his baggage though belonging to or for use of his infant child or wife traveling with him, see *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773, 113 Am. St. 533 (even though the child is of such tender years that no fare is charged or paid); *Prentice v. Decker*, 49 Barb. (N. Y.) 21; *Burke v. Louisville &c. R. Co.* 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Wheeler v. St. Joseph &c. R. Co.*, 31 Kans. 640, 3 Pac. 297; *Smith v. Abair*, 87 Mich. 62, 49 N. W. 509. See also *Kansas City &c. R. Co. v. Skinner*, 88 Ark. 189, 113 S. W. 1019, 21 L. R. A. (N. S.) 850; *Jacksonville R. Co. v. Mitchell*, 32 Fla. 77, 13 So. 673, 21 L. R. A. 487; *Packet Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575.

¹¹ *Metz v. California &c. R. Co.*, 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. 228; *Chicago &c.*

R. Co. v. Boyce, 73 Ill. 510, 24 Am. Rep. 268; *Mississippi &c. R. Co. v. Kennedy* 41 Miss. 671; *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845; *Weed v. Saratoga &c. R. Co.*, 19 Wend. (N. Y.) 534; *Brick v. Atlantic &c. R. Co.*, 145 N. Car. 203, 58 S. E. 1073, 122 Am. St. 440, 13 Ann. Cas. 328; *Lusk v. Bloch* (Okla.), 168 Pac. 430, L. R. A. 1918C, 109 (and carrier is no more than a gratuitous bailee). As to articles of merchandise or the like carried by an employe and belonging to his employer, see note in L. R. A. 1918C, 109.

¹² *Hutchings v. Western R. Co.*, 25 Ga. 61, 71 Am. Dec. 156; *Davis v. Michigan Central R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749n; *Toledo &c. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69, 51 Am. Dec. 44; *Dunlap v. International &c. Co.*, 98 Mass. 371; *Fairfax v. New York &c. R. Co.* 73 N. Y. 167, 29 Am. Rep. 119; *Mad River R. Co. v. Fulton*, 20 Ohio, 318; *Texas &c. R. Co. v. Lawrence*, 42 Tex. Civ. App. 318, 95 S. W. 663, 664 (citing text). In *Railway Co. v. Berry*, 60 Ark. 433,

ing,¹³ jewelry and the like to be worn on the person,¹⁴ fire-arms,¹⁵

28 L. R. A. 501, 46 Am. St. 212, it was said: "The carrier is liable, as insurer, for money which the passenger, bona fide, includes in his baggage to pay traveling expenses, and for personal use on his journey, provided no more is taken than is necessary or usual for passengers of like station, habits and conditions in life, while on similar journeys." But see *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586, 41 Am. Dec. 767, and compare *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, 83 Am. Dec. 143.

¹³ *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Doyle v. Kiser*, 6 Ind. 242; *Toledo &c. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221; *Baltimore R. Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575; *Runyan v. Central R. Co.*, 61 N. J. L. 537, 41 Atl. 367, 68 Am. St. 711; *Dexter v. Syracuse &c. R. Co.*, 42 N. Y. 326, 1 Am. Rep. 527; *Fairfax v. New York &c. R. Co.*, 73 N. Y. 167, 29 Am. Rep. 119; *McGill v. Rowand*, 3 Pa. St. 451, 45 Am. Dec. 654; *Brooke v. Pickwick*, 4 Bing. 218; *Munster v. Southeastern R. Co.*, 4 C. B. N. S. 676. Clothing may be cut into patterns and not made up. *Duffy v. Thompson*, 4 E. D. Smith (N. Y.) 178; *Van Horn v. Kermit*, 4 E. D. Smith 453. See also *Kansas City &c. R. Co. v. Skinner*, 88 Ark. 189, 113 S. W. 1019, 21 L. R. A. (N. S.) 850; *Mexican Cent. R. Co. v. DeRosear*, (Tex. Civ. App.), 109 S. W. 949.

¹⁴ *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Mauritz v.*

New York &c. R. Co., 23 Fed 765; *Pullman Co. v. Green*, 128 Ga. 142, 57 S. E. 233; *Michigan &c. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *American Cont. Co. v. Cross*, 71 Ky. 472, 8 Am. Rep. 471; *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212n; *Doerner v. St. Louis &c. R. Co.*, 149 Mo. App. 170, 130 S. W. 62; *Jones v. Voorhes*, 10 Ohio 145; *Godfrey v. Pullman Co.*, 87 S. Car. 361, 69 S. E. 666, Ann. Cas. 1912B, 971; *Coward v. East Tennessee &c. R. Co.*, 84 Tenn. 225, 57 Am. Rep. 226; *Galveston &c. R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234. See also *Bush v. Beauchamp*, 132 Ark. 582, 201 S. W. 828. But see *Bomar v. Maxwell*, 28 Tenn. 620, 51 Am. Dec. 682, and compare *Bonner v. Blum* (Tex. Civ. App.), 25 S. W. 60; *Metz v. California So. R. Co.*, 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. 228. Or a sword of a military officer to be worn when in full dress. *Merrill v. Grinnell*, 30 N. Y. 594.

¹⁵ *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; *Woods v. Devin*, 13 Ill. 747, 56 Am. Dec. 483; *Davis v. Michigan Central R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Bruty v. Grand Trunk R. Co.*, 32 Up. Can. Q. B. 66; *Parmelee v. Fischer*, 22 Ill. 212, 74 Am. Dec. 138. See also *Little Rock &c. R. Co. v. Record*, 74 Ark. 125, 85 S. W. 421, 423, 109 Am. St. 67 (citing text). But where a grocer is going into the country to buy butter one pistol is all he will be allowed to carry as bag-

fishing tackle¹⁶ of sportsmen, and many others, under particular circumstances.¹⁷ Among those things which have been held not to be personal baggage may be mentioned, money in excess of that reasonably sufficient to pay the expenses of the passen-

gage. *Chicago &c. R. Co. v. Collins*, 56 Ill. 212. And even one pistol has been held not to be entitled to be claimed as part of the baggage. *Cooney v. Pullman P. C. Co.*, 121 Ala. 368, 25 So. 712, 53 L. R. A. 690. See also *Pullman P. C. Co. v. Adams*, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. 53.

¹⁶ *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612.

¹⁷ We give a number of illustrative cases of what has been held to be personal baggage. A traveling salesman's catalogue or price-list: *Staub v. Kendrick*, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619, 40 Am. & Eng. R. Cas. 632; *Gleason v. Goodrich Transportation Co.*, 32 Wis. 85, 14 Am. Rep. 716. (But compare *McElroy v. Iowa Cent. R. Co.*, 133 Iowa 544, 110 N. W. 915; *Rossier v. Wabash R. Co.*, 115 Mo. App. 515, 91 S. W. 1018). Books for amusement and entertainment: *Doyle v. Kiser*, 6 Ind. 242. A traveling man's samples; *Rossier v. Wabash R. Co.*, 115 Mo. App. 515, 91 S. W. 1018. A reasonable quantity of tools for a mechanic: *Porter v. Hildebrand*, 14 Pa. St. 129; *Kansas City &c. R. Co. v. Morrison*, 34 Kans. 502, 9 Pac. 225, 55 Am. Rep. 252, 23 Am. & Eng. R. Cas. 481; *Grzwacz v. New York Cent. &c. R. Co.*, 149 App. Div. 936, 134 N. Y. S. 1133 (razors and other tools of barber); *Davis v. Cayuga &c. R.*

Co., 10 How. Pr. (N. Y.) 330; *Wells v. Great Northern R. Co.*, 59 Ore. 165, 114 Pac. 92, 34 L. R. A. (N. S.) 818 (watchmaker's tools). *Missouri R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317. Opera glasses: *Toledo &c. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221. See also *Atwood v. Mohler*, 108 Ill. App. 416 (camera). Telescopes for one crossing the ocean: *Cadwallader v. Grand Trunk R. Co.*, 9 L. Canada 169. A carpet: *Minter v. Pacific R. Co.*, 41 Mo. 503, 97 Am. Dec. 288. Manuscript and books of a student: *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64. A pair of gold spectacles: *Newb. Admr.* 494. Stage costumes where the carrier knowingly accepts them as baggage: *Oakes v. Northern Pac. R. Co.*, 20 Ore. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. 126; compare *Saunders v. Southern R. Co.*, 128 Fed. 15. Household goods: *House v. Chicago &c. R. Co.*, 30 S. Dak. 321, 138 N. W. 809, Ann. Cas. 1915C, 1045 (but see note 20). As to bicycles, see "Bicycles as Baggage," 43 Cent. L. J. 363; *State v. Missouri Pac. R. Co.*, 71 Mo. App. 385. For a case in which the company was held liable for loss of a hunting dog, see *Kansas City &c. R. Co. v. Higdon*, 94 Ala. 286, 10 So. 282, 14 L. R. A. 515, 33 Am. St. 119; and compare *Louisville &c. R. Co. v. Dickson*, 15 Ala. App. 423, 73 So. 750.

ger's journey,¹⁸ jewelry not to be worn by the passenger,¹⁹ bed clothing and articles of furniture and bedding not to be used²⁰ on

¹⁸ *Pfister v. Central &c. R. Co.*, 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; *Hickox v. Naugatuck &c. R. Co.*, 31 Conn. 281, 83 Am. Dec. 143; *Rome &c. R. Co. v. Wimberly*, 75 Ga. 316, 58 Am. Rep. 468; *Illinois &c. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Cincinnati &c. R. Co. v. Marcus*, 38 Ill. 219; *Willis v. Chicago &c. R. Co.*, 72 Iowa, 228, 33 N. W. 643; *Chesapeake &c. R. Co. v. Hall*, 136 Ky. 379, 124 S. W. 372, Ann. Cas. 1912A, 364; *Jordan v. Fall River R. Co.*, 59 Mass. 69, 51 Am. Dec. 44; *Dunlap v. International &c. Co.*, 98 Mass. 371; *Levins v. New York &c. R. Co.*, 183 Mass. 175, 66 N. E. 803, 97 Am. St. 434; *Whitmore v. Steamboat Caroline*, 20 Mo. 513; *First National Bank v. Marietta &c. R. Co.*, 20 Ohio St. 259, 5 Am. Rep. 655; *Phelps v. London &c. R. Co.*, 19 C. B. N. S. 321. But where the passenger informs the agent of the company that a trunk which he tenders as baggage contains a large sum of money, more than necessary for the expenses of the passenger, and the agent accepts it as baggage, the carrier will be liable for its loss. *Railway Co. v. Berry*, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. 212. A company may rightfully refuse to accept \$90,000 as baggage. *Pfister v. Central &c. R. Co.*, 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404, 27 Am. & Eng. R. Cas. 246.

¹⁹ *Michigan &c. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248;

Buck v. Atlantic &c. R. Co., 145 N. Car. 203, 58 S. E. 1073, 122 Am. St. 440, 13 Ann. Cas. 328; *Ionic, The*, 5 Blatchf. (U. S.) 538; *Belfast &c. R. Co. v. Keys*, 9 H. L. 556; *Metz v. California &c. R. Co.*, 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. 228.

²⁰ *Mauritz v. New York &c. R. Co.*, 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; *Connolly v. Warren*, 106 Mass. 146, 8 Am. Rep. 300n; *Texas &c. R. Co. v. Ferguson*, 1 Tex. App. (Civil Cases) 724, 9 Am. & Eng. R. Cas. 395; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612; *St. Louis &c. R. Co. v. Hardway*, 17 Ill. App. 321. But a reasonable amount may be under some circumstances: *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Glovinsky v. Cunard &c. Co.*, 4 Misc. (N. Y.) 266, 24 N. Y. S. 136; *Hirschon v. Hamburg &c. Co.*, 34 N. Y. Super. Ct. 521; *Missouri Pac. R. Co. v. York*, 2 Wills Civ. Cas. Ct. App. sec. 639. See also *House v. Chicago &c. R. Co.*, 30 S. Dak. 321, 138 N. W. 809, Ann. Cas. 1915C, 1045. Thus bed linen and other articles designed to be used in the hotel business by one moving from one locality to another are not baggage which he is entitled to carry at the risk of the carrier. *St. Louis &c. R. Co. v. Miller*, 103 Ark. 37, 145 S. W. 889, 39 L. R. A. (N. S.) 634. But see where such articles are to be used on a fishing trip or the like. *Chicago &c. R. Co.*

the journey and many other articles of use and adornment for the traveler.²¹

§ 2507 (1648). When a question for the jury and when for the court.—There is apparently some slight conflict among the authorities as to whether the question of what articles of property are personal baggage is one of law or one of fact. The true rule is as we believe, that it is usually for the jury to say, under instructions from the court and subject to the right of the court to correct abuses, what articles are or are not personal baggage in the particular case.²² There are, however, as we have inti-

v. Whitten, 90 Ark. 462, 119 S. W. 853, 21 Ann. Cas. 726.

²¹ Silver knives, forks and spoons: *Giles v. Fauntleroy*, 13 Md. 126; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767. A sacque, muff and silver napkin rings carried by a man: *Chicago &c. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268. Deeds and documents; *Phelps v. London &c. R. Co.*, 19 C. B. N. S. 321; *Thomas v. Great Western R. Co.*, 14 Up. Can. Q. B. 389; *Masonic Regalia: Nevins v. Bay State S. Co.*, 4 Bosw. (N. Y.) 225. Pencil sketches made by an artist: *Mytton v. Midland R. Co.*, 28 L. J. Exch. 385. A child's hobby horse: *Hudston v. Midland R. Co.* L. R. 4 Q. B. 366, 38 L. J. R. (Q. B.) 213. Dogs: *Honeyman v. Oregon &c. R. Co.*, 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20n; but compare *Cantling v. Hannibal &c. R. Co.*, 54 Mo. 385, 14 Am. Rep. 476; *Kansas City &c. R. Co. v. Higdon*, 94 Ala. 286, 10 So. 282, 14 L. R. A. 515n, 33 Am. St. 119. Masquerade costumes: *Michigan &c. R. Co. v.*

Oehm, 56 Ill. 293. A silk bed quilt carried in a lady's trunk: *St. Louis &c. R. Co. v. Hardway*, 17 Ill. App. 321. Ladies' jewelry carried by a man: *Metz v. California &c. R. Co.*, 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431n, 20 Am. St. 288, 44 Am. & Eng. R. Cas. 433. A concertina: *Bruty v. Grand Trunk R. Co.*, 32 U. C. Q. B. 66. Handcuffs: *Bomar v. Maxwell*, 28 Tenn. 620, 51 Am. Dec. 682. Fruit and groceries: *Georgia R. Co. v. Johnson*, 113 Ga. 589, 38 S. E. 954; *Bullock v. Delaware &c. R. Co.*, 60 N. J. L. 24, 36 Atl. 773, 37 L. R. A. 417. Under other circumstances, however, some of these things might properly have been considered as baggage.

²² *Mauritz v. New York &c. R. Co.*, 23 Fed. 765; *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Fairfax v. New York Central R. Co.*, 73 N. Y. 167, 29 Am. Rep. 119; *Oakes v. Northern Pac. R. Co.*, 20 Ore. 392, 26 Pac. 230, 12 L. R. A. 318, 47 Am. & Eng. R. Cas. 437, 23 Am. St. 126; *Texas &c. R. Co. v. Ferguson*, 1 Tex. App. (Civ. Cas.) 724, 9 Am. & Eng. R.

mated, some authorities which hold that the question is one of law.²³ What is a reasonable amount of baggage or how much of any particular article shall be regarded as baggage is, ordinarily, a question for the jury,²⁴ but where the facts are undisputed and there can be no reasonable difference of opinion, upon the subject, we think it may well become a question for the court to determine not only what is baggage in a general sense but also whether the particular articles should be regarded as bag-

Cas. 395; *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646. See also *Little Rock &c. R. Co. v. Record*, 74 Ark. 125, 85 S. W. 421, 423, 109 Am. St. 67 (citing text); *Chicago &c. R. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726; *Hubbard v. Mobile &c. R. Co.*, 112 Mo. App. 459, 87 S. W. 54; *McIntosh v. Augusta &c. R. Co.*, 87 S. Car. 181, 69 S. E. 159, 30 L. R. A. (N. S.) 889; *Texas &c. R. Co. v. Lawrence*, 42 Tex. Civ. App. 318, 95 S. W. 663, 664 (citing text); *Texas &c. R. Co. v. Russell* (Tex. Civ. App.), 97 S. W. 1090. It was said in *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531: "Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while traveling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases."

²³ See *Jones v. Priester*, 1 Tex. App. (Civ. Cas.) 326; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct.

711, 37 L. ed. 587; *Connolly v. Warren*, 106 Mass. 146, 8 Am. Rep. 300; *Kansas &c. R. Co. v. Morrison*, 34 Kans. 502, 9 Pac. 225, 55 Am. Rep. 252; *Yazoo &c. R. Co. v. Blackmar*, 85 Miss. 7, 37 So. 500, 67 L. R. A. 646, 107 Am. St. 265. Certainly where the facts and inferences are undisputed the question might become one of law and the court could unquestionably say that some things at least, are or are not baggage.

²⁴ *Kansas City &c. R. Co. v. Morrison*, 34 Kans. 502, 9 Pac. 225, 55 Am. Rep. 252, 23 Am. & Eng. R. Cas. 481; *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Galveston &c. R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234. See also *Illinois Cent. R. Co. v. Cope-land*, 24 Ill. 332, 76 Am. Dec. 749. Cases illustrative of the rule are those which hold that it is for the jury to say how much money carried by the passenger is reasonably necessary for the expenses of the journey. *Railway Co. v. Berry*, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. 212; *Jones v. Priester*, 1 Tex. App. (Civ. Cas.) 326; *Merrill v. Grinnell*, 30 N. Y. 594.

gage in the particular instance.²⁵ And the reasonableness of a rule as to what may be carried as baggage on a street car has generally been held a question for the court.²⁶

§ 2508 (1649). Merchandise as baggage.—Merchandise is often carried as baggage, but the carrier is not always liable for it as such. The general rule is that the carrier is not liable for merchandise shipped as baggage, in the absence of conversion or gross negligence, unless it had notice that such merchandise was being so shipped and accepted it as such.²⁷ Thus where the

²⁵ To take an extreme case, we suppose that if a woman, going from a neighboring town to Brooklyn to attend services at church in the daytime, should carry with her half a dozen revolvers and a bowie knife, any court would correctly say that they were not baggage, and that a court might also well hold that if a man should carry half a dozen revolvers, ostensibly for his own protection and sole use while traveling in a civilized and peaceable country, no more than one, or at the most, two of them could be considered as baggage. See *Chicago &c R. Co. v. Collins*, 56 Ill. 212. See also *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. ed. 587; *Bomar v. Maxwell*, 9 Humph (28 Tenn.) 621, 51 Am. Dec. 682.

²⁶ *Daniel v. North Jersey St. R. Co.*, 64 N. J. L. 603, 46 Atl. 625; *Dowd v. Albany R. Co.*, 47 App. Div. 202, 62 N. Y. S. 179; *Vlasantsh v. Augusta &c. R. Co.*, 85 S. Car. 291, 67 S. E. 306.

²⁷ *Michigan &c. R. Co. v. Oehm*, 56 Ill. 293; *Collins v. Boston &c. R. Co.*, 10 Cush. (Mass.) 506; *Stimson v. Connecticut &c. R. Co.*,

98 Mass. 83, 93 Am. Dec. 140; *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, 34 Am. Rep. 376; *Mississippi &c. R. Co. v. Kennedy*, 41 Miss. 671; *Spooner v. Hannibal &c. R. Co.*, 23 Mo. App. 403; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; *Chamberlain v. Western Trans. Co.*, 45 Barb. (N. Y.) 218; *Simpson v. New York &c. R. Co.*, 16 Misc. (N. Y.) 613, 38 N. Y. S. 341; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Toledo &c. R. Co. v. Ambach*, 10 Ohio Cir. Ct. 490; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541, 35 Am. Rep. 620; *Belfast &c. Railway Co. v. Keys*, 9 H. L. Cas. 556; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Cahill v. London &c. R. Co.*, 10 Com. B. (N. S.) 154. "Baggage means such articles of necessity and convenience as are usually carried by passengers for their personal use, and does not include merchandise held for sale." *Ferris v. Minneapolis &c. Ry. Co.*, 143 Minn. 90, 173 N. W. 178. See also *Kansas City &c. R. Co. v. State*, 65 Ark. 363, 46 S. W. 421, 41 L. R. A. 333, 67 Am. St. 933; *Rossier v. Wabash R. Co.*, 115 Mo. App. 515, 91 S. W. 1018. It

trunk of a passenger contains both personal baggage and also merchandise, but the carrier has no notice that merchandise is in the passenger's trunk, it will be liable only for the loss of the personal baggage and not for the merchandise.²⁸ Where a traveling agent for a wholesale jewelry house checked a trunk containing a large quantity of jewelry as baggage and the trunk was destroyed by fire, it was held that the company was not liable for its loss in the absence of notice of its contents at the time it was accepted as baggage.²⁹ Where a passenger presents a trunk to be carried as baggage and there is nothing about the trunk to indicate that it contains merchandise the carrier is not bound to inquire as to the contents, but may assume that it contains only the personal baggage of the passenger.³⁰ The rule is

is liable only as a gratuitous bailee. *Illinois So. R. Co. v. Antvon*, 122 Ill. App. 359; *Brick v. Atlantic &c. R. Co.*, 145 N. Car. 203, 58 S. E. 1073, 122 Am. St. 440, 13 Ann. Cas. 328. Liability, however, may exist where there is gross negligence. *Michigan &c. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Smith v. Boston &c. R. Co.*, 44 N. H. 325.

²⁸ *Simpson v. New York &c. R. Co.*, 16 Misc. (N. Y.) 613, 38 N. Y. S. 341; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 54 Am. & Eng. R. Cas. 29, reversing *Central Trust Co. v. Wabash &c. R. Co.*, 39 Fed. 417, 40 Am. & Eng. R. Cas. 636; *Wunsch v. Northern Pac. R. Co.*, 62 Fed. 878. See also *St. Louis &c. R. Co. v. Miller*, 103 Ark. 37, 145 S. W. 889, 39 L. R. A. (N. S.) 634.

²⁹ *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. ed. 587. See also *Alling v. Boston &c. R. Co.*, 126 Mass. 121, 30 Am. Rep. 667; *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, 34 Am. Rep.

376n; *Michigan &c. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Haines v. Chicago &c. R. Co.*, 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199; *Milwaukee Mirror Works v. Chicago &c. R. Co.*, 148 Wis. 173, 134 N. W. 379, 38 L. R. A. (N. S.) 383. In *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. ed. 587, it was shown that it was usual to carry trunks in the manner referred to, but it was also shown that no company would do so when it had notice of their contents. It was held that proof of the custom would not render the carrier liable. *Blumenthal v. Maine &c. R. Co.*, 79 Maine 550, 34 Am. & Eng. R. Cas. 247, is to the same effect on point of custom. But see *Fleischman v. Southern R. Co.*, 76 S. Car. 237, 56 S. E. 974.

³⁰ *Haines v. Chicago &c. R. Co.*, 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199, approved in *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. ed. 587, in which the case of *Kuter v. Michigan &c. R. Co.*, 1 Biss. (U. S.) 35, on this

that the passenger is entitled to have carried, as baggage free of charge, only such things as are personal baggage,³¹ but if the carrier itself knowingly accepts articles of merchandise and transports them as baggage it will be liable, as in the case of ordinary baggage, for their loss,³² although no compensation other than the ticket purchased by the passenger was paid for

point was criticised. See also *Ca-hill v. London R. Co.*, 10 Com. B. (N. S.) 154; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Illinois Cent. R. Co. v. Matthews*, 114 Ky. 973, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. 316; *Toledo &c. R. Co. v. Bowler*, 57 Ohio St. 38, 47 N. E. 1039, 63 Am. St. 702. Held a question for the jury as to whether the agent had such knowledge in *Bowler &c. Co. v. Toledo &c. R. Co.*, 10 Ohio Circ. Ct. 272. Passenger is not bound to disclose contents or value in absence of reasonable inquiry. *Doerner v. St. Louis &c. R. Co.*, 149 Mo. App. 170, 130 S. W. 62; *Godfrey v. Pullman Co.*, 87 S. Car. 361, 69 S. E. 666, Ann. Cas. 1912B, 971.

³¹ *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262, 20 L. ed. 423; *Strouss v. Wabash &c. R. Co.*, 17 Fed. 209; *Jacobs v. Tutt*, 33 Fed. 412; *Pfister v. Central &c. R. Co.*, 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; *Waldron v. Chicago &c. R. Co.*, 1 Dak. 351, 46 N. W. 456; *McElroy v. Iowa Cent. R. Co.*, 133 Iowa 544, 110 N. W. 915; *Chicago &c. R. Co. v. Conklin*, 32 Kans. 55, 3 Pac. 762; *Wilson v. Grand Trunk Railway*, 56 Maine 60, 96 Am. Dec. 435; *Blumenthal v. Maine &c. R. Co.*, 79 Maine 550, 11 Atl. 605. 34

Am. & Eng. R. Cas. 247; *Haines v. Chicago &c. R. Co.*, 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199; *Minter v. Pacific R. Co.*, 41 Mo. 503, 97 Am. Dec. 288; *Sloman v. Great Western R. Co.*, 6 Hun (N. Y.) 546; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Robinson v. New York Cent. R. Co.*, 203 N. Y. 627, 97 N. E. 1115; *Oakes v. Northern &c. R. Co.*, 20 Ore. 39, 26 Pac. 230; *Texas &c. R. Co. v. Cupps (Tex.)*, 16 Am. & Eng. R. Cas. 118; *Hoeger v. Chicago &c. R. Co.*, 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271; *Hellman v. Holliday*, 1 Woolw. (C. C.) 365.

³² *Hamberg &c. Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. 662; *Amory v. Wabash R.*, 130 Mich. 404, 90 N. W. 22; *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052; *Ferris v. Minneapolis &c. Ry. Co.*, 143 Minn. 90, 173 N. W. 178; *New Orleans &c. R. Co. v. Shackleford*, 87 Miss. 610, 40 So. 427, 4 L. R. A. (N. S.) 1035, 112 Am. St. 461; *Ross v. Missouri &c. R. Co.*, 4 Mo. App. 582; *Toledo &c. R. Co. v. Bowler*, 57 Ohio St. 38, 47 N. E. 1039, 63 Am. St. 702; *Wells v. Great Northern R. Co.*, 59 Ore. 165, 114 Pac. 92, 34 L. R. A. (N. S.) 818; *Butler v. Hudson River R. Co.*, 3 E. D. Smith 571.

their transportation.⁸³ It is also said that knowledge on the part of the carrier that the baggage contains merchandise may be acquired by observing the baggage, where its nature is obvious, or by notice from the passenger to that effect.⁸⁴ Merchandise, when knowingly carried by the company as baggage, is ordinarily carried as under a contract not contained in the ticket purchased by the passenger.⁸⁵ In the prosecution of a great

⁸³ *Oakes v. Northern &c. R. Co.*, 20 Ore. 39, 26 Pac. 230; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612. See also *Kansas City &c. R. Co. v. Higdon*, 94 Ala. 286, 10 So. 282, 33 Am. St. 119; note to *Hutchings v. Western R.*, 71 Am. Dec. 160, 161; *Landesman &c. R. Co. v. Louisville &c. R. Co.*, 178 Ky. 712, 199 S. W. 1050, L. R. A. 1918C, 105 and note.

⁸⁴ 3 *Thomp. Neg.* (2d ed.), § 3403. See also *Kansas City &c. R. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781n, 58 Am. St. 111; *Dahrooge v. Pere Marquette R. Co.*, 144 Mich. 544, 108 N. W. 283; *Rossier v. Wabash R. Co.*, 115 Mo. App. 515, 91 S. W. 1018; *Charlotte Trouser Co. v. Seaboard &c. R. Co.*, 139 N. Car. 382, 51 S. E. 973; *Kansas City &c. R. Co. v. Fugatt*, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916A, 545 (citing text). But actual knowledge, though it may be proved by circumstantial evidence, is usually required. Notice is not imputed by the mere fact that the passenger pays a charge for excess baggage. *Illinois Cent. R. Co. v. Matthews*, 114 Ky. 973, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. 316. Nor by fact that the articles are packed in a laundry basket. *St.*

Louis &c. R. Co. v. Miller, 103 Ark. 37, 145 S. W. 889, 39 L. R. A. (N. S.) 634. See also *Ferris v. Minneapolis &c. Ry. Co.*, 143 Minn. 90, 173 N. W. 178. The question as to whether it had such knowledge is generally for the jury. See as to what is sufficient as tending to show it. *Trimble v. New York &c. R. Co.*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; *Saunders v. Southern R. Co.*, 128 Fed. 15; *Waldron v. Chicago &c. R. Co.*, 1 Dak. Ter. 351, 46 N. W. 456; *McKibbin v. Great Northern R. Co.*, 78 Minn. 232, 80 N. W. 1052; *Ft. Worth R. Co. v. Rosenthal &c. Co.* (Tex. Civ. App.), 29 S. W. 196; *Great Northern R. v. Shepherd*, 8 Exch. 30. A carrier is bound by the act of its baggage master who receives and checks a trunk as personal baggage of a passenger with knowledge that it contains goods not baggage, without advising the passenger, ignorant of the extent of his authority, that he exceeds his authority, and is liable for the loss thereof. *Bergstrom v. Chicago &c. R. Co.*, 134 Iowa 223, 111 N. W. 818, 10 L. R. A. (N. S.) 1119, 1122, (citing text), 13 Ann. Cas. 239.

⁸⁵ See *Millard v. Missouri &c. R. Co.*, 86 N. Y. 441, 6 Am. & Eng. R. Cas. 311; *Talcott v. Wabash R. Co.*, 159 N. Y. 461, 54 N. E. 1.

many kinds of business, such as the sale of costly articles, taking orders and the like by commercial travelers, it is necessary that they carry with them, either for sale direct or for samples, different articles of merchandise. In such cases carriers usually accept such merchandise and carry it as baggage, charging a compensation therefor. Under such contracts the company becomes a carrier of goods for hire and is subject to all the liabilities of a common carrier, that is, it is an insurer of the goods carried and is liable for their loss or damage,⁸⁶ unless such loss or damage was caused by the act of God, the public enemy or the inherent nature of the goods themselves, or unless there is a valid contract limiting its liability.⁸⁷ It has been held that one who, by the exercise of ordinary care, diligence and intelligence, should have known that the checking by a station agent or baggage-master of cases or trunks containing merchandise was prohibited by a rule of the carrier, can not recover the value of the same if lost or destroyed,⁸⁸ and that notice to the baggage-master that trunks offered and received as baggage contain mer-

⁸⁶ *Jacobs v. Tutt*, 33 Fed. 412; *Perley v. New York &c. R. Co.*, 65 N. Y. 374; *Millard v. Missouri &c. R. Co.*, 86 N. Y. 441; *Saleeby v. Central R. Co.*, 184 N. Y. 597, 77 N. E. 1196; *Charlotte Trouser Co. v. Seaboard &c. R. Co.*, 139 N. Car. 382, 51 S. E. 973; *Oakes v. Northern Pac. R. Co.*, 20 Ore. 39, 26 Pac. 230, 23 Am. St. 126

⁸⁷ As to such contracts and limitation of liability, see *Saunders v. Southern R. Co.*, 128 Fed. 15; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. ed. 1039; *The La Bourgoyne*, 144 Fed. 781; *Steers v. Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *Jacobs v. Central R. Co.*, 208 Pa. St. 535, 57 Atl. 982; 3 *Thomp. Neg.* (2d ed.), § 3455, et seq. The general subject has already been sufficiently treated

elsewhere in considering contracts limiting liability in case of ordinary goods or freight. See also post, § 2526. As to whether notice on the back of baggage check that carrier will not be liable above a certain amount will relieve it from liability for full value, see *Fessler v. Detroit Taxicab &c. Co.* 204 Mich. 694, 171 N. W. 360, 5 A. L. R. 983, and note. Contributory negligence of passenger in regard to baggage may also defeat recovery. *Denver &c. R. Co. v. Johnson*, 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C, 627, and note; post, § 2517.

⁸⁸ *Weber Co. v. Chicago &c. R. Co.*, 92 Iowa 364, 60 N. W. 637, 113 Iowa 188, 84 N. W. 1042. See also *Toledo &c. R. Co. v. Bowler*, 63 Ohio St. 274, 58 N. E. 813.

chandise will not bind the carrier to transport it as baggage in the absence of authority in the baggage-master to make a special agreement to that effect.³⁹ But the last proposition seems to be contrary to the prevailing rule which we have already stated, and it has been held by other courts that a baggage-master is not acting outside the scope of his employment and beyond his implied authority in receiving extra baggage, or merchandise as baggage, although contrary to his instructions or the rules of the company, which are unknown to the passenger.⁴⁰

§ 2509 (1649a). **Papers, books, and documents.**—The question has arisen in several cases as to whether papers, books, or documents carried by the passenger in a trunk, or otherwise, should be considered as baggage. A traveling salesman's price list and catalogues have been held to be baggage when they were his own individual property.⁴¹ But the contrary is generally held

³⁹ *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, 34 Am. Rep. 376n; *Alling v. Boston &c. R. Co.*, 126 Mass. 121, 30 Am. Rep. 667; *Jordan v. Fall River R. Co.*, 59 Mass. 69, 51 Am. Dec. 44. See also *Bomar v. Maxwell*, 28 Tenn. 620, 51 Am. Dec. 682; *Blumenthal v. Maine &c. R. Co.*, 79 Maine 550, 11 Atl. 605; *Central R. Co. v. Joseph*, 125 Ala. 313, 28 So. 35; *Toledo &c. R. Co. v. Bowler*, 63 Ohio St. 274, 58 N. E. 813.

⁴⁰ *Strouss v. Wabash &c. R. Co.*, 17 Fed. 209; *Railway Co. v. Berry*, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. 212; *Waldron v. Chicago &c. R. Co.*, 1 Dak. 351, 46 N. W. 456; *Bergstrom v. Chicago &c. R. Co.*, 134 Iowa 223, 111 N. W. 818, 10 L. R. A. (N. S.) 1119, 13 Ann. Cas. 239; *Minter v. Pacific R. Co.*, 41 Mo. 503, 97 Am. Dec. 288; *Sherlock v. Chicago &c. R. Co.*, 85 Mo. App. 46. See also *St. Louis*

&c. R. Co. v. Lilly, 1 Ala. App. 320, 55 So. 937; *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262, 20 L. ed. 423; *Jacobs v. Tutt*, 33 Fed. 412; *Kansas City &c. R. Co. v. Higdon*, 94 Ala. 286, 10 So. 282, 14 L. R. A. 515, and note, 33 Am. St. 119; *Lake Shore &c. R. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; *Illinois Cent. R. Co. v. Matthews*, 114 Ky. 973, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. 316; *Isaacson v. New York &c. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142; *Trimble v. Railroad*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; *Camden &c. R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; 7 Eng. R. & Canal Cas. 310; note in 2 A. L. R. 110, 111.

⁴¹ *Staub v. Kendrick*, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716; *Mil-*

as to samples, or the like, used in making sales,⁴² and papers pertaining to the business of an insurance agent, but belonging to his employers, have been held not to be baggage, although he had placed them in his trunk as a passenger.⁴³ So, in other cases, deeds and documents have been held not to be baggage.⁴⁴

§ 2510 (1650). **Excess of baggage.**—Railroad companies no doubt may, and usually do, make reasonable regulations as to the amount or weight of baggage which they will carry for each passenger.⁴⁵ In some states there are statutory provisions fixing the amount, and for extra baggage or any excess in weight over that amount the company has the right to stipulate for compensation.⁴⁶ The mere payment of extra compensation on account of overweight of baggage does not necessarily convert

Waukeee Mirror &c. Works v. Chicago &c. R. Co., 148 Wis. 173, 134 N. W. 379, 38 L. R. A. (N. S.) 383. See also *Texas &c. R. Co. v. Morrison's Faust Co.*, 20 Tex. Civ. App. 144, 48 S. W. 1103; *Werner v. Evans*, 94 Ill. App. 328.

⁴² *McElroy v. Iowa Cent. R. Co.*, 133 Iowa 544, 110 N. W. 915; *McKibbin v. Great Northern R. Co.*, 78 Minn. 232, 80 N. W. 1052. See also *Kansas &c. R. Co. v. State*, 65 Ark. 363, 46 S. W. 421, 41 L. R. A. 333, 67 Am. St. 933; *Gurney v. Grand Trunk R. Co.*, 59 Hun 626, 14 N. Y. S. 321.

⁴³ *Yazoo &c. R. Co. v. Blackmar*, 85 Miss. 7, 37 So. 500, 67 L. R. A. 646, 107 Am. St. 265.

⁴⁴ *Phelps v. London &c. R. Co.*, 19 C. B. (N. S.) 321; *Thomas v. Great Western R. Co.*, 14 Up. Can. Q. B. 389. See also *Hurwitz v. Packet Co.*, 27 Misc. (N. Y.) 814, 56 N. Y. S. 379; *Mauritz v. New York &c. R. Co.*, 23 Fed. 765; *Choctaw &c. R. Co. v. Zwirtz*, 13 Okla. 411, 73 Pac. 941; *Mytton v.*

Midland R. Co., 28 L. J. Exch. 385. But books of the passenger taken for his amusement and entertainment, are considered as baggage. *Doyle v. Kiser*, 6 Ind. 242. And manuscripts and books of a student *Hopkins v. Wescott*, 6 Blatchf. (U. S.) 64. And manuscript manual on Greek grammar prepared with a view to ultimate publication and carried about in the meantime to aid in teaching. *Wood v. Cunard S. S. Co.*, 192 Fed. 293, 41 L. R. A. (N. S.) 371. See also *Werner v. Evans*, 94 Ill. App. 328.

⁴⁵ See *Norfolk &c. R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532; *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Majestic, The*, 60 Fed. 624.

⁴⁶ *Gulf &c. R. Co. v. Ions*, 3 Tex. Civ. App. 619, 22 S. W. 1011, 1012; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460, 468. In the first case just cited it is said that all tickets are purchased with a knowledge of the statute, and that a demand for pay for extra baggage is nei-

it into freight.⁴⁷ And the fact that the weight of baggage checked as such is so great that it is required to be paid for as excess baggage is not notice to the carrier that it includes other than personal baggage.⁴⁸ Of course, as shown in the preceding section, where it is not properly baggage, but merchandise, for instance, and the company is notified of its character, the carrier's liability on accepting it with the extra compensation may be the same as for freight.⁴⁹

§ 2511 (1650a). Baggage of infant traveling with parent without paying fare.—The question sometimes arises whether a child of tender years traveling with a parent without the payment of fare is a gratuitous passenger for whose baggage the carrier is liable only as a gratuitous bailee, or whether his effects, being the property of the parent with whom he is traveling and who has paid his fare, are not a part of the parent's baggage for which the carrier is liable. The authorities do not generally regard the infant as a gratuitous passenger.⁵⁰ In a recent case

ther a violation, change nor substitute of the original contract made in the purchase of the ticket. See also *National Baggage Co. v. Atchison &c. Ry. Co.*, 32 I. C. C. 152; *In re Cummins Amendment*, 33 I. C. C. R. 682, 40 Rep. Am. Bar Assn. (1915) 387. Charges for excess baggage have been held subject to regulation of the public service or railroad commission. *Michigan R. Co. v. Wayne Circuit Judge*, 156 Mich. 459, 120 N. W. 1073; *Michigan C. R. Co. v. Michigan R. Co.*, 160 Mich. 355, 125 N. W. 549.

⁴⁷ *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. 662, 664. But see *Sloman v. Great Western R. Co.*, 67 N. Y. 208.

⁴⁸ *Humphrey v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. ed. 587;

Illinois Cent. R. Co. v. Matthews, 114 Ky. 973, 72 S. W. 302, 60 L. R. A. 846, 102 Am. St. 316. But in *Tamarin v. Pennsylvania R. Co.*, 244 Pa. 100, 90 Atl. 433, the company was held a bailee for hire where excess baggage was paid on two trunks, although it had no knowledge of the contents.

⁴⁹ See *Glasco v. New York &c. R. Co.*, 36 Barb. (N. Y.) 557. See also *Louisville &c. R. Co. v. Dickson*, 15 Ala. App. 423, 73 So. 750; *Trimble v. New York &c. R. Co.*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; *Fleischman v. Southern R. Co.*, 76 S. Car. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519.

⁵⁰ *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442; *Rawlings v. Wabash R. Co.*, 97 Mo. App. 515, 71 S. W. 534.

where the question of liability for such baggage was squarely presented, it was held that a father, paying full fare for himself, traveling with an infant child of such tender years that by custom no fare is demanded for its carriage, may recover upon the contract of carriage for loss or injury of articles bought and used for the child, which articles are a part of the father's baggage.⁵¹ In discussing this point the court said: "Even if it can be said that the child was carried free, a point which we do not consider, it by no means follows that the articles in question, the child's wearing apparel, were carried free. The clothing of the infant was the property of the father, and was in the trunks of the father, with whom the defendant had made a contract of carriage, both of his person and his baggage. While it is asserted on the part of the defendant that it had the right to charge for the carriage of the infant, it is not claimed that under its rules and practice it does charge anything for the carriage of infants of the age of the plaintiff's child. Nor do we base our determination at all upon the fact, which appears in the record, that the infant occupied for hire a seat in the parlor car during the trip. What we hold, and what we think the correct rule of law, is that a father paying full fare for himself, traveling with an infant child of such tender years that by custom no fare is demanded for its carriage, may recover upon the contract for carriage for the loss or injury of articles bought and used for the child, which articles are a part of, and packed and carried with his baggage and upon the ground that such articles are the property of the parent, in his possession and properly a part of his proper baggage."⁵²

⁵¹ *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773, 1 L. R. A. (N. S.) 352, 113 Am. St. 533, 12 Det. Leg. N. 511.

⁵² *Wheeler v. St. Joseph &c. R. Co.*, 31 Kans. 640, 3 Pac. 297; *Smith v. Abair*, 87 Mich. 62, 49 N. W. 509; *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773, 1 L. R. A. (N. S.) 352, 113 Am. St. 533, 12 Det. Leg. N. 511, citing

Prentice v. Decker, 49 Barb. (N. Y.) 21; *Burke v. Louisville &c. R. Co.*, 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Callan v. Canada Northern R. Co.*, 19 Manitoba L. R. 141. The principal case also considers the question as to the right of the husband to recover for loss of wife's jewels. And see note in 99 Am. St. 389, 390. See also *Richardson v. Louisville &c. R. Co.*, 85

§ 2512 (1651). **When company is liable as a common carrier.**—Where there is a liability on the part of a carrier for baggage the liability is sometimes that of a common carrier and sometimes that of a warehouseman. The general rule is that the carrier is liable for baggage as a common carrier, that is, it is liable for the loss or injury to the baggage at all events,⁵³ except where the loss or damage is caused by the act of God, or inevitable accident in the sense in which the term is sometimes used, the act of the owners, or by public enemies.⁵⁴ The lia-

Ala. 559, 5 So. 308, 2 L. R. A. 716; *Curtis v. Delaware &c. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271.

⁵³ *Montgomery &c. R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Coskery v. Nagle*, 83 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. 333; *Georgia &c. R. Co. v. Thompson*, 86 Ga. 327, 12 S. E. 640; *Staub v. Kendrick*, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619; *Peterson v. Chicago &c. R. Co.*, 80 Iowa 92, 45 N. W. 573; *Leavenworth &c. R. Co. v. Maris*, 16 Kans. 333; *Kansas City &c. R. Co. v. Patten*, 3 Kans. App. 338, 45 Pac. 108; *Shaw v. Northern Pacific R. Co.*, 40 Minn. 144, 41 N. W. 548; *McKibben v. Great Northern R. Co.*, 78 Minn. 232, 80 N. W. 1052; *Ringwall v. Wabash R. Co.*, 45 Nebr. 760, 64 N. W. 219; *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845; *Hyman v. Central Vt. R. Co.*, 66 Hun 202, 21 N. Y. S. 119; *Camden &c. Co. v. Burke*, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; *Robinson v. New York &c. R. Co.*, 203 N. Y. 627, 97 N. E. 1115; *Oakes v. Northern Pacific R. Co.*, 20 Ore. 392, 26 Pac. 230, 23 Am. St. 126, 47 Am. & Eng. R. Cas. 437; *Adger v. Blue Ridge Ry. Co.*,

71 S. Car. 213, 50 S. E. 783, 110 Am. St. 568; *Houston &c. R. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W. 437; *Christie v. Griggs*, 2 Camp. 79; *Brooke v. Pickwick*, 4 Bing. 218. See also elaborate note to *Wood v. Maine Cent. R. Co.*, 98 Maine 98, in 97 Am. St. 339, 345, et seq.

⁵⁴ *Strouss v. Wabash &c. R. Co.*, 17 Fed. 209; *Ford v. Atlantic &c. R. Co.*, 8 Ga. App. 295, 68 S. E. 1027; *Howell v. Grand Trunk R. Co.*, 92 Hun 423, 36 N. Y. S. 544; *Kansas City &c. Ry. Co. v. Fugatt*, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916A, 545 (quoting text); *Pennsylvania R. Co. v. McKinney*, 124 Pa. St. 462, 17 Atl. 14; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. 732; *Springer v. Pullman Co.*, 234 Pa. St. 172, 83 Atl. 98. See also as to when it will not excuse where the carrier did not exercise proper care. *Sonneborn v. Southern R. Co.*, 65 S. Car. 502, 44 S. E. 77; *Harzburg v. Southern R. Co.*, 65 S. Car. 539, 44 S. E. 75; *Wald v. Pittsburgh &c. R. Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. 332; *Spaids v. New York &c. Co.*, 3 Daly (N. Y.) 139.

bility of the company as a common carrier begins, as a rule, at the time the baggage is delivered to it for transportation, unless the time of such delivery be an unreasonable length of time before the owner's intended departure.⁵⁵ In order that the liability as a common carrier should exist it is not always necessary that the passenger should have purchased a ticket, nor that he should even make the journey which he intends to make. As persons often become entitled to the rights of passengers before the purchase of a ticket, so the liability of the carrier for baggage sometimes begins before the purchase of a ticket, or even before the company becomes liable to the owner of the baggage as a passenger.⁵⁶ Where a person in good faith intends to take passage on a railway train or the like and delivers his baggage to the company a reasonable time in advance of the anticipated journey, it seems that the company will be liable for such bag-

⁵⁵ *Lake Shore &c. R. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; *Illinois &c. R. Co. v. Tronstine*, 64 Miss. 834, 2 So. 255, 31 Am. & Eng. R. Cas. 99; *Fitchburg &c. R. Co. v. Hanna*, 72 Mass. 539, 66 Am. Dec. 427; *Michigan &c. R. Co. v. Shurtz*, 7 Mich. 515. See also *Davis v. Cayuga &c. R. Co.*, 10 How. Pr. (N. Y.) 330; *Fleischman &c. Co. v. Southern Ry.*, 76 S. Car. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519; *Wilson v. Grand Trunk R. Co.*, 57 Maine 138, 2 Am. Rep. 26. As to what is a good delivery, see *Battle v. Columbia &c. R. Co.*, 70 S. Car. 329, 49 S. E. 849; *International &c. R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 630. But compare *Lennon v. Illinois Cent. R. Co.*, 127 Iowa 431, 103 N. W. 343; *Rider v. Wabash &c. R. Co.*, 14 Mo. App. 529; *Williams v. Southern R. Co.*, 155 N. Car. 260, 71 S. E. 346; *Kerr v. Grand Trunk R. Co.*, 24 U. C. C.

P. 209. In *Shaw v. Northern &c. R. Co.*, 40 Minn. 144, 41 N. W. 548, it was held that this liability attached at the time of delivery for transportation although for the convenience of the carrier, the passenger consented that it need not be forwarded upon the same or the next train. If earlier delivery is made the custody is that of warehouseman. *Goldberg v. Ahnapsee R. Co.*, 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. 899. See the same case last above cited as to reasonableness of rules as to time of checking, also *Coffee v. Louisville R. Co.*, 76 Miss. 569, 25 So. 157, 45 L. R. A. 112, 71 Am. St. 535.

⁵⁶ *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, 83 Am. Dec. 143; *Lake Shore &c. R. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Dec. 319; *Green v. Milwaukee &c. R. Co.*, 41 Iowa 410; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

gage as a common carrier from the time of such delivery and acceptance.⁵⁷ And in such cases the company may be liable although the person does not purchase a ticket or make the proposed journey, as for instance, where he is prevented from so doing by the fault of the carrier and the loss or destruction of the baggage before the journey begins.⁵⁸ It seems that a company may, however, adopt a regulation that it shall not be liable for baggage as a common carrier until the owner has purchased a ticket. Such a regulation would seem to be reasonable under proper circumstances, but it has been held that unless it is regularly enforced it does not bind a person delivering baggage to the carrier before the purchase of a ticket.⁵⁹ The liability of a company as a common carrier in respect to baggage terminates when the company has transported the baggage to its destination and given the owner a reasonable time and opportunity to claim and take it away.⁶⁰

⁵⁷ *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, 83 Am. Dec. 143; *Camden &c. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Rogers v. Long Island &c. R. Co.*, 1 T. & C. (N. Y.) 396; *Fairfax v. New York &c. R. Co.*, 37 N. Y. Super. Ct. 516. See also *Coffee v. Louisville &c. R. Co.*, 76 Miss. 569, 25 So. 157, 45 L. R. A. 112, 71 Am. St. 535; *Cone v. Southern Ry.*, 85 S. Car. 524, 67 S. E. 779, 21 Ann. Cas. 158; *Goldberg v. Ahnapee R. Co.*, 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. 899. But see *Goodbar v. Wabash R. Co.*, 53 Mo. App. 434; *Little Rock &c. R. Co. v. Hunter*, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527; *Van Gilder v. Chicago &c. R. Co.*, 44 Iowa 548.

⁵⁸ "Suppose a party at a railway station places his baggage in possession of the baggage-master and procures a check, and proceeds to purchase a ticket, but before he

makes the purchase his baggage as stolen, in consequence of which he is compelled to forego the journey, and determines not to buy a ticket, may he not recover on account of the loss of his baggage? . . . The true question is not what the party might do, but what, in view of all the circumstances disclosed, did he intend to do?" *Green v. Milwaukee &c. R. Co.*, 41 Iowa 410.

⁵⁹ *Lake Shore &c. R. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319. See *Goldberg v. Ahnapee R. Co.*, 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. 899; *Murray v. International Steamship Co.*, 170 Mass. 166, 48 N. E. 1093, 64 Am. St. 290.

⁶⁰ *Toledo &c. R. Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 462; *Bartholomew v. St. Louis &c. R. Co.*, 53 Ill. 227, 5 Am. Rep. 45; *Chicago &c. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Mote v. Chicago &c.*

§ 2513 (1652). **When company is liable as a warehouseman.**—We have seen that during transit and for a reasonable time after the arrival of baggage at its destination, the liability of a company is that of a common carrier.⁶¹ At the expiration of a reasonable time after baggage reaches its destination the liability as a common carrier usually ceases,⁶² but it does not fol-

R. Co., 27 Iowa 22, 1 Am. Rep. 212; Louisville &c. R. Co. v. Mahan, 8 Bush (Ky.), 184; Burnell v. New York &c. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Dininny v. New York &c. R. Co., 49 N. Y. 546; Hoeger v. Chicago &c. R. Co., 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271; Vineberg v. Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271. See also Pennsylvania Co. v. Liveright, 14 Ind. App. 518, 41 N. E. 350; Central &c. R. Co. v. Jones, 150 Ala. 379, 43 So. 575, 9 L. R. A. (N. S.) 1240, 124 Am. St. 71; Wald v. Louisville &c. R. Co., 92 Ky. 645, 18 S. W. 850; Nealand v. Boston &c. R. Co., 161 Mass. 67, 36 N. E. 592; Galveston &c. R. Co. v. Smith, 81 Tex. Civ. App. 479, 24 S. W. 668; Chesapeake &c. R. Co. v. Beasley &c. Co., 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183. The rule is thus stated in the case of Kansas City &c. R. Co. v. Patten, 3 Kans. App. 338, 45 Pac. 108: "A common carrier of passengers for hire is an insurer of the safety of the passenger's baggage intrusted to it, during transit, and for a reasonable time after its arrival at the place of destination, in order to allow the passenger time to receive and remove it. Leavenworth &c. R. Co. v. Maris, 16 Kans. 333. But the liability of the carrier terminates when the baggage has arrived at

its destination, and has remained there a reasonable time, sufficient to allow the owner to receive and remove it from the carrier's premises." In Iowa the rule as to termination of liability for baggage is different from that as to goods. Hicks v. Wabash R. Co., 131 Iowa 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235. Carrier has been held while holding baggage under lien for fare or until it ascertained amount due on excess baggage. Southwestern R. Co. v. Bentley, 51 Ga. 311; Mexican Cent. R. Co. v. De Rosear (Tex. Civ. App.), 109 S. W. 949. As to baggage checked in check or parcel room, see notes in 18 L. R. A. (N. S.) 295, 29 L. R. A. (N. S.) 834 and Wisconsin case cited in note 67, *infra*.

⁶¹ Anté, § 2512.

⁶² Mote v. Chicago &c. R. Co., 27 Iowa 22, 1 Am. Rep. 212; Patscheider v. Great Western R. Co., L. R. 3 Ex. Div. 153; Dininny v. New York &c. R. Co., 49 N. Y. 546; Louisville &c. R. Co. v. Mahan, 8 Bush (Ky.) 184; Cohen v. St. Louis &c. R. Co., 59 Mo. App. 66; and other authorities cited in the last note to the preceding section. See also Indiana &c. R. Co. v. Zilley, 20 Ind. App. 569, 51 N. E. 141; St. Louis &c. R. Co. v. Terrell (Tex. Civ. App.), 72 S. W. 430; Galveston &c. R. Co. v. Smith, 81 Tex. 479, 17 S. W. 133, 24 S. W.

low that from that time there is no liability whatever. If the owner of baggage does not call for it within a reasonable time after it reaches the destination a duty rests upon the carrier to store it and care for it a reasonable time until called for.⁶³ The rule is that after the baggage has been held for a reasonable time after its arrival, and the owner does not call for it, the liability as a common carrier ceases and the liability of a warehouseman for hire begins.⁶⁴ The measure of duty resting upon the carrier as a warehouseman is that of reasonable care, and in such cases it is only liable for loss or injury to the baggage which results from its actual negligence.⁶⁵ In providing a place

668. But it was held otherwise in a case where the carrier retained the baggage to weigh it and locked the door so that it could not be removed, during which time it was destroyed by fire. *Chesapeake &c. Ry. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183. See also *George F. Ditman Boot & Shoe Co. v. Keokuk &c. R. Co.*, 91 Iowa 416, 59 N. W. 257, 51 Am. St. 352; *Tallman v. Chicago &c. R. Co.*, 136 Wis. 648, 118 N. W. 205, 16 Ann. Cas. 711.

⁶³ *Wald v. Louisville &c. R. Co.*, 92 Ky. 645, 18 S. W. 850, 58 Am. & Eng. R. Cas. 123; *St. Louis &c. R. Co. v. Hardway*, 17 Ill. App. 321; *Galveston &c. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *Matteson v. New York &c. R. Co.*, 76 N. Y. 381; notes in 36 L. R. A. (N. S.) 781, and 38 L. R. A. (N. S.) 383. See also *Central &c. R. Co. v. Jones*, 150 Ala. 379, 43 So. 575, 9 L. R. A. (N. S.) 1240, 124 Am. St. 71, in which it was held that proof of loss of the baggage after arrival raised a presumption that the carrier's agent was negligent.

⁶⁴ *Geo. F. Ditman &c. Co. v. Keokuk &c. R. Co.*, 91 Iowa 416,

59 N. W. 257, 51 Am. St. 352; *Leavenworth &c. R. Co. v. Maris*, 16 Kans. 333; *Kansas City &c. R. Co. v. Patten*, 3 Kans. App. 338, 45 Pac. 108; *Louisville &c. R. Co. v. Mahan*, 8 Bush (Ky.) 184; *Wald v. Louisville &c. R. Co.*, 92 Ky. 645, 18 S. W. 850, 58 Am. & Eng. R. Cas. 123; *Nealand v. Boston &c. R. Co.*, 161 Mass. 67, 36 N. E. 592; *Laffrey v. Grummond*, 74 Mich. 186, 41 N. W. 894, 3 L. R. A. 287, 16 Am. St. 624; *Ross v. Missouri &c. R. Co.*, 4 Mo. App. 582; *Galveston &c. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *Texas &c. R. Co. v. Capps*, 2 Tex. App. (Civ. Cas.) 35; *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646. See also *Blackmore v. Missouri Pac. R. Co.*, 162 Mo. 455, 62 S. W. 993; *Campbell v. Missouri Pac. R. Co.*, 78 Nebr. 479, 111 N. W. 126.

⁶⁵ *Kansas City &c. R. Co. v. Patten*, 3 Kans. App. 338, 45 Pac. 108; *Galveston &c. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *Chicago &c. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Hoeger v. Chicago &c. R. Co.*, 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271.

for storing the baggage the carrier is bound to exercise only such a degree of care as would be used by a reasonably prudent man under the circumstances; it is not bound to provide a place either fire or burglar proof.⁶⁶ The test for determining liability is whether or not there was negligence.⁶⁷ In some cases the liability of the carrier is not even that of a warehouseman for hire. The liability may sometimes be only that of a gratuitous bailee. Thus, where on the arrival of baggage and the owner at the destination the owner calls for his baggage and is given an opportunity to remove it, but requests that the company keep and care for it for a while, the company then becomes a mere gratuitous bailee and is liable only for what is known as gross negligence.⁶⁸ In order, however, to reduce the liability of the com-

⁶⁶ *Kansas City &c. R. Co. v. Pat-ten*, 3 Kans. App. 338, 45 Pac. 108; *Wald v. Louisville &c. R. Co.*, 92 Ky. 645, 18 S. W. 850, 58 Am. & Eng. R. Cas. 123. Whether reasonably safe, held a question for the jury in *Nealand v. Boston &c. R. Co.*, 161 Mass. 67, 36 N. E. 592. Carrier is not ordinarily liable as warehouseman for not keeping a night watchman. *Levi v. Missouri &c. R. Co.*, 157 Mo. App. 536, 138 S. W. 699.

⁶⁷ *Chicago &c. R. Co. v. Fairclough*, 52 Ill. 106; *Kansas &c. R. Co. v. Thomas*, 97 Ark. 287, 133 S. W. 1030; *Georgia &c. R. Co. v. Thompson*, 86 Ga. 327, 12 S. E. 640; *Curtis v. Delaware &c. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271. There is no presumption of negligence against a warehouseman. It must appear from the evidence. *Wald v. Louisville &c. R. Co.* 92 Ky. 645, 18 S. W. 850, 58 Am. & Eng. R. Cas. 123; *Texas &c. R. Co. v. Capps*, 2 Tex. App. (Civ. Cas.) 35, 16 Am. & Eng. R. Cas. 118; *Kahn v. Atlantic &c. R. Co.*, 115 N. Car. 638,

20 S. E. 169. See also *Yazoo &c. R. Co. v. Hughes*, 94 Miss. 242, 47 So. 662, 22 L. R. A. (N. S.) 975; *East Tenn. &c. R. Co. v. Kelly*, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. 902. But compare *Southern R. Co. v. Aldredge*, 142 Ala. 368, 38 So. 805; *Central R. Co. v. Jones*, 150 Ala. 379, 43 So. 575, 124 Am. St. 71, 9 L. R. A. (N. S.) 1240; *Southern R. Co. v. Edmundson*, 123 Ga. 474, 51 S. E. 388; *Zeigler v. Mobile &c. R. Co.*, 87 Miss. 367, 39 So. 811; *Milwaukee Mirror &c. Co. v. Chicago &c. Ry. Co.*, 148 Wis. 173, 134 N. W. 379, 38 L. R. A. (N. S.) 383.

⁶⁸ *Minor v. Chicago &c. R. Co.*, 19 Wis. 40, 88 Am. Dec. 670; *Little Rock &c. R. Co. v. Hunter*, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527. See *Mortland v. Philadelphia &c. R. Co.*, 81 Hun 473, 30 N. Y. S. 1021; *Galveston &c. R. Co. v. Smith*, 81 Tex. 479, 24 S. W. 668. Compare also *Jonesboro &c. R. Co. v. Davenport*, 132 Ark. 596, 201 S. W. 1114 (carrier liable only as warehouseman).

pany to that of a warehouseman the company must give the owner reasonable opportunity to demand his baggage and take it away.⁶⁹ If on the arrival of baggage the company immediately stores it and locks its baggage room so that the owner can not secure the baggage, the liability of a common carrier still continues and does not terminate until reasonable opportunity is given the owner to remove his baggage.⁷⁰ The carrier can not terminate or change its liability by its own wrong. What is a reasonable time in which to call for and remove baggage has been held, where the facts are undisputed, to be one of law,⁷¹ but where the facts are disputed it is a mixed question of law and fact.⁷²

⁶⁹ Toledo &c. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462. See also Pennsylvania Co. v. Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162; George F. Ditman Boot and Shoe Co. v. Keokuk &c. R. Co., 91 Iowa 614, 59 N. W. 257; Chesapeake &c. R. Co. v. Beasley, 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183; Zeigler Bros. v. Mobile &c. R. Co., 87 Miss. 367, 39 So. 811. It was held in a recent case that the company, in ejecting a passenger, had no right to put his baggage off in a place where it would be injured, and that he had a right to use such force as was necessary to prevent its injury. Gulf &c. R. Co. v. Moody (Tex. Civ. App.), 30 S. W. 574.

⁷⁰ Toledo &c. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Georgia R. &c. Co. v. Phillips, 93 Ga. 801, 20 S. E. 646. See also Chesapeake &c. R. Co. v. Beasley, 104 Va. 788, 52 S. E. 566; Dinniny v. New York &c. R. Co., 49 N. Y. 546. But compare Graves v. Fitchburg R. Co., 51 App. Div. 591, 51 N. Y. S. 636.

⁷¹ Burgevin v. New York &c. R. Co., 69 Hun 479, 23 N. Y. S. 415; Toledo &c. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462. This may not be so where more than one reasonable inference can be drawn but is certainly true in a case where the facts are undisputed and but one reasonable inference can be drawn. See Wiegand v. Central R. Co., 75 Fed. 370; Roth v. Buffalo &c. R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Vineburg v. Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271.

⁷² Kansas City &c. R. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781n, 58 Am. St. 111; Toledo &c. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Mote v. Chicago &c. R. Co., 27 Iowa 22, 1 Am. Rep. 212; Louisville &c. R. Co. v. Mahan, 8 Bush (Ky.) 184; Ziegler Bros. v. Mobile &c. R. Co., 87 Miss. 367, 39 So. 811; Brown v. Canadian Pac. R. Co., 3 Manitoba 496. See generally as illustrative cases of what is a reasonable time for the removal of baggage, Roth v. Buffalo &c. R. Co., 34 N. Y. 548,

§ 2514 (1652a). **Gratuitous bailee.**—There are cases in which the carrier may not be liable even as a warehouseman, but only as a gratuitous bailee. Thus, where the passenger is carried free and there is no charge for his baggage, the carrier is liable for such baggage only as a gratuitous bailee.⁷³ So, it has been held that where a carrier receives baggage with the understanding that it will go forward as the baggage of a passenger, but he does not intend to, and does not in fact, accompany it, the carrier is liable only as a gratuitous bailee, and if the carrier deposits it in an ordinarily well-constructed baggage room, with doors and windows closed in the ordinary manner, the carrier is not liable for its loss by reason of its theft by one who feloniously effects an entrance by breaking a pane of glass in one of the windows.⁷⁴ It has also been held that if a passenger voluntarily

90 Am. Dec. 736n; *Jones v. Norwich &c. R. Co.*, 50 Barb. (N. Y.) 193; *George F. Ditman Boot &c. Co. v. Keokuk &c. R. Co.*, 91 Iowa 416, 59 N. W. 257, 51 Am. St. 352; *Wiegand v. Central R. Co.*, 75 Fed. 370. In *Chesapeake &c. R. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, it is said: "A carrier's liability, as such, for a passenger's baggage, continues during transportation, and for such a time thereafter as affords the passenger a reasonable opportunity to remove it. In determining what is a reasonable time for removing the baggage after reaching its destination, the peculiar circumstances surrounding each case must be looked to, such as the character of the station, the opportunities afforded by the common carrier for delivering baggage when called for, etc. *Penn. Co. v. Liveright*, 14 Ind. App. 518, 41 N. E. 350; *Wald v. Louisville &c. R. Co.*, 92 Ky. 645, 18 S. W. 850; *Mote v. Chicago &c.*

R. Co., 27 Iowa 22, 1 Am. Rep. 212; *Roth v. Railroad Co.*, 34 N. Y. 548, 90 Am. Dec. 736; *Burnell v. Railway Co.*, 45 N. Y. 184, 6 Am. Rep. 61." For illustrative cases as to what is or is not a reasonable time. See also *Ditman &c. Shoe Co. v. Keokuk &c. R. Co.*, 91 Iowa 416, 59 N. W. 257, 51 Am. St. 352; *Campbell v. Missouri Pac. R. Co.*, 78 Nebr. 479, 111 N. W. 126; *Larned v. Central R. Co.*, 81 N. J. L. 571, 79 Atl. 289; *Quimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Tallman v. Chicago &c. R. Co.*, 136 Wis. 648, 118 N. W. 205, 16 Ann. Cas. 711. Illness has been held not to extend the time. *Chicago &c. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268.

⁷³ *Flint &c. R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499, 5 Cent. Law Jour. 285; *Holly v. Southern R. Co.*, 119 Ga. 767, 47 S. E. 188; *White v. St. Louis R. Co.* (Tex. Civ. App.), 86 S. W. 962.

⁷⁴ *Wood v. Maine Cent. R. Co.*,

stops or lies over at an intermediate point on his journey, without the consent of the carrier, and permits his baggage to go on without him, the carrier is not liable as such, but is liable, it seems, only as a gratuitous bailee.⁷⁵ So, where the owner calls for his baggage and receives it at its destination with reasonable opportunity to remove it, but requests the company's agent to keep it for a time for the passenger's accommodation, the carrier is no longer liable as such, and may be liable only as a gratuitous bailee.⁷⁶ And so, it may, perhaps, be laid down as a general rule, that when an article is carried as baggage, by mistake or the like, and no compensation is received for it, as, for instance, where the owner travels over a different road, and the carrier receives the baggage, supposing that he has bought a ticket over its road, or that the baggage belongs to one of its passengers, such carrier is liable only as a gratuitous bailee.⁷⁷

98 Maine 98, 56 Atl. 457, 99 Am. St. 339; *Marshall v. Pontiac &c. R. Co.*, 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650; *Crout v. Yazoo &c. R. Co.*, 131 Tenn. 667, 176 S. W. 1027, L. R. A. 1915E, 281, 284 (quoting text). See also *Southern Ry. &c. Co. v. Dinkins &c. Hardware Co.*, 139 Ga. 332, 77 S. E. 147, 43 L. R. A. (N. S.) 806; *Carlisle v. Grand Trunk R. Co.*, 25 Ont. L. R. 372. But compare *Alabama &c. R. Co. v. Knox*, 184 Ala. 485, 63 So. 538, 49 L. R. A. (N. S.) 411; *McKibbin v. Wisconsin Cent. R. Co.*, 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489, 117 Am. St. 689; *Larned v. Central R. Co.*, 81 N. J. L. 571, 79 Atl. 289; *Adger v. Blue Ridge Ry. Co.*, 71 S. Car. 213, 50 S. E. 783, 110 Am. St. 568. In most of these cases, however, the passenger intended to go on the carrier's train and did go, although on a later train. See post, § 2519.

⁷⁵ *Cutler v. Railway*, 19 Q. B.

Div. 64. Compare *Hicks v. Wabash R. Co.*, 131 Iowa 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235; *Laffrey v. Grummond*, 74 Mich. 186, 41 N. W. 894, 3 L. R. A. 287, 16 Am. St. 624; *Howell v. Grand Trunk R. Co.*, 92 Hun 423, 36 N. Y. S. 544.

⁷⁶ *Miner v. Chicago &c. R. Co.*, 19 Wis. 40, 88 Am. Dec. 670; *Little Rock &c. R. Co. v. Hunter*, 42 Ark. 200. See also *Mattison v. New York Cent. R. Co.*, 57 N. Y. 552; *Mulligan v. Northern Pac. R. Co.*, 4 Dak. 315, 29 N. W. 659; *Galveston &c. R. Co. v. Smith*, 81 Tex. 479, 24 S. W. 668; *Hodkinson v. London &c. R. Co.*, 14 Q. B. Div. 228. But see *Voss v. Wagner P. C. Co.*, 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010. In some cases it might be liable as warehouseman.

⁷⁷ *Beers v. Boston &c. R. Co.*, 67 Conn. 417, 34 Atl. 541, 32 L. R. A. 535, 52 Am. St. 293. See also *Marshall v. Pontiac &c. R. Co.*, 126

§ 2515. **Baggage of ejected passenger.**—Where a passenger is ejected the duty and liability of the company may depend largely on the cause or reason for ejection, as to whether it is rightful or not. But it has been held that the carrier has no right to so place or dispose of it that it will be injured.⁷⁸ And it has also been held that failure to purchase a ticket and check baggage in accordance with the rule of the carrier does not prevent one from becoming a passenger by presenting himself on board as such on the usual terms and conditions and being accepted; and that his refusal to pay fare, after his baggage had been lost in the water while attempting to load it, does not destroy his right to hold the carrier liable for such loss, at least where the carrier continued the performance of the contract.⁷⁹

§ 2516 (1653). **Delivery to the company.**—In order that any liability may arise on the part of a carrier in respect to baggage it is necessary that there should be a delivery of the baggage to the carrier.⁸⁰ Unless there is a delivery there is no liability.⁸¹

Mich. 45, 85 N. W. 242, 55 L. R. A. 650n; Hicks v. Wabash R. Co., 131 Iowa 295, 108 N. W. 534, 535, 8 L. R. A. (N. S.) 235.; Wilson v. Grand Trunk R. Co., 56 Maine 60, 96 Am. Dec. 435, 57 Maine 138, 2 Am. Rep. 26; Pennsylvania R. Co. v. Knight, 58 N. J. L. 287, 33 Atl. 845; Becher v. Great Eastern R. Co., L. R. 5 Q. B. 241; Collins v. Boston &c. R. Co., 10 Cush. (Mass.) 506, and see where passenger forgets and leaves baggage on train. Clark v. Eastern R. Co., 139 Mass. 423, 1 N. E. 128, 21 Am. & Eng. R. Cas. 307; Bonner v. DeMendoza, 4 Willson Civ. Cas. Ct. App. (Tex.), § 234, 16 S. W. 976; Morris v. Third Ave. R. Co., 1 Daly (N. Y.) 202. In Foulke v. New York & R. Co., 228 N. Y. 269, 127 N. E. 237, 9 A. L. R. 1384, it is held that in such a case the carrier may assert the

right of a gratuitous bailee, and has the right of custody to the property inadvertently left by a passenger, as against another passenger.

⁷⁸ Gulf &c. R. Co. v. Moody (Tex. Civ. App.), 30 S. W. 575 (also holding that the passenger has a right to use such force as is necessary to prevent injury to it).

⁷⁹ Clark v. North Pac. S. S. Co., 74 Ore. 470, 144 Pac. 472, L. R. A. 1916E, 487.

⁸⁰ Kerr v. Grand Trunk R. Co., 24 U. C. C. P. 209; Wilson v. Grand Trunk R. Co., 57 Maine 138, 2 Am. Rep. 26; Ringwalt v. Wabash R. Co., 45 Nebr. 760, 64 N. W. 219; Southern Ry. Co. v. Bickley &c. Co., 119 Tenn. 528, 107 S. W. 680, 14 L. R. A. (N. S.) 859, 123 Am. St. 754, 14 Ann. Cas. 910.

⁸¹ Perkins v. Wright, 37 Ind. 27; Michigan &c. R. Co. v. Meyers, 21

The general rule is that there must be a delivery and acceptance by the carrier, although there may sometimes be a constructive acceptance.⁸² Where delivery has been made and there is an actual acceptance by the carrier there is no question as to the responsibility of the company. But where there is no actual acceptance the question is what is a sufficient delivery to make the acceptance constructive so as to bind the carrier. Where baggage was left on a dock near a steamboat and the person leaving the baggage called the attention of an employe on the boat to it, who answered "all right," it was held that the delivery was sufficient.⁸³ Merely depositing baggage on the carrier's platform or vehicle without calling anyone's attention to it is not a sufficient delivery, at least in the absence of a custom or an arrangement to that effect, to the carrier to cause its liability to attach.⁸⁴ Delivery must, as a rule, in order to render the carrier liable, be made to some duly authorized agent of the company. It need not always be made to the person expressly authorized to care for baggage; it may sometimes be made to the ticket agent or other agent who is permitted to hold himself out as authorized to receive baggage and does actually receive baggage,⁸⁵ especially where such is the custom. Delivery, as

Ill. 627; *Lustig v. International Nav. Co.*, 78 Misc. (N. Y.) 802, 78 N. Y. S. 885; *Aikin v. Westcott*, 123 N. Y. 363, 25 N. E. 503; *Park v. Southern Ry.*, 78 S. Car. 302, 58 S. E. 931; *Forbes v. Davis*, 18 Tex. 268.

⁸² *Merriam v. Hartford &c. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *Cone v. Southern Ry.*, 85 S. Car. 524, 67 S. E. 779, 21 Ann. Cas. 158.

⁸³ *Rogers v. Long Island R. Co.*, 1 T. & C. (N. Y.) 396; *Merriam v. Hartford &c. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344. See also *Bankier v. Wilson*, 5 L. Can. 203; *Priscilla, The*, 106 Fed. 739.

⁸⁴ *Lennon v. Illinois Cent. R. Co.*, 127 Iowa 431, 103 N. W. 343;

Wright v. Caldwell, 3 Mich. 51; *Rider v. Wabash &c. R. Co.*, 14 Mo. App. 529; *Ball v. New Jersey Steamboat Co.*, 1 Daly (N. Y.) 491; *Gregory v. Webb*, 40 Tex. Civ. App. 360, 89 S. W. 1109; *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209. See also *Williams v. Southern R. Co.*, 155 N. Car. 260, 71 S. E. 346; *Gregory v. Webb*, 40 Tex. Civ. App. 360, 89 S. W. 1109; *Leigh v. Smith*, 1 C. P. 638.

⁸⁵ *Rogers v. Long Island R. Co.*, 38 How. Pr. (N. Y.) 289; *Camden &c. R. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Witbeck v. Schuyler*, 31 How. Pr. (N. Y.) 97; *International &c. R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep.

we have just intimated, is often affected by custom. Thus, when it is customary to take baggage to a railway station and deposit it in the carrier's depot the carrier may become liable, although no agent's attention was expressly called to the baggage.⁸⁶ But, as elsewhere shown, where the passenger retains exclusive custody and control of the baggage, there is ordinarily no such constructive delivery or acceptance as will render the company liable for it as a common carrier.⁸⁷ The general subject of delivery and acceptance has been heretofore discussed at full length.⁸⁸

§ 2517 (1654). Rule where passenger retains custody of baggage.—The general rule in regard to the liability of common

632; *Jordan v. Fall River R. Co.*, 59 Mass. 69, 51 Am. Dec. 44. The baggage need not necessarily come into the possession of the company at the time the check is issued. *Chicago &c. R. Co. v. Clayton*, 78 Ill. 616. In England it is customary for porters to receive baggage for the company, and it is held that the liability of the company attaches as soon as it is placed in their hands for the purpose of transit. *Lovell v. London &c. R. Co.*, 45 L. J. Q. B. 476, 24 W. R. 394. But not where placed in their hands merely for custody and deposit. *Great Western R. Co. v. Bunch*, 13 App. Cas. 31, 57 L. J. Q. B. 361; *Welch v. London &c. R. Co.*, 34 W. R. 166. See also *Leach v. South Eastern R. Co.*, 34 L. T. R. 134; *Bunch v. Great Western R. Co.*, L. R. 17 Q. B. Div. 215, 26 Am. & Eng. R. Cas. 137; *Union Pac. R. Co. v. Grace*, 22 Wyo. 452, 143 Pac. 353, L. R. A. 1915B 608, and note (distinguishing *Hasbrouck v. New York &c. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D,

1150). And see as to how far carrier is bound by act of baggage-man in receiving articles as baggage, note in 10 L. R. A. (N. S.) 537.

⁸⁶ *Green v. Milwaukee &c. R. Co.*, 38 Iowa 100; *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246; *Wright v. Caldwell*, 3 Mich. 51. See also *Najac v. Boston &c. R. Co.*, 7 Allen (Mass.) 329, 83 Am. Dec. 686; *Williams v. Southern R. Co.*, 155 N. Car. 260, 71 S. E. 346.

⁸⁷ Post, § 2517. See also *Hoskins v. Southern Pac. Co.*, 148 Ill. App. 11, aff'd in 90 N. E. 669.

⁸⁸ Ante, §§ 2115, 2127. See also *Wolf v. Grand Rapids &c. R. Co.*, 149 Mich. 75, 112 N. W. 732 (agent apparently authorized to receive); *Battle v. Columbia &c. R. Co.*, 70 S. Car. 329, 49 S. E. 849 (same); *Illinois Cent. R. Co. v. Tronstine*, 64 Miss. 834, 2 So. 255 (not accepted as baggage when merely left for accommodation); *Southern R. Co. v. Bickley &c. Co.*, 119 Tenn. 528, 107 S. W. 680, 14 Ann. Cas. 910, 14 L. R. A. (N. S.) 859, 123 Am. St. 754.

carriers of goods is, as we have elsewhere seen, that they are not liable as such unless they have the sole custody of the goods. This rule has also been applied to baggage in some cases, but it should not, perhaps, be applied with the same strictness, although the rule is essentially the same in both classes of cases. If the passenger retains the sole possession and custody of the baggage, so that there is no delivery to the company, the latter is not liable for its injury or loss, at least in the absence of negligence on its part, and even though negligent it may not always be liable.⁸⁹ Thus, where a passenger kept a hand-bag in her possession and accidentally dropped it out of the car window, it was held that the company was not liable, although upon notice of the loss it refused to stop to enable her to recover it.⁹⁰

⁸⁹ Ante, § 2459; *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209; *Tower v. Utica R. Co.*, 7 Hill (N. Y.) 47, 42 Am. Dec. 36; *Bergheim v. Great Eastern R. Co.*, L. R. 3 C. P. Div. 221, 6 Cent. L. J. 222. (But see *Bunch v. Great Western R.*, 17 Q. B. Div. 215); *Devalle v. Steamboat Richmond*, 27 La. Ann. 90; *Cohen v. Frost*, 2 Duer (N. Y.) 335; *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209. See also *Railroad Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. 947; *Holmes v. Steamship Co.*, 184 N. Y. 280, 77 N. E. 21. This is particularly true in regard to clothing and other articles carried on or about the person. *The R. E. Lee*, 2 Abb. (U. S.) 49; *Carpenter v. New York &c. R. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. 644; *Clark v. Burns*, 118 Mass. 275, 19 Am. Rep. 456; *Steamboat Chrystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302. See also *Weeks v. New York &c. R. Co.*, 72 N. Y. 50, 28 Am. Rep. 104n; *Sperry v. Consoli-*

dated R. Co., 79 Conn. 565, 65 Atl. 962, 10 L. R. A. (N. S.) 907, 118 Am. St. 169, 9 Ann. Cas. 199; *Hillis v. Chicago &c. R. Co.*, 72 Iowa 228, 33 N. W. 643; *Abbott v. Bradstreet*, 55 Maine 530; *Levins v. New York &c. R. Co.*, 183 Mass. 175, 66 N. E. 803, 97 Am. St. 434; *Bursteen v. Boston Elev. R. Co.*, 211 Mass. 459, 98 N. E. 27, 39 L. R. A. (N. S.) 313, Ann. Cas. 1913B, 558; *First Nat. Bank v. Marietta &c. R. Co.*, 20 Ohio St. 259, 5 Am. Rep. 655.

⁹⁰ *Henderson v. Louisville &c. R. Co.*, 20 Fed. 430, on appeal, 123 U. S. 61, 3 Sup. Ct. 60, 31 L. ed. 92. And see further as to non-liability in case of contributory negligence. *Denver &c. R. Co. v. Johnson*. 50 Colo. 187, 114 Pac. 650, Ann. Cas. 1912C, 627; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010. But compare *Hasbrouck v. New York &c. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D, 1150; *Bonner v. Mendoza*, 4 Tex. Civ. App. Ct. App., § 234, 16 S. W. 976.

But it has been held that the mere fact that by the mutual consent of the carrier and passenger, part of his baggage is placed in the same car in which he travels, and is to a certain extent under his immediate control, will not necessarily relieve the carrier from its liability as an insurer.⁹¹ If, however, he assumes the control and custody of it, the carrier will be liable only for loss or injury caused by its failure to exercise reasonable and ordinary care.⁹² So, in any event, "if negligence of the passenger conduces to the loss," there can be no recovery.⁹³

⁹¹ *Hannibal &c. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 20 L. ed. 423; *Nashville &c. Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. 947; *Le Conteur v. London &c. R. Co.*, L. R. 1 Q. B. 54; *Richards v. London &c. R. Co.*, 7 Man. G. & S. 838, 62 Eng. Com. L. 838; *Butcher v. London &c. R. Co.*, 16 Com. B. 13; *Great Western R. Co. v. Bunch*, L. R. 13 App. Cas. 31; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Gamble v. Great Western R. Co.*, 3 Up. Can. Error and App. 163; "Baggage in the custody of the passenger," 40 Cent. L. J. 444. But see ante, § 2459; *Bergheim v. Great Eastern R. Co.*, L. R. 3 C. P. Div. 221, 6 Cent. L. J. 222; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44.

⁹² *Kinsley v. Lake Shore &c. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200n; *American Steamship Co. v. Bryan*, 83 Pa. St. 446; *Pullman Car Co. v. Pollock*, 60 Tex. 120, 5 S. W. 814, 816, 5 Am. St. 31; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010; *Williams v. Keokuk &c. Co.*, 3 Cent. L. J. 400; ante, § 2459. See also *Carpenter v. New York &c. R. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21

Am. St. 644; *Sperry v. Consolidated R. Co.*, 79 Conn. 565, 65 Atl. 962, 10 L. R. A. (N. S.) 907, 118 Am. St. 169, 9 Ann. Cas. 199; *McKee v. Owen*, 15 Mich. 115; *Humboldt, The*, 97 Fed. 656. But compare *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229; *Mudgett v. Bay State Steamboat Co.*, 1 Daly (N. Y.) 151; *Gore v. Norwich &c. Transp. Co.*, 2 Daly (N. Y.) 254.

⁹³ *Henderson v. Louisville &c. R. Co.*, 20 Fed. 430, on appeal, 123 U. S. 61, 3 Sup. Ct. 60, 31 L. ed. 92; *Wilson v. Baltimore &c. R. Co.*, 32 Mo. App. 682; *Tower v. Utica &c. R. Co.*, 7 Hill (N. Y.) 47, 42 Am. Dec. 36; *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32, 11 Am. Rep. 650; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85, 14 Am. Rep. 716; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44; *Great Western R. Co. v. Bunch*, L. R. 13 App. Cas. 31, 57 L. J. Q. B. 361, 34 Am & Eng. R. Cas. 224; ante, § 2460. But see *Bonner v. Mendoza*, 4 Tex. App. (Civ. Cas.) 392, 16 S. W. 976.

§ 2518 (1655). **Baggage checks.**—Baggage checks are checks or tickets which railway companies issue to owners of baggage when the same is received for transportation. The custom of issuing baggage checks is in force on nearly, if not quite, all railroads in this country, and is so well known and established that the courts will take judicial knowledge of the general system.⁹⁴ The most important question that arises in regard to baggage checks is as to their effect. While there is some slight conflict in the authorities the strong current of opinion is to the effect that a baggage check does not embody the contract between the carrier and the person whose baggage is being carried, but is merely a token or receipt for the baggage given to the owner to enable the baggage to be identified at the end of the line.⁹⁵ There are some authorities, however, to the effect that a baggage check partakes of the nature of a bill of lading, and is evidence of the contract between the carrier and the owner

⁹⁴ *Isaacson v. New York &c. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142, 16 Am. & Eng. R. Cas. 188; 1 *Elliott Ev.*, § 772. See also *Boston &c. R. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 868, L. R. A. 1915B, 450, Ann. Cas 1915D, 593. Fact that check does not show payment of charge for excess baggage does not preclude owner from showing it. *Davis v. Atlantic Coast Line R. Co.*, 104 S. Car. 63, 88 S. E. 273, 2 A. L. R. 102. As to baggage checked in parcel room and liability of carrier for it, see *Dodge v. Nashville &c. R. Co.* (Tenn.), 215 S. W. 274, 7 A. L. R. 1229, and note 1234.

⁹⁵ *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, 83 Am. Dec. 143; *Chicago &c. R. Co. v. Clayton*, 78 Ill. 616; *Hoskins v. Southern Pac. R. Co.*, 148 Ill. App. 11, aff'd in 90 N. E. 669; *Cleveland &c. R. Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. 523; *Ahlbeck v. St. Paul &c. R.*

Co., 39 Minn. 424, 40 N. W. 364, 12 Am. St. 661; *Mississippi &c. R. Co. v. Kennedy*, 41 Miss. 671; *Griffith v. Atchison R. Co.*, 114 Mo. App. 590, 90 S. W. 408; *Smith v. Boston &c. R. Co.*, 44 N. H. 325; *Hyman v. Central Vt. R. Co.*, 66 Hun 202, 21 N. Y. S. 119; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Isaacson v. New York &c. Railroad Co.*, 94 N. Y. 278, 46 Am. Rep. 142; *Park v. Southern Ry.*, 78 S. Car. 302, 58 S. E. 931; *Davis v. Atlantic &c. R. Co.*, 104 S. Car. 63, 88 S. E. 273, 2 A. L. R. 102. It has been held that a baggage check is not ordinarily a contract but merely a receipt and a limitation on the check does not limit the carrier's liability unless assented to by the passenger so that there is a contract fairly and honestly entered into between the parties establishing the limitation of liability. *Ferris v. Muni-*

of the baggage.⁹⁶ The possession of a baggage check is prima facie evidence of the receipt of the baggage by the carrier,⁹⁷ and of ownership or authority of the holder to receive the baggage.⁹⁸ Such evidence is not conclusive, however, but may be

cial &c. Ry. Co., 143 Minn. 90, 173 N. W. 179, also holding contrary to decision of the Supreme Court of the United States under the Hepburn Act (but see later act of Congress in U. S. Comp. St., § 8604a) that a limitation of the amount of the carrier's liability in the schedule of rates published and filed as required by statute is not effective for such purpose unless assented to by the shipper. But failure to read a check has been held to be contributory negligence. *Gonthier v. New Orleans &c. R. Co.*, 28 La. Ann. 67. The Interstate Commerce Act, in providing that the carrier shall issue a receipt or bill of lading for property received in interstate commerce, does not require the carrier to give any other receipt than the customary baggage check for baggage. *Boston &c. R. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593.

⁹⁶ "The check is in legal effect a bill of lading." *Louisville &c. R. Co. v. Weaver*, 77 Tenn. 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218. "A check for baggage answers the purpose of a bill of lading. It is evidence of the contract between the carrier and the traveler for the transportation of his baggage, and this suit was brought on that contract." *Anderson v. Wabash &c. R. Co.*, 65 Iowa

131, 21 N. W. 485, 18 Am. & Eng. R. Cas. 377. So, it has been held that where a check is given for baggage to be carried only a part of the distance called for by the ticket, the check is regarded as standing in the place of a bill of lading for the distance called for, and the carriage and delivery must be made accordingly. *Louisville &c. R. Co. v. Weaver*, 77 Tenn. 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218; *Dill v. South Carolina &c. R. Co.*, 7 Rich. L. (S. Car.) 158, 62 Am. Dec. 407; *Wilson v. Chesapeake &c. R. Co.*, 21 Gratt. (Va.) 654.

⁹⁷ *Davis v. Michigan &c. R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Dill v. South Carolina R. Co.*, 7 Rich. L. (S. Car.) 158, 62 Am. Dec. 407; *Denver &c. R. Co. v. Roberts*, 6 Colo. 333, 18 Am. & Eng. Cas. 627; *Atchison &c. R. Co. v. Brewer*, 20 Kans. 669; *Louisville &c. R. Co. v. Weaver*, 77 Tenn. 38, 42 Am. Rep. 654. See also *Savannah R. R. Co. v. McIntosh*, 73 Ga. 532; *Atlanta Baggage C. Co. v. Mezo*, 4 Ga. App. 407, 61 S. E. 844; *Chicago &c. R. Co. v. Steear*, 53 Nebr. 95, 73 N. W. 466; *Cone v. Southern Ry. Co.*, 85 S. Car. 524, 67 S. E. 779, 21 Ann. Cas. 158.

⁹⁸ *St. Louis &c. R. Co. v. Stone*, 78 Ark. 318, 95 S. W. 471, 472; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Hickox v. Naugatuck R.*, 32 Conn. 284, 83 Am. Dec. 143; *Isaacson v. New York Cent. R.*, 94 N. Y. 278, 46 Am. Rep.

explained by other evidence.⁹⁹ It has also been held that proof of the presentation of the check with a demand for the baggage at a proper time at the place of destination, and an unconditional refusal on the part of the carrier to deliver it, raises a presumption of negligence on its part and makes a prima facie case against it.¹ Where baggage is checked by an owner who intends making a journey over lines of different railroads and at the end of one line he surrenders the baggage check first received and

142; *Denver R. v. Roberts*, 6 Colo. 333. In the first case cited, which was an action for loss of a trunk, the court said: this is necessarily true from the nature of the business of a carrier of passengers and baggage. The identity of the passenger is unknown to the agents of the carrier at the destination, and the only evidence of the right to receive the baggage is the possession of the check. Learned counsel for appellee urge that this would open the door for fraud by allowing a person to present a bogus check for baggage and receive it from the possession of the carrier, and thus deprive the true owner of his property. It is sufficient to say that the carrier is not permitted to surrender the baggage upon a bogus or forged check. The carrier must, at its peril, see that the check presented is genuine and is the check issued for the piece of baggage claimed. So, in this case, it was for the jury to say whether, in the face of plaintiff's denial that she intrusted the check to Stone, it was in fact the genuine check which he exhibited to the baggage clerk at Pine Bluff; and Stone's recent possession of the check (if the jury believed that he had it), together with the other circumstances

proved in the case as to the relation between plaintiff and Stone, should have gone to the jury to enable them to determine whether the return of the truck to Haileyville was directed by authority from plaintiff.

⁹⁹ *Chicago &c. R. Co. v. Clayton*, 78 Ill. 616; *Davis v. Michigan &c. R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Hoskins v. Southern Pac. R. Co.*, 148 Ill. App. 11, aff'd. in 90 N. E. 669; see also *Park v. Southern Ry.*, 78 S. Car. 302, 58 S. E. 931. Baggage checks have also been held by some courts to be admissible in evidence to show the nature of the carrier's contract. *Wilson v. Chesapeake &c. R. Co.*, 21 Gratt. (Va.) 654. See also *Illinois Cent. R. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Milnor v. Railroad*, 53 N. Y. 363.

¹ *Atchison &c. R. Co. v. Brewer*, 20 Kans. 669; *Cleveland &c. R. Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. 523. Indeed, it was held in the last case that such a demand and refusal made a prima facie case although the check was not presented. But this last case seems to unjustly put the burden upon the company of determining at its peril who is the true owner, and require it to deliver the baggage to him without any proof of identity. The carrier has been held

receives the baggage check of the second line the latter check is evidence that the line issuing it had received the baggage represented by such check.² But at common law a through check over several different lines will not of itself, without a contract for through transportation, make the carrier responsible for loss of the baggage by one of the other connecting carriers.³ In some states statutes are in force which impose upon railway companies a penalty for failure to check baggage.⁴

liable for delivering baggage to one upon his statement that he was the owner, without presentation of the check, and if this is the law, and if the check is prima facie evidence of identity against the carrier, it is difficult to see why it is not prima facie evidence in its favor, and why it should be held liable to one who demands the baggage without presentation of the check or proof of identity or right to it. *Lafferty v. Brummond*, 74 Mich. 186, 41 N. W. 894, 895, 3 L. R. A. 287, 16 Am. St. 624.

² *Ahlbeck v. St. Paul &c. R. Co.*, 39 Minn. 424, 40 N. W. 364, 12 Am. St. 661; *Park v. Southern Ry.* 78 S. Car. 302, 58 S. E. 931; *St. Louis &c. R. Co. v. Hawkins*, 39 Ill. App. 406; *Kansas Pacific R. Co. v. Montelle*, 10 Kans. 119.

³ *Green v. New York &c. R. Co.*, 4 Daly (N. Y.) 553; *Stimson v. Connecticut &c. R. Co.*, 98 Mass. 83, 93 Am. Dec. 148; *Talcott v. Wabash R. Co.*, 89 Hun 492, 35 N. Y. S. 574. See *Louisville &c. R. Co. v. Weaver*, 77 Tenn. 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218, and compare *Fox v. Wabash &c. R. Co.*, 16 Misc. 370, 38 N. Y. S. 88.

⁴ *Norfolk &c. R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532, 1 L. R. A. 110;

Commonwealth v. Connecticut River R. Co., 15 Gray (Mass.) 447. And a carrier may be liable in a proper case even though it issues no check. *Waldron v. Chicago &c. R. Co.*, 1 Dak. 351, 46 N. W. 456; *Texas &c. R. Co. v. Weatherby*, 41 Tex. Civ. App. 409, 92 S. W. 58; *Ft. Worth &c. R. Co. v. McCarty*, 42 Tex. Civ. App. 514, 94 S. W. 178. And it was held in *Matteson v. New York &c. R. Co.*, 76 N. Y. 381, that a carrier might be liable where it gave a check for baggage received, even though the passenger had bought no ticket. But a rule that no check shall be issued until a ticket has been procured has been held reasonable. *Coffee v. Louisiana &c. R. Co.*, 76 Miss. 569, 25 So. 157, 45 L. R. A. 112, 71 Am. St. 535. See also *Lake Shore &c. R. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319. In *Sullivan v. Southern Ry.*, 74 S. Car. 377, 54 S. E. 586, it is held that a passenger is entitled to have his baggage checked through to his destination and can not be required to recheck his baggage at the point of junction with the connecting carrier over whose line he has bought from the initial carrier a through ticket.

§ 2519 (1656). **Baggage on one train and owner on another.**— In the absence of anything to the contrary, the general rule is that the implied contract to carry a passenger's baggage which arises from the purchase of a ticket is that the passenger and his baggage shall be transported by the same train;⁵ and the carrier is liable in a proper case for delay or loss of the baggage caused by its failure to so transport it.⁶ It has been held in a number of cases that the purchase of a ticket usually entitles a passenger only to transportation for himself and his baggage on the same train and nothing more;⁷ and where baggage is received after the passenger has gone, the baggage, if carried at all, is usually carried as freight, and the carrier is entitled to compensation for such carriage.⁸ But it is said with much force that, under the modern methods of checking baggage, there is now no good reason, if there ever was, for holding as a matter of law that a railroad carrier is not liable except as a gratuitous bailee. Where

⁵ Toledo &c. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462; Wilson v. Grand Trunk &c. R. Co., 56 Maine 60, 96 Am. Dec. 435, 8 Am. Law Reg. (N. S.) 398; Glasco v. New York &c. R. Co., 36 Barb. (N. Y.) 557; Perry v. Seaboard Air Line Co., 171 N. Car. 158, 88 S. E. 156, L. R. A. 1916 E, 478, 481 (quoting text); Marshall v. Pontiac &c. R. Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650 (criticised in note as last reported).

⁶ Wald v. Pittsburgh &c. R. Co. 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. 332; Conheim v. Chicago &c. Ry. Co., 104 Minn. 312, 116 N. W. 581, 17 L. R. A. (N. S.) 1091, 124 Am. St. 623, 15 Ann. Cas. 389. And authorities cited in last preceding note. See also Kansas City &c. R. Co. v. Fugatt, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916a, 545 and note.

⁷ Blumenthal v. Maine &c. R. Co., 79 Maine 550, 11 Atl. 605, 34 Am. & Eng. R. Cas. 247; Beecher v. Great Eastern R. Co., L. R. 5 Q. B. 241, 18 W. R. 627. See also Bradley v. Chicago &c. R. Co., 147 Ill. App. 397; Carlisle v. Grand Trunk R. Co., 25 Ont. L. R. 372; Wood v. Maine Cent. R. Co., 98 Maine 98, 56 Atl. 457, 99 Am. St. 339; and authorities cited in first note to this section.

⁸ Wilson v. Grand Trunk Railway Co., 56 Maine 60, 96 Am. Dec. 435, 8 Am. Law Reg. (N. S.) 398; Collins v. Boston &c. R. Co., 10 Cush. (Mass.) 506; Graffam v. Boston &c. R. Co., 67 Maine 234. See also Elvira Harbeck, The, 2 Blatchf. (U. S.) 336; Hicks v. Wabash R. Co., 131 Iowa 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235n; compare McKibbin v. Wisconsin Cent. R. Co., 100 Minn. 270, 110 N. W. 964; 8 L. R. A. (N. S.) 489, 117 Am. St. 689.

the passenger does not go on the same train even though the carrier has received and regularly checked the baggage. Most of the recent decisions take this view and hold that the liability of such carrier where there is no valid contract or binding rule to the contrary, is the same in general, no matter whether the passenger goes on the same train with his baggage or not.⁹ So, even though the company may ordinarily be under the duty to carry baggage on the same train on which the owner is carried, and even though a passenger may not ordinarily have the right to insist that it should be carried on another train, yet there are cases in which the carrier must carry the baggage as such although the owner does not accompany it on the same train. Thus, where the carrier receives the baggage in ample time to send it by the same train on which the owner takes passage, but fails to do so, it is still under an obligation to transport it on subsequent trains as baggage.¹⁰ And where the company makes such a contract on the purchase of a ticket that it is bound to transport the baggage at all events, it is bound to exercise the same degree of care in the transportation of such baggage, whether the same goes on a preceding train or on a subsequent train to that on which the owner goes.¹¹ So,

⁹ *Alabama &c. R. Co. v. Knox*, 184 Ala. 485, 63 So. 538, 49 L. R. A. (N. S.) 411; *St. Louis &c. Ry. Co. v. De Witt*, 115 Ark. 578, 171 S. W. 906; *McKibbin v. Wisconsin &c. R. Co.*, 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489, 117 Am. St. 689; *Larned v. Central R. Co.*, 81 N. J. L. 571, 79 Atl. 289; *Moffatt v. Long Island R. Co.*, 123 App. Div. 719, 107 N. Y. S. 1113; note in L. R. A. 1915E, 281. We are inclined to regard this as the better rule, but we do not think it should be carried so far as a few of the courts have carried it and extended to cases in which the owner of the baggage did not become and did not intend to become a passenger on the carrier's road. See

ante §§ 2514, 2515; *Crout v. Yazoo &c. R. Co.* 131 Tenn. 667, 176 S. W. 1027, L. R. A. 1915E 281. A good statement of the rule and its limitation is that made in the Georgia case cited in note 12 *infra*.

¹⁰ *Wilson v. Grant Trunk Railway Co.*, 56 Maine 60, 96 Am. Dec. 435, 8 Am. Law Reg. (N. S.) 398; *Warner v. Burlington &c. R. Co.*, 22 Iowa 166, 92 Am. Dec. 389.

¹¹ *Warner v. Burlington &c. R. Co.*, 22 Iowa 166, 92 Am. Dec. 389; *Wilson v. Chesapeake &c. R. Co.*, 21 Gratt. (Va.) 654. See also *St. Louis &c. Ry. Co. v. De Witt*, 115 Ark. 578, 171 S. W. 906; *Williams v. Central R. Co.*, 93 App. Div. (N. Y.) 582, 88 N. Y. S. 434; *Adger v. Blue Ridge R.*, 71

on the other hand, where a valid contract is made on the purchase of a mileage ticket, at a reduced rate, that the baggage will be transported only over such lines and between such stations as the purchaser will travel on the day the baggage is presented for checking or only in case he will travel on the same train, the purchaser who intentionally fails to comply with such contract can not hold the carrier, who is without fault, liable as the carrier of baggage of a passenger who goes on the same train, but only, it seems, as a gratuitous bailee.¹² In order that there may be a recovery for lost or injured baggage, or that it should be carried as such, it is not always necessary, even under the general rule which requires the passenger to go on the same train with the baggage, that the owner himself should accompany the baggage. Some person who is a member of the owner's family and interested in the baggage may accompany it, and if the baggage is lost or injured the holder of the title to the baggage may recover.¹³ But it has been held that where a servant, who pays his own fare, carries with him a parcel of baggage belonging to his master, who travels on a later train, and the baggage is lost, the master can not recover.¹⁴

§ 2520 (1656a). **Baggage on street cars.**—The very nature of ordinary street railway transportation precludes the carrier from assuming control of such baggage as its passengers may bring with them into the cars, at least without limitation, and it has

S. Car. 213, 50 S. E. 783, 110 Am. St. 568; Ft. Worth R. Co. v. McCarty, 42 Tex. Civ. App. 514, 94 S. W. 178.

¹² Southern R. Co. v. Dinkins & Hardware Co., 139 Ga. 332, 77 S. E. 147, 43 L. R. A. (N. S.) 806; Crout v. Yazoo & R. Co., 131 Tenn. 667, 176 S. W. 1027, L. R. A. 1915E, 281. In the first case cited this rule is applied even though the court took the view that, in the absence of such a contract, the traveler is not bound to travel on the same train with his baggage, provided he uses the ticket with-

in such time, after checking the baggage as to indicate that the checking of the baggage and the travel relate to the same journey.

¹³ Curtis v. Delaware & R. Co., 74 N. Y. 116. See also Battle v. Columbian & R. Co., 70 S. Car. 329, 49 S. E. 849.

¹⁴ Becher v. Great Eastern R. Co., L. R. 5 Q. B. 241, 39 L. J. Q. B. 122. But compare Meux v. Railway Co., (1895), 2 Q. B. 387, 64 L. J. Q. B. 657.

been held that the street railway company will not be liable for such baggage unless it binds itself by a special agreement to that effect.¹⁵ "It is a matter of common knowledge that electric street passenger cars are never furnished, either in the manner in which they are constructed or in the way in which they are operated, with facilities and means to enable the companies themselves to take into their custody and control the baggage of passengers. The well-known facts that there are in such cars no places for the separate storage of baggage beyond the control of its owners, and that the duties of the conductor and motorman, who are the only agents of the company upon the cars, necessarily prevent them from taking charge of baggage, indicate that the companies do not assume control of such baggage as passengers may bring with them into such cars. When the carrier does not take full possession of the baggage, and it remains under the control of the passenger, the former, in the absence of special agreement, does not assume the common carrier's liability of an insurer, but becomes responsible only when it is shown that the carrier has failed to exercise reasonable care to protect from loss or injury such baggage or property as the passenger has the right to bring with him into the car."¹⁶

§ 2521 (1657). Rule where baggage is received by mistake.—As a general rule, at least, "no man can have the care of another's property thrust upon him, without his invitation or consent, in such a way as to raise a duty calling for the performance of positive acts of protection." It is therefore held that where baggage is delivered to a carrier by the owner, who erro-

¹⁵ *Sperry v. Consolidated R. Co.*, 79 Conn. 565, 65 Atl. 962, 10 L. R. A. (N. S.) 907, 118 Am. St. 169, 9 Ann. Cas. 119..

¹⁶ *Sperry v. Consolidated R. Co.*, 79 Conn. 565, 65 Atl. 962, 10 L. R. A. (N. S.) 907, 118 Am. St. 169, 9 Ann. Cas. 199, citing *Henderson v. Louisville &c. R. Co.*, 123 U. S. 61, 8 Sup. Ct. 60, 31 L. ed. 92; *Voss v. Palace Car Co.*, 16 Ind. App. 271, 43

N. E. 20, 44 N. E. 1010; *Kingsley v. Lake Shore &c. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200; *Whicher v. Boston &c. R. Co.*, 176 Mass. 275, 57 N. E. 601, 79 Am. St. 314; *Carpenter v. New York &c. R. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. 644. So, as already shown, such a carrier may make reasonable regulations as to what may be taken on the car as baggage.

neously supposes that his ticket entitles him to have it transported by such carrier, and the latter receives it under the mistaken belief that the owner had bought a ticket over its own road entitling him to have it so transported, when, in fact, he had purchased his ticket over another road, such carrier is not liable even for negligence in transporting the baggage, and the only duty it owes the owner with reference thereto is to abstain from willful or wanton injury to it.¹⁷ If, however, the mistake occurs solely on account of the fault of the railroad company, as, for instance, where it takes baggage checked over another route, or not delivered to it, such company is doubtless liable at least for loss or injury caused by its failure to exercise ordinary care.¹⁸

§ 2522 (1658). **Baggage shipped over connecting roads.**—The subject of connecting carriers of freight has been fully treated elsewhere,¹⁹ and, as the rules in regard to baggage are, in most respects, substantially the same, it will be unnecessary here to treat the subject at length. A railroad company is not bound to transport passengers and their baggage beyond its own terminus,²⁰ and may, as we shall hereafter see, in the absence of

¹⁷ *Beers v. Boston &c. R. Co.*, 67 Conn. 417, 34 Atl. 541, 32 L. R. A. 535, 52 Am. St. 293. See also *Hicks v. Wabash R. Co.*, 131 Iowa 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235; *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845; *Weed v. Railroad*, 19 Wend. (N. Y.) 534; ante §§ 2514, 2515; *Stimson v. Connecticut R. Co.* 98 Mass. 83, 93 Am. Dec. 140.

¹⁸ See *Fairfax v. New York &c. R. Co.*, 73 N. Y. 167, 170, 29 Am. Rep. 119. See also *Isaacson v. New York &c. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142; *Estes v. St. Paul &c. R. Co.*, 55 Hun 605, 7 N. Y. S. 863; *Toledo &c. R. Co. v. Lapp*, 6 Ind. App. 304, 33 N. E. 462.

¹⁹ Ante, chapters LXVII, LXVIII.

²⁰ *Mauritz v. New York &c. R. Co.*, 23 Fed. 765, 21 Am. & Eng. R. Cas.

286; *Central Trust Co. v. Wabash &c. R. Co.*, 31 Fed. 247; *Harris v. Howe*, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. 862, 39 Am. & Eng. R. Cas. 498; *Pennsylvania R. Co. v. Schwarzenberger*, 45 Pa. St. 208, 84 Am. Dec. 490. But where a passenger bought a ticket from a point on the carrier's line to a station on another line with which a connection was made at a junctional point, it was held that the carrier must check the baggage to the point of destination and cannot require the passenger to recheck at the junctional point and that where the ticket agent refused to so check the baggage, because of the rules of the company, and, on return of the check to the junctional point, threw the baggage out of the

any valid statute to the contrary, limit its liability for baggage by contract to its own line, as in the case of freight. But, as the carriage of baggage is considered as an incident to the contract for the carriage of its owner, a through contract for the transportation of a passenger over several connecting lines is a through contract for the carriage of his baggage, and the initial company so contracting, in the absence of any valid limitation, may be held liable for the loss or destruction of the baggage on any of the lines.²¹ The passenger may, however, if he elects to do so, proceed directly against the company on whose line the baggage was lost.²² And, as we have elsewhere shown, at com-

car and refused to take further charge of it, it authorized a recovery of punitive damages by the passenger. *Sullivan v. Southern R. Co.*, 74 S. Car. 377, 54 S. E. 586.

²¹ *Hawley v. Screven*, 62 Ga. 347, 35 Am. Rep. 126; *Wolff v. Central &c. R. Co.*, 68 Ga. 653, 45 Am. Rep. 501; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Najac v. Boston &c. R. Co.*, 89 Mass. 329, 83 Am. Dec. 686; *Talcott v. Wabash R. Co.*, 66 Hun 456, 21 N. Y. S. 318, 159 N. Y. 461, 54 N. E. 1; *Hart v. Rensselaer R. Co.*, 8 N. Y. 37; *Burnell v. New York &c. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Baltimore &c. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. St. 617, 3 Am. & Eng. R. Cas. 246; *Louisville &c. R. Co. v. Weaver*, 77 Tenn. 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218; *Wilson v. Chesapeake &c. R. Co.*, 21 Gratt. (Va.) 654; *Gomm v. Ore. R. &c. Nav. Co.*, 52 Wash. 685, 101 Pac. 361, 25 L. R. A. (N. S.) 537; *Candee v. Pennsylvania R. Co.*, 21 Wis. 582, 94 Am. Dec. 566; *Smith v. Grand Trunk R. Co.*, 35 U. C. Q. B. 547; *Mytton v. Midland R. Co.*, 4 H. & N. 615. See also *Bush v. Beauchamp*,

132 Ark. 582, 201 S. W. 828; *Kansas City &c. R. Co. v. Washington*, 74 Ark. 9, 85 S. W. 406, 109 Am. St. 61; *House v. Chicago &c. R. Co.*, 30 S. Dak. 321, 138 N. W. 809, Ann. Cas. 1915C, 1045 (under Carmack amendment). But compare *Mauritz v. New York &c. R. Co.*, 23 Fed. 765.

²² *Savannah &c. R. Co. v. McIntosh*, 73 Ga. 532, 27 Am. & Eng. R. Cas. 269; *Davis v. Michigan &c. R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Chicago &c. R. Co. v. Fahey*, 52 Ill. 81; *Atchison &c. R. Co. v. Roach*, 35 Kans. 740, 12 Pac. 93, 57 Am. Rep. 199, 27 Am. & Eng. R. Cas. 257; *Baltimore &c. Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575; *Philadelphia &c. R. Co. v. Harper*, 29 Md. 330; *McCormick v. Hudson River &c. R. Co.*, 4 E. D. Smith (N. Y.) 181; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Louisville &c. R. Co. v. Weaver*, 77 Tenn. 38, 42 Am. Rep. 654, 16 Am. & Eng. R. 218, 225; *Hooper v. London &c. R. Co.*, 50 L. J. Q. B. Div. 103, 29 W. R. 241; ante, § 2187. See also *Fairfax v. New York Cent. R. Co.*, 73 N. Y. 167, 29 Am. Rep. 119; *Montgomery &c. R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483.

mon law, a railroad company, in selling a ticket over several different lines, may be acting simply as agent for the other lines, so that the contract will not be a contract for through transportation on its part either for the passenger or his baggage.²³ So, it has been held that the mere fact that the initial carrier issues a through check is not sufficient to make it liable beyond its own line if the passenger's ticket is not a through ticket, or the liability of the company is expressly limited to its own line.²⁴ But, in other cases, baggage checks have been held admissible to show the nature of the carrier's undertaking.²⁵ In a recent case, although the ticket was what is known as a coupon ticket, over three roads, it was held that evidence that each coupon contained the initials of all the roads, that when the plaintiff reached the end of the first carrier's line he received a check from the second company over both its line and that of the last company, and was charged for extra weight of the baggage, and that the baggage went through from that point with him on the same train to his destination was sufficient to authorize a finding that the undertaking was a joint one and that the last two companies were jointly liable for articles which had been taken out of the trunk at some unknown place after it had left the line of

²³ Ante, § 2420. See also § 2162, et seq; *Central Trust Co. v. Wabash &c. R. Co.*, 31 Fed. 247; *Talcott v. Wabash R. Co.*, 159 N. Y. 461, 54 N. E. 1; *Felder v. Columbia &c. R. Co.*, 21 S. Car. 35, 53 Am. Rep. 656.

²⁴ *Green v. New York &c. R. Co.*, 12 Abb. Pr. N. S. (N. Y.) 473; *Milnor v. New York &c. R. Co.*, 53 N. Y. 363; *Marmorstein v. Pennsylvania R. Co.*, 13 Misc. 32, 34 N. Y. S. 97. One reason for this, as said in the last case just cited, is that a baggage-master as such has no authority to contract for carriage beyond the line of his own company. Where tickets over a certain route were presented to the baggage-master, who agreed to check over that route, and

he checked the baggage over a different connecting road, it was held that the undertaking of the company was to deliver to the connecting carrier over the route named in the tickets and that it remained liable as an insurer. *Isaacson v. New York Cent. &c. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142, 16 Am. & Eng. R. Cas. 188. See also *Rome R. Co. v. Wimberly*, 75 Ga. 316, 58 Am. Rep. 468.

²⁵ *Wilson v. Chesapeake &c. R. Co.*, 21 Gratt. (Va.) 654; *Anderson v. Wabash &c. R. Co.*, 65 Iowa 131, 21 N. W. 485; *Louisville &c. R. Co. v. Weaver*, 77 Tenn. 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218.

the first carrier, which was not liable because it had expressly contracted against liability beyond its own line.²⁶ Where there is a valid contract limiting the liability of the first carrier to its own line, or in any case in which the passenger sues one of the connecting carriers, it is frequently difficult to locate the place of the loss or injury to the baggage. In such a case the last carrier has sometimes been held liable where the baggage started in good condition and was delivered by it in bad condition, upon the ground that it might be presumed to have reached it in the condition in which it started;²⁷ but proof of the mere failure of the last carrier to deliver any of the baggage, without proof that it ever came into its hands, is insufficient to entitle the passenger to recover from it.²⁸

²⁶ *Peterson v. Chicago &c. R. Co.*, 80 Iowa 92, 45 N. W. 573. But compare *Montgomery &c. R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483, 22 Am. & Eng. R. Cas. 411. See also *Louisville &c. R. Co. v. Weaver*, 9 Lea (77 Tenn.) 38, 42 Am. Rep. 654; *Gulf &c. R. Co. v. Ions*, 3 Tex. Civ. App. 619, 22 S. W. 1011; *Felder v. Columbia &c. R. Co.*, 21 S. Car. 35, 53 Am. Rep. 656; *Texas &c. R. Co. v. Ferguson*, 1 Tex. App. (Civ. Cas.) 724, 9 Am. & Eng. R. Cas. 724; *Wolff v. Central R. Co.*, 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441.

²⁷ *Jacobs v. Tutt*, 33 Fed. 412; *Montgomery &c. R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483, 22 Am. & Eng. R. Cas. 411; *Savannah &c. R. Co. v. McIntosh*, 73 Ga. 532; *Peterson v. Chicago &c. R. Co.*, 80 Iowa 92, 45 N. W. 573; *Lin v. Terre Haute &c. R. Co.*, 10 Mo. App. 125; *McCormick v. Hudson River &c. R. Co.*, 4 E. D. Smith (N. Y.) 181; *Myerson v. Woolverton*, 61 N. Y. St. 78,

29 N. Y. S. 737; *Caldwell v. Erie Transfer Co.*, 67 N. Y. St. 843; 33 N. Y. S. 993; *International &c. R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541. See also *Moore v. New York &c. R. Co.*, 173 Mass. 335, 53 N. E. 816, 73 Am. St. 298. But see as to effect of Carmack and Cummins' amendments, last section of this chapter.

²⁸ *Kessler v. New York &c. R. Co.*, 61 N. Y. 538; *Stimson v. Connecticut River R. Co.*, 98 Mass. 83, 93 Am. Dec. 140; *Felder v. Columbia &c. R. Co.*, 21 S. Car. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264; *Texas &c. R. Co. v. Berry*, 31 Tex. Civ. App. 1, 71 S. W. 326. But see *Central of Georgia R. Co. v. Dean* (Ga.), 101 S. E. 771, 102 S. E. 45. *Savannah &c. R. Co. v. McIntosh*, 73 Ga. 532, 27 Am. & Eng. R. Cas. 269, with which compare *East Tenn. &c. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809. See also *Ringwalt v. Wabash R. Co.*, 45 Nebr. 760, 64 N. W. 219, §§ 2187, 2190.

§ 2523 (1658a). **Connecting roads—Joint agent—Custom.**—In a recent case the following facts appeared. It had been the custom of the Missouri Pacific Railway Company for some years to stop all of its passenger trains to discharge passengers and their baggage at the station of the Union Pacific Railway Company in South Omaha, over a part of whose lines it operated its trains, and it had been the custom of the agent of the Union Pacific Railway Company to remove and care for the baggage coming from all Missouri Pacific passenger trains the same as for that from the Union Pacific trains, except that all checks on baggage from the Missouri Pacific trains were taken off before the baggage was removed from the trains. A portion of the baggage of a passenger reaching South Omaha on the Missouri Pacific train in the evening was placed in the baggage room at the Union Pacific station by the agent, according to the usual custom. When it was called for in the morning it could not be found. The court held that the agent of the Union Pacific Railway Company was the agent of the Missouri Pacific Railway Company in the receipt and care of such baggage; that the liability of the Missouri Pacific Railway Company was that of warehouseman; and, that since no explanation was given of the loss of the baggage, the presumption arose that the bailee was guilty of negligence.²⁹

§ 2524 (1659). **Delivery by company—Duty of owner.**—As already shown, it is the duty of a railroad company to have a passenger's baggage ready for delivery to him at a proper place as soon as it reasonably can after his arrival at his destination, and it is the duty of the passenger to call for it within a reasonable time.³⁰ As a general rule this reasonable time does not extend to "another day or another occasion."³¹ A passenger has

²⁹ Campbell v. Missouri Pac. Ry Co., 78 Nebr. 479, 111 N. W. 126.

³⁰ Ante, § 2513; Patscheider v. Great Western R. Co., L. R. 3 Exch. Div. 153, 26 W. R. 268; Ouimit v. Henshaw, 35 Vt. 605; Hoeger v. Chicago & C. R. Co., 63 Wis. 100, 23 N. W. 435, 53 Am. Rep. 271; Vineberg

v. Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271.

³¹ Jacobs v. Tutt, 33 Fed. 412; Wiegand v. Central R. Co., 75 Fed. 370, 79 Fed. 991; Kansas City & C. R. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. 111; Chicago & C. R. Co. v. Addizoat,

a right to have his baggage delivered, in a proper case, at any regular station at which the train stops, and a regulation that baggage will be delivered at only one of the several regular stations at which the train stops in a large city has been held unreasonable.⁸² A delivery to the wrong person upon a forged order, it has been held, will not discharge the company.⁸³ It has also been held that where it is the custom to deliver the baggage into a carriage, and the baggage is lost while a railway porter is so delivering it, the company is liable.⁸⁴ But the general rule is that where the passenger, after arriving at his destination, takes charge of the baggage himself, or, after it is there delivered to him, either actually or constructively re-delivers it to a third person, or even to one of the company's employes as his agent, the company will not usually be liable for its loss.⁸⁵ If a rail-

17 Bradw. (Ill. App.) 632; Louisville &c. R. Co. v. Mahan, 8 Bush (Ky.) 184; Jones v. Norwich &c. Transp. Co., 50 Barb. (N. Y.) 193; Roth v. Buffalo &c. R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Vineberg v. Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271; Penton v. Grand Trunk R. Co., 28 U. C. Q. B. 367. But see Burnell v. New York &c. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Prickett v. New Orleans &c. Line, 13 Mo. App. 436; Burgevin v. New York &c. R. Co., 69 Hun 479, 23 N. Y. S. 415, 52 N. Y. St. 617; Mote v. Chicago &c. R. Co., 27 Iowa 22, 1 Am. Rep. 212; Cary v. Cleveland &c. R. Co., 29 Barb. (N. Y.) 35; Felton v. Chicago &c. R. Co., 86 Mo. App. 332. As already shown in another section the question as to what is a reasonable time is usually, although not always, one for the jury under the circumstances shown in the particular case.

⁸² Pittsburgh &c. R. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. 517. But see Howell v. Grand Trunk R. Co., 92 Hun 423, 36 N. Y. S. 544.

⁸³ Powell v. Myers, 26 Wend. (N. Y.) 591. See also Brown v. Canadian Pac. R. Co., 3 Manitoba, 496. But compare Mattison v. New York &c. R. Co., 57 N. Y. 552. And see Waldron v. Chicago &c. R. Co., 1 Dak. 351, 46 N. W. 456.

⁸⁴ Butcher v. London &c. R. Co., 16 C. B. 13, 3 W. R. 409. Explained in Bergheim v. Great Eastern R. Co., L. R. 3, C. P. Div. 221, 26 W. R. 318. See also Mobile &c. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Voss v. Wagner P. C. Co., 16 Ind. App. 271, 43 N. E. 20; Fisher v. Geddes, 15 La. Ann. 14; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Richards v. London &c. R. Co., 7 Com. B. 830, 62 Eng. Com. L. 837.

⁸⁵ Hodkinson v. London &c. R. Co., L. R. A. 14 Q. B. Div. 228, 32 W. R. 662; Midland &c. R. Co. v. Brom-

road company carries baggage beyond the proper station and puts it in its baggage room at another station, from which it is stolen, it is liable for the loss,³⁶ and, as elsewhere shown, it may be liable as a warehouseman for damages caused by its failure to exercise ordinary care after it had the baggage ready for delivery, although the passenger failed to call for it at that time.³⁷

§ 2525 (1660). **Liability for loss, injury or delay.**—We have already considered the liability of a railroad company generally in regard to baggage, and have shown when it is responsible as a common carrier, when as a warehouseman, and when merely as a gratuitous bailee.³⁸ It may be liable in tort for the loss of a passenger's baggage, although his fare was paid by another,³⁹ and it has been held that a married man may recover for the loss of baggage furnished by him for the use of his wife and children as well as that used by himself, although he goes on one train and the baggage goes with the family on another,⁴⁰ and that where the merchandise or extra baggage is knowingly received by the company and paid for by the passenger as the property of another, for whom he is agent, the principal may recover for its loss.⁴¹ But it has been rightly held, on the other

ley, 17 C. B. 372; *Minor v. Chicago &c. R. Co.*, 19 Wis. 40, 88 Am. Dec. 670; *Mulligan v. Northern &c. Co.*, 4 Dak. 315, 29 N. W. 659, 27 Am. & Eng. R. Cas. 33; *Texas &c. R. Co. v. Capps*, 2 Tex. App. (Civ. Cases) 35, 16 Am. & Eng. R. Cas. 118. But see *Voss v. Cleveland &c. R. Co.*, 16 Ind. App. 271, 43 N. E. 20; *Curtis v. Avon &c. R. Co.*, 49 Barb. (N. Y.) 148. See ante §§ 2513, 2516.

³⁶ *Toledo &c. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221.

³⁷ Ante, § 2513.

³⁸ Ante, §§ 2512, 2513, 2514, 2515.

³⁹ *Nugent v. Boston &c. R. Co.*, 80 Maine 62, 12 Atl. 797, 800, 6 Am. St. 151, citing *Marshall v. York &c. R. Co.*, 11 C. B. (73 E. C. L.) 655.

See also *Catlin v. Adirondack Co.*, 20 Hun (N. Y.) 19; *Flint &c. R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453; *Macklin v. New Jersey &c. Co.*, 7 Abb. Pr. N. S. (N. Y.) 229.

⁴⁰ *Curtis v. Delaware &c. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271. See also *Richardson v. Louisville &c. R. Co.*, 85 Ala. 559, 5 So. 308, 2 L. R. A. 716; *Baltimore &c. Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575; *Battle v. Columbian &c. R. Co.*, 70 S. Car. 329, 49 S. E. 849; *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773, 113 Am. St. 533.

⁴¹ *Sloman v. Great Western R. Co.*, 67 N. Y. 208; *Talcott v. Wabash R.*

hand, that a railroad company is not liable for the goods of one who is not a passenger which are carried in the trunk of a passenger without its knowledge.⁴² In another case passengers who had bought a ticket jointly and received a joint check for their baggage, which consisted of a chest owned by them jointly and articles therein owned by them in severalty, were permitted to maintain a joint action.⁴³ Where baggage is lost or injured while in the custody of a railroad company as a common carrier, the presumption is generally against the company.⁴⁴ At common law, under the rule that parties in interest were incompetent, it was held in some jurisdictions that a passenger could not testify as to the contents and value of baggage in a trunk or the like,⁴⁵ but in others such evidence was admitted on the ground of necessity,⁴⁶ and it is certainly admissible now, in most

Co., 159 N. Y. 461, 54 N. E. 1; *Fort Worth &c. R. Co. v. I. B. Rosenthal Millinery Co.* (Tex. Civ. App.), 29 S. W. 196. But compare *Weed v. Saratoga &c. R. Co.*, 19 Wend. (N. Y.) 534; *Gurney v. Grand Trunk R. Co.*, 59 Hun 625, 14 N. Y. S. 321, 138 N. Y. 638, 34 N. E. 512; *Southern &c. R. Co. v. Clark*, 52 Kans. 398, 34 Pac. 1054; *Trimble v. New York &c. R. Co.*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; ante §§ 2506, 2508.

⁴² *Gurney v. Grand Trunk R. Co.*, 59 Hun 625, 14 N. Y. S. 321; *Talcott v. Wabash R. Co.*, 66 Hun 456, 21 N. Y. S. 318; *Becher v. Great Eastern R. Co.*, L. R. 5 Q. B. 241, 18 W. R. 627; *Dunlap v. International &c. Co.*, 98 Mass. 371.

⁴³ *Anderson v. Wabash &c. R. Co.*, 65 Iowa 131, 21 N. W. 485. But see *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845.

⁴⁴ *Montgomery &c. R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483, 22

Am. & Eng. R. Cas. 411; *Chicago &c. R. Co. v. Conklin*, 32 Kas. 55, 3 Pac. 762; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Burnell v. New York &c. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Matteson v. New York &c. R. Co.*, 76 N. Y. 381; *McCormick v. Pennsylvania R. Co.*, 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6; *Camden &c. R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481; *Pelland v. Canadian Pac. R. Co.*, 7 Mont. L. R. (S. C.) 131. But compare *Wald v. Louisville &c. R. Co.*, 92 Ky. 645, 18 S. W. 850; *McQuesten v. Sanford*, 40 Maine 117; *Ringwalt v. Wabash R. Co.*, 45 Nebr. 760, 64 N. W. 219. See 3 Elliott Ev. § 1905; note in 99 Am. St. 390.

⁴⁵ *Snow v. Eastern R. Co.*, 12 Met. (Mass.) 44; *Wright v. Caldwell*, 3 Mich. 51; *Bingham v. Rogers*, 6 Watts & S. (Pa.) 495; *Dill v. South Carolina R. Co.*, 7 Rich. L. (S. Car.) 158, 62 Am. Dec. 407.

⁴⁶ *Cadwallader v. Grand Trunk R.*

jurisdictions at least, under the modern statute and rules of evidence. Damages may be recovered, in a proper case, for delay as well as for loss or injury to baggage.⁴⁷ But it has been held that a carrier is not liable for the loss of baggage caused by an unforeseen and unprecedented flood, although the flood would not have been encountered but for the carrier's delay.⁴⁸ It is the holding of a recent English case that a carrier which

Co., 9 Low. Can. 169; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460; McGill v. Rowand, 3 Pa. St. 451, 45 Am. Dec. 654; Mad River &c. R. Co. v. Fulton, 20 Ohio 318. See also Illinois &c. R. Co. v. Taylor, 24 Ill. 323; Davis v. Michigan &c. R. Co., 32 Ill. 278, 74 Am. Dec. 151; Douglass v. Montgomery &c. R. Co., 37 Ala. 638, 79 Am. Dec. 76; Sugg v. Memphis &c. Packet Co., 40 Mo. 442.

⁴⁷ Kansas City &c. Ry. Co. v. Fugatt, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916A, 545 (and note on measure of damages for delay); Gulf &c. R. Co. v. Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303; Gulf &c. R. Co. v. Douglas (Tex. Civ. App.), 30 S. W. 487; Texas &c. R. Co. v. Taylor, 3 Tex. App. (Civ. Cas.) 234; International &c. R. Co. v. Philips, 63 Tex. 590. But the company will not always be liable for delay merely because it does not carry the baggage on the same train with the passenger. St. Louis &c. R. Co. v. Ray, 13 Tex. Civ. App. 628, 35 S. W. 951. As to the measure of damages for loss or injury, see Gulf &c. R. Co. v. Jackson, 4 Tex. App. (Civ. Cas.) 73, 15 S. W. 128; New Orleans &c. R. Co. v. Moore, 40 Miss. 39; Spooner v. Hannibal &c. R. Co., 23 Mo. App. 403; Fairfax v. New York &c. R. Co., 73

N. Y. 167, 29 Am. Rep. 119; Texas &c. R. Co. v. Ferguson, 1 Tex. App. (Civ. Cas.) 724, 9 Am. & Eng. R. Cas. 395, note in 99 Am. St. 385, 386; Lake Shore &c. R. Co. v. Warren, 3 Wyo. 134, 6 Pac. 724. Not liable for profits which passenger might have made by use of article where carrier has no notice of the special circumstances rendering the use valuable. Milhous v. Atlantic &c. R. Co., 75 S. Car. 351, 55 S. E. 764; Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356; Turner v. Southern R., 75 S. Car. 58, 54 S. E. 825. The carrier was held not liable for delay in delivery of sample case in McElroy v. Iowa Cent. R. Co., 133 Iowa 544, 110 N. W. 915. But in Kansas &c. R. Co. v. Fugatt, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916A, 545, it was held liable for such delay in forwarding sample trunks.

⁴⁸ Wald v. Pittsburgh &c. R. Co., 60 Ill. App. 460. In another recent case it is also held that where the baggage is lost in such a flood there is no presumption of negligence against the carrier and the burden of proving negligence rests upon the plaintiff. Long v. Pennsylvania R. Co., 147 Pa. St. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. 732.

accepts commercial travelers' samples for carriage, as luggage, by passenger train, under a condition, contained in the company's time-table, that the company is to be relieved from all liability for loss, damage, misdelivery, or delay, is nevertheless liable under Railway & Canal Traffic Act 1854, § 7, for the loss of such samples through the negligence of its servants, unless such condition is contained in a special contract which is signed by the consignor, as required by the section.⁴⁹

§ 2526 (1661). **Limiting liability.**—A railroad company, in the absence of any statute to the contrary, although it sells a through ticket for a continuous passage over several different lines, may, by a stipulation in the contract of carriage, limit its liability for loss or injury to baggage to such as may occur on its own line.⁵⁰ So, it has been held that carriers of passengers may, by specific regulations brought to the knowledge of the passenger, "protect themselves against liability as insurers for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk, provided the regulations are reasonable, and not inconsistent with any statute or their duties to the public."⁵¹ It has been held by some courts,

⁴⁹ *Wilkinson v. Lancashire & Y. R.*, 75 L. J. K. B. 603 [1906], 2 K. B. 619, 94 L. T. 820, 22 Times L. 591.

⁵⁰ *Central Trust Co. v. Wabash & C. R. Co.*, 31 Fed. 247, 31 Am. & Eng. R. Cas. 103; *Peterson v. Chicago & N. W. R. Co.*, 80 Iowa 92, 45 N. W. 573; *Griffith v. Atchison & C. R. Co.*, 114 Mo. App. 591, 90 S. W. 408; *Nealon v. Grand Trunk R. Co.*, 42 Hun (N. Y.), 651; *Gulf & C. R. Co. v. Ions*, 3 Tex. Civ. App. 619, 22 S. W. 1011; *Zunz v. Southeastern R. Co.*, L. R. 4 Q. B. 539; *Burke v. Southeastern R. Co.*, L. R. 5 C. P. Div. 1, 28 W. R. 306.

⁵¹ *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Majestic, The*,

56 Fed. 244, 60 Fed. 624; *Steers v. Liverpool & C. Co.*, 57 N. Y. 1, 15 Am. Rep. 453n; *Smith v. North Carolina R. Co.*, 64 N. Car. 235; *Texas & C. R. Co. v. Willis*, 3 Tex. App. (Civ. Cas.) 94; *Wilton v. Atlantic & C. Co.*, 10 C. B. N. S. 453. See also *Logan v. Pontchartrain R. Co.*, 11 Rob. (La.) 24, 43 Am. Dec. 199; *Camden & C. R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481; *Jacobs v. Central R. Co.*, 208 Pa. St. 535, 57 Atl. 982; *Rose v. Northern Pac. R. Co.*, 35 Mont. 70, 88 Pac. 767, 119 Am. St. 836. We have already considered the general question of limitations against liability for negligence and limitation to a fixed value in case of negligence, but

however, that the liability of the carrier can not be restricted by words on a ticket or check or by other notice, even if brought to the knowledge of the passenger, unless he agrees to it.⁵² Other courts, also treating a ticket or a check as a mere token, voucher or receipt, and not as a contract, have taken the same view where it did not appear that the passenger accepted it with notice of the condition or limitation.⁵³ There is certainly good reason for applying this rule where the notice or condition is printed in

the following recent cases may also be consulted as to such limitation in care of baggage. In *Alabama &c. R. Co. v. Knox*, 184 Ala. 485, 63 So. 538, 49 L. R. A. (N. S.) 401; *Gardiner v. New York &c. R. Co.*, 201 N. Y. 387, 94 N. E. 876, 34 L. R. A. (N. S.) 826, Ann. Cas. 1912B, 281. And some of the other cases cited in the notes to said cases it is held that by special contract a valuation may be agreed upon, in consideration of a reduced rate, which will limit the amount of damages even though the loss results from the carrier's negligence. See also *Boston &c. R. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 868, L. R. A. 1915B, 450, 47 Ann. Cas. 1915D, 593; *Powell v. Hines*, 180 N. Car. 665, 104 S. E. 533. But other recent cases hold that, notwithstanding such a valuation, the full value may be recovered in case of the carrier's negligence. *Southern R. Co. v. Dinkins &c. Hardware Co.*, 139 Ga. 332, 77 S. E. 147, 43 L. R. A. (N. S.) 806, and note; *Wells v. Great Northern Ry. Co.*, 59 Ore. 165, 114 Pac. 92, 34 L. R. A. (N. S.) 818; *Zetler v. Tonapah &c. R. Co.*, 35 Nev. 381, 129 Pac. 299, L. R. A. 1916A, 1270.

⁵² *Baltimore &c. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246. "General Liability of Carriers of Passengers for Baggage," 2 Am. & Eng. R. Cas. (N. S.) i, and authorities cited; *Davis v. Chicago &c. R. Co.*, 83 Iowa 744, 49 N. W. 77 (invalid under statute); *Indianapolis &c. R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640; *Camden &c. R. Co. v. Burke*, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488. See also *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; *Kansas City &c. R. Co. v. Rodebaugh*, 38 Kans. 45, 15 Pac. 899, 5 Am. St. 715; *Rose v. Northern Pac. R. Co.*, 35 Mont. 70, 88 Pac. 767, 119 Am. St. 836. See also *Lancaster v. Sanford* (Tex. Civ. App.), 225 S. W. 808.

⁵³ *Mauritz v. New York &c. R. Co.*, 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; *Kansas City &c. R. Co. v. Rodebaugh*, 38 Kans. 45, 15 Pac. 899, 5 Am. St. 715, 34 Am. & Eng. R. Cas. 219; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153; *Wilson v. Chesapeake &c. R. Co.*, 21 Gratt. (Va.) 654; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; *Parker v. Southeastern R. Co.*, L.

such a manner as to deceive or mislead the passenger, and without negligence on his part, he fails to discover it at all, or until after his journey has commenced,⁵⁴ and a carrier after unconditionally receiving a passenger's baggage can not limit its responsibility by such a notice printed on a ticket afterwards purchased.⁵⁵ But, in some jurisdictions, it has been held that notice printed on a ticket is sufficient to bind the passenger,⁵⁶ and we think that where it is in the form of a contract, as is frequently the case where commutation and limited tickets or the like are issued, and the passenger has an opportunity to read it, he will be bound thereby, if the limitation is valid, even if

R. 2 C. P. Div. 416, 25 W. R. 564. See also *Little Rock &c. R. Co. v. Record*, 74 Ark. 125, 85 S. W. 421, 422, 423, 109 Am. St. 67 (citing text); *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. ed. 1039; *Smith v. Steamship Co.*, 142 Fed. 1032; *Merrill v. Pacific &c. Co.*, 131 Cal. 582, 63 Pac. 915; *Southern Ry. Co. v. Dinkins &c. Hardware Co.*, 139 Ga. 332, 77 S. E. 147, 43 L. R. A. (N. S.) 806; *Springer v. Westcott*, 166 N. Y. 117, 59 N. E. 693; *Homer v. Oregon Short Line R. Co.*, 42 Utah 15, 128 Pac. 522; *Ranchan v. Rutland R. Co.*, 71 Vt. 142, 43 Atl. 11, 76 Am. St. 761; *Richardson &c. Co. v. Rowntree* (1894), App. Cas. 217, 63 L. J. Q. B. 283.

⁵⁴ *Malone v. Boston R. Co.*, 78 Mass. 388, 74 Am. Dec. 598; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Isaacson v. New York &c. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142; *Camden R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481; *Verner v. Sweitzer*,

32 Pa. St. 208; *Anderson v. Canadian Pac. R. Co.*, 17 Ont. 747, 40 Am. & Eng. R. Cas. 624; *Butler v. Heane*, 2 Camp. 415; *Clayton v. Hunt*, 3 Camp. 27; *Henderson v. Stevenson*, L. R. 2 Sc. & Div. App. Cas. 470, 32 L. T. N. S. 709. See also *Black v. Atlantic &c. R. Co.*, 82 S. Car. 478, 64 S. E. 418; *Ranchan v. Rutland R. Co.*, 71 Vt. 142, 43 Atl. 11, 76 Am. St. 761.

⁵⁵ *Nevins v. Bay State &c. Co.*, 4 Bosw. (N. Y.) 225.

⁵⁶ *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324, 40 Am. St. 670; *Jacobs v. Central R. Co.*, 208 Pa. St. 535, 57 Atl. 982; *Hopkins v. Westcott*, 6 Blatchf. (U. S. C. C.) 64. See also *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. 660; *Aiken v. Wabash R. Co.*, 80 Mo. App. 8, 2 Mo. App. Rep. 576, note in 99 Am. St. 366, et seq.; *Tewes v. North German Lloyd Steamship Co.*, 186 N. Y. 151, 78 N. E. 864.

he does not read it, especially if he signs it.⁵⁷ It is held that after the acceptance of the baggage and after transportation has commenced, the assent of the passenger to a limiting contract can not be coerced.⁵⁸ We have elsewhere stated our views upon this subject,⁵⁹ and have fully treated the effect of an attempt on the part of a carrier to contract against liability for its own negligence.⁶⁰

§ 2527 (1662). Carrier's lien on baggage.—As the fare charged a passenger is for, or includes, the transportation of his baggage as well as himself, the carrier has a lien on the baggage, while in its possession, for the payment of such fare.⁶¹ But it has no lien

⁵⁷ *Majestic, The*, 60 Fed. 624; *Bland v. Southern Pac. R. Co.*, 55 Cal. 570, 36 Am. Rep. 50; *Terre Haute &c. R. Co. v. Fitzgerald*, 47 Ind. 79; *Louisville R. Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. 206; *Fonseca v. Cunard &c. Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. 660; *Steers v. Liverpool &c. Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *Gardiner v. New York &c. R. Co.*, 201 N. Y. 387, 94 N. E. 876, 34 L. R. A. (N. S.) 826, Ann. Cas. 1912B, 281; *Cresson v. Philadelphia &c. R. Co.*, 11 Phila. (Pa.) 597; *Louisville &c. R. Co. v. Harris*, 9 Lea (Tenn.) 180, 42 Am. Rep. 668; *Bate v. Canadian Pac. R. Co.*, 15 Ont. App. 338, 37 Am. & Eng. R. Cas. 208; *Harris v. Great Western R. Co.*, L. R. 1 Q. B. Div. 515.

⁵⁸ *Saunders v. Southern R. Co.*, 128 Fed. 15. See also *Rawson v. Penna. R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Wilson v. Chesapeake &c. R. Co.*, 21 Gratt. (62 Va.) 654.

⁵⁹ Ante, §§ 2256, 2257, 2415, et seq. and notes.

⁶⁰ Ante, §§ 2252, 2253, 2255, 2268. The entire subject is fully considered

and numerous authorities are cited in an article entitled "General Liability of Carriers of Passengers for Baggage, 2 Am. & Eng. R. Cas. (N. S.) i." See also as to construction of such limitations, *Louisville &c. R. Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. 206; *Gomm v. Oregon &c. Nav. Co.*, 52 Wash. 685, 101 Pac. 361, 25 L. R. A. (N. S.) 537; *Wells v. Great Northern R. Co.*, 59 Ore. 165, 116 Pac. 1070, 34 L. R. A. (N. S.) 818; *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64, note in 99 Am. St. 369, 370. And see the principal and dissenting opinions in the recent cases of *Zetler v. Tonopah &c. R. Co.*, 35 Nev. 381, 129 Pac. 299, L. R. A. 1916A, 1270, and *Chesapeake &c. R. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566.

⁶¹ *Roberts v. Koehler*, 30 Fed. 94; *Hutchings & Co. v. Western &c. R. Co.*, 25 Ga. 61, 71 Am. Dec. 156; *Wolf v. Summers*, 2 Camp. 631. See also *Rumsey v. Northeastern R. Co.*, 14 C. B. N. S. 641, 11 W. R. 911; *Nordmeyer v. Loescher*, 1 Hilt. (N. Y.) 499.

upon the clothing and other articles upon the person of the passenger or retained in his exclusive possession.⁶² The right of a carrier to detain baggage, under its lien, for the payment of fare, must be properly exercised, and if it permits part of the baggage to be wrongfully taken away, or if it is lost or injured on account of the carrier's negligence while so detaining it, the carrier will be answerable therefor.⁶³ Where a railroad has ceased to be a common carrier, and has become a warehouseman, it has a lien on baggage left in storage for storage charges and may detain the goods until the lien is paid, under statutes providing for warehousemen's liens.⁶⁴

§ 2528 (1662a). Measure of damages for loss or delay in transportation of baggage.—The measure of damages for loss of baggage and injury thereto may depend somewhat on circumstances, but is usually limited to the actual fair market value of the articles destroyed, and the damage to articles injured or partially destroyed, with legal interest on the aggregate amount.⁶⁵ This

⁶² See *Ramsden v. Boston &c. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Lynch v. Metropolitan &c. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141.

⁶³ *Southwestern R. Co. v. Bently*, 51 Ga. 311. See also *Tanco v. Booth*, 89 N. Y. St. 82; *Moskowitz v. Navigation Co.*, 84 N. Y. S. 297.

⁶⁴ *Kressin v. Central R. Co.*, 103 N. Y. S. 1002.

⁶⁵ *Houston &c. R. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W. 437; *Wall v. Atlantic Coast Line R. Co.*, 71 S. Car. 337, 51 S. E. 95; *Fraloff v. New York &c. R. Co.*, 10 Blatchf. (U. S.) 16; affirmed 100 U. S. 24, 25 L. ed. 531; *Illinois &c. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *New Orleans &c. R. Co. v. Moore*, 40 Miss. 39. In case of loss the value of the property at place of destination has been held to be the measure

of damages. *Turner v. Southern Ry.*, 75 S. Car. 58, 54 S. E. 825, 7 L. R. A. (N. S.) 188; *Lake Shore &c. R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724, and in case of injury it has been held to be the difference between the actual value just before and subsequent to the injury, and not the difference in the market value of similar goods at such times at the nearest place where such market obtains. *St. Louis &c. R. Co. v. Dickerson*, 29 Okla. 386, 118 Pac. 140; *Anderson v. Northeastern R. Co.*, 4 L. T. (N. S.) 216, 9 W. R. 519. If it has no fair market value then the fair value to the owner. *Spooner v. Hannibal &c. R. Co.*, 23 Mo. App. 403; *Fairfax v. New York &c. R. Co.*, 73 N. Y. 167, 29 Am. Rep. 119; *International &c. R. Co. v. Nicholson*, 61 Tex. 553. See also *La Bourgogne*, 144 Fed. 781.

has been held to exclude a recovery of such items of damage as mental distress occasioned by the loss,⁶⁶ the amount spent in purchasing clothing and other articles of immediate necessity, in consequence of the loss of the baggage,⁶⁷ in some cases the expense incurred in making a long search for the baggage,⁶⁸ and the loss of profits on merchandise carried as baggage.⁶⁹ The measure of damages for negligent delay in the delivery of baggage containing wearing apparel would properly include the value of the use of such of the articles as were necessary for the passenger's comfort during the delay, which must not, however, exceed the cost of such articles.⁷⁰ In a case where the passenger was a mother accompanied by her baby it was held that the fact that the mother deprived herself of certain clothing in order to supply the child with such garments, however much her discomfort therefrom, could not be considered.⁷¹ And substantial dam-

⁶⁶ *Chicago &c. R. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726; *Houston &c. R. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W. 437. See also *Eller v. Carolina &c. R. Co.*, 140 N. Car. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225.

⁶⁷ *St. Louis &c. R. Co. v. Campbell*, 108 Ark. 432, 158 S. W. 120; *New Orleans &c. R. Co. v. Moore*, 40 Miss. 39. Compare *Texas &c. R. Co. v. Douglas* (Tex. Civ. App.), 30 S. W. 487.

⁶⁸ *Mississippi &c. R. Co. v. Kennedy*, 41 Miss. 671. See also *Texas &c. R. Co. v. Ferguson*, 1 Tex. App. (Civ. Cas.) § 1253. But compare *Morrison v. European &c. R. Co.*, 15 New Bruns. 295; *Ross v. St. Louis &c. R. Co.*, 185 Mo. App. 154, 170 S. W. 920.

⁶⁹ *Michigan &c. R. Co. v. Oehm*, 56 Ill. 293; *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356. But compare *Con-*

heim v. Chicago &c. R. Co., 104 Minn. 312, 116 N. W. 581, 17 L. R. A. (N. S.) 1091, 124 Am. St. 623, 15 Ann. Cas. 389, and note; *Kansas City &c. Ry. Co. v. Fugatt*, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916A, 545, and note (cases of delay). See as to damages where baggage is found and restored after suit, *Provencher v. Canadian Pac. R. Co.*, 5 Montreal, L. R. Super. Ct. 9; *Wall v. Atlantic &c. R. Co.*, 71 S. Car. 337, 51 S. E. 95; *Lake Shore &c. R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724.

⁷⁰ See *Ford v. Atlantic &c. R. Co.*, 8 Ga. App. 295, 68 S. E. 1072; *Conheim v. Chicago &c. R. Co.*, 104 Minn. 312, 116 N. W. 581, 17 L. R. A. (N. S.) 1091, 124 Am. St. 623, 15 Ann. Cas. 389 (citing text); *Brooks v. Northern Pac. R. Co.*, 58 Ore. 387, 114 Pac. 949.

⁷¹ *Texas &c. R. Co. v. Russell* (Tex. Civ. App.), 97 S. W. 1090. But see *Webb v. Atlantic Coast Line R. Co.*, 76 S. Car. 193, 56 S. E. 954.

ages for mere inconvenience or discomfort caused by delay are not usually recoverable.⁷² But incidental expenses and damages in the contemplation of the parties may be recovered.⁷³ In order to recover such damages, however, they must not be too remote and speculative,⁷⁴ and the carrier must have notice of the special circumstances causing damage which would not ordinarily or naturally follow from the delay.⁷⁵ In the case of delay in the transportation of sample trunks the damages can not exceed those in, or to be deemed in, the contemplation of the parties at the time of making the contract. Thus it has been held that a passenger's notice to the baggage man of a carrier that he had a large sample trunk which he wished checked, was held insufficient to charge the carrier with knowledge that any special reason existed for expediting the delivery of the trunk in such a sense as to render the carrier liable for damages caused by the passenger's inability to fulfill engagements already made to meet prospective customers who would not buy except from samples.⁷⁶ But later cases, while not denying the general rule that the damages must be such as were or should have been within the contemplation of the parties, hold that a traveling salesman may recover in similar cases.⁷⁷ In South Carolina, and the rule is

⁷² *Gulf &c. R. Co. v. Chambers* (Tex. Civ. App.), 149 S. W. 1182; *Mexican C. R. Co. v. De Rosear* (Tex. Civ. App.), 109 S. W. 949.

⁷³ *Carnahan v. Chesapeake &c. R. Co.*, 145 Ky. 676, 141 S. W. 49; *Conheim v. Chicago &c. R. Co.*, 104 Minn. 312, 116 N. W. 581, 17 L. R. A. (N. S.) 1091, 124 Am. St. 623, 15 Ann. Cas. 389; *Kansas City &c. R. Co. v. Fugatt*, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916A, 545.

⁷⁴ *St. Louis &c. R. Co. v. Lilly*, 1 Ala. App. 320, 55 So. 937; *Strange v. Atlantic &c. R. Co.*, 77 S. Car. 182, 57 S. E. 724. See also *Palmer v. Louisville &c. R. Co.*, 123 N. Y. S. 47.

⁷⁵ *Milhous v. Atlantic &c. R. Co.*, 75 S. Car. 351, 55 S. E. 764; *Turner v. Southern R. Co.*, 75 S. Car. 58, 54 S. E. 825, 7 L. R. A. (N. S.) 188; *Texas &c. R. Co. v. Taylor*, 3 Tex. Civ. App. Cas. § 192.

⁷⁶ *Katz v. Cleveland &c. R. Co.*, 46 Misc. 259, 91 N. Y. S. 720.

⁷⁷ *Conheim v. Chicago &c. R. Co.*, 104 Minn. 312, 116 N. W. 581, 124 Am. St. 623, 17 L. R. A. (N. S.) 1091, 15 Ann. Cas. 389; *Kansas City &c. R. Co. v. Fugatt*, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916A, 545; *Brooks v. Northern Pac. R. Co.*, 58 Ore. 387, 114 Pac. 949. The first case, however, cites the New York case referred to in the preceding note

probably the same elsewhere, it is held that exemplary damages may be recovered for a wilful and wanton failure to transport baggage with reasonable dispatch.⁷⁸ The amount and extent of the damages should be clearly set forth and itemized when required, in the complaint. In one case an allegation that "the articles destroyed consisted of three dresses, worth three hundred dollars; that the articles injured consisted of shirt waists, collars, cuffs, and ladies' undergarments," was held not sufficiently specific; and it was said that an itemized list of the clothing destroyed or injured, with the value of each, and the extent of the damage to each article injured should have been set out.⁷⁹ An interesting question arose in a case lately decided in North Carolina. In the case referred to a man sought to recover damages for mental suffering because of the carrier's delay in delivering the baggage of his intended wife, thus causing a postponement of the wedding. The court rightly held that no such damages could be recovered, at least where the carrier was not notified of the anticipated wedding and could not have had the damages in contemplation.⁸⁰

§ 2529. Hepburn Act—Carmack and Cummins Amendments.
—Acts of Congress have made some changes in the law of inter-

without questioning it and it is possible that it can be distinguished from both the Minnesota and the Oregon cases.

⁷⁸ Webb v. Atlantic Coast Line R. Co., 76 S. Car. 193, 56 S. E. 954, 9 L. R. A. (N. S.) 1218, 11 Ann. Cas. 834, and note; Sullivan v. Southern R. Co., 74 S. Car. 377, 54 S. E. 586. See also Pittsburgh &c. R. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. 517. But, not in other cases. Black v. Atlantic &c. R. Co., 82 S. Car. 478, 64 S. E. 418. Nor as a rule can damages for mere mental suffering be recovered. Chicago &c. R. Co. v. Whitten, 90

Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726; St. Louis &c. R. Co. v. Campbell, 108 Ark. 432, 158 S. W. 120.

⁷⁹ Houston &c. R. Co. v. Seale, 28 Tex. Civ. App. 364, 67 So. 437. But see Dill v. South Carolina R. Co., 7 Rich. L. (S. Car.) 158, 62 Am. Dec. 407. It is questionable whether such a strict rule would be applied in most jurisdictions.

⁸⁰ Eller v. Carolina &c. R. Co., 140 N. Car. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225. See also to much the same effect, Houston &c. R. Co. v. Seale, 28 Tex. Civ. App. 364, 67 S. W. 437.

state carriers in relation to baggage as well as in other respects. It has been expressly and authoritatively decided that the Hepburn Act and Carmack Amendment include within their provision the transportation of baggage as well as other property.⁸¹ Thus, it is held that "a regulation contained in the published tariffs of an interstate railway carrier on file with the Interstate Commerce Commission, limiting its baggage liability to \$100 unless a greater value is declared and stipulated by the owner and the excess charges paid, is binding upon the passenger in case of loss of baggage through the carrier's negligence, even though the passenger did not expressly assent to such regulation or even know of it, and regardless of the carrier's failure to inquire as to the value of the baggage, or if its outward appearance as indicating greater value; and that any state law or policy to the contrary was superseded when congress, by the Carmack amendment of June 30, 1906, to the act to regulate commerce of February 4, 1887, took possession of the subject of the interstate railway transportation of property."⁸² So, it has been held that a carrier receiving baggage for transportation to a point in another state beyond its own line is liable for its loss upon the

⁸¹ *Boston & Maine R. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 868, Ann. Cas. 1915D, 593, L. R. A. 1915B, 450 (reversing *Hooker v. Boston & Maine R. Co.*, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B, 669). See also *House v. Chicago &c. R. Co.*, 30 S. D. 321, 138 N. W. 809, Ann. Cas. 1915C, 1045. But compare *La Bourgogne*, 144 Fed. 781.

⁸² *Boston & Maine R. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 868, Ann. Cas. 1915D, 593, L. R. A. 1915B, 450 (but also holding that the act in question does not require a bill of lading or receipt as to the baggage other than the ordinary check.) See also *Gal-*

veston &c. R. Co. v. Woodbury (U. S.), 41 Sup. Ct. 114 *Gardiner v. New York &c. R. Co.*, 201 N. Y. 387, 94 N. E. 876, 34 L. R. A. (N. S.) 826n, Ann. Cas. 1912B, 281; *Harris v. Southern R. Co.*, 100 S. Car. 469, 85 S. E. 158; *Missouri &c. R. Co. v. Hailey* (Tex. Civ. App.), 156 S. W. 1119. "The court, in reaching this decision, held that a limitation as to the baggage liability of an interstate carrier, based upon the requirement to declare its value when more than \$100, and pay an excess charge, is a regulation determinative of the rate to be charged and affecting the service to be rendered to the passenger within the meaning of section 6 of the act to regulate commerce of Feb.

line of a connecting carrier.⁸³ There has been much difference of opinion among lawyers, railroad men and shippers, as to the proper construction and effect of the Cummins amendment of March 4, 1915.⁸⁴ But the Interstate Commerce Commission gave an opinion covering the most important points, including the question as to whether it applies to the transportation of baggage. According to this opinion this Cummins amendment does not automatically bring into effect increased rates named in the classifications and tariff publications as applicable to shipments which are not made subject to the terms of the uniform or carrier's bill of lading; the carrier may still limit its liability in its tariff and rate schedules to the full value of the property so classified and established as of the time and place of shipment; the amendment does not apply to export and import shipments to and from foreign countries not adjacent to the United States; and the amendment applies to the transportation of baggage.⁸⁵ The opinion of the Interstate Commerce Commission as to baggage was based largely on the proviso in the Cummins amendment "that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specially state in writing the value of the goods, and the carrier

4, 1887 (24 Stat. at Large 379, chap. 104, 3 Fed. St. Ann., p. 827), as amended by the act of June 29, 1906 (34 Stat. at Large 584, chap. 3591, Fed. Stat. Ann. 1909 Supp. p. 260), which requires regulations of that character to be filed and posted in accordance with its provisions as a part of the carrier's tariff schedules." See also Act of June 18, 1910, c. 309, 36 Stat. 539, 546, Fed. Stat. Ann. 1914 Supp. p. 113.

⁸³ *House v. Chicago &c. R. Co.*, 30 S. Dak. 321, 138 N. W. 809, Ann. Cas. 1915C, 1045.

⁸⁴ See ante last section in chapter on Initial Carrier.

⁸⁵ In re Cummins Amendment, 33 I. C. R. 682, 40 Reports of Am. Bar Assn. (1915) 387. As said by the Commission, the conditions attached to the carrier's liability are stated in the fare schedules and on passage tickets of contract form. All ordinary personal or sample baggage is hidden from view by boxing, wrapping or other means, and the amendment seems clearly to recognize the carrier's right to fix conditions and terms applicable to the transportation of baggage dependent upon the value as declared by the person offering the baggage for transportation.

shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper." But another proviso was substituted for this in the second Cummins amendment of August 9, 1916,⁸⁶ wherein it is provided, among other things, that the provisions of the act respecting liability for full actual loss, damage or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply to baggage. This apparently makes it clear that in case of interstate baggage a reasonable limitation of liability for loss or damage, even when due to negligence, to an agreed valuation is valid, at least when such valuation is agreed on for the purpose of obtaining the lower of two alternative lawful rates.

⁸⁶ 39 Stat. at L. 441. See also §§ 434-438; Barnes' Fed Code 1921, Transportation Act 1920, c. 91, Supplement § 7976.

CHAPTER LXXX.

THE INTERSTATE COMMERCE ACT—UNLAWFUL COMBINATIONS AND DISCRIMINATION—RECENT AMENDMENTS.

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| <p>Sec.
2535. Scope of chapter.</p> <p>2536. Duties of railroad companies to public—Monopolies—Control and regulation.</p> <p>2537. Private interests of railroads—Limits to governmental control.</p> <p>2538. The source, nature, and extent of the federal power over interstate railroads.</p> <p>2539. Commerce clause of the federal constitution—Generally.</p> <p>2540. State power as limited by the commerce clause of the federal constitution—Generally</p> <p>2541. The interstate commerce act—Generally.</p> <p>2542. Construction of the interstate commerce act.</p> <p>2543. The police power as affected by the commerce clause.</p> <p>2544. Police power—Other cases.</p> <p>2545. State statutes held to be regulations of interstate commerce.</p> <p>2546. State statutes held not to be regulations of interstate commerce.</p> <p>2547. State regulations — Recent cases—Reasonable rates—Due process and equal protection.</p> | <p>Sec.
2548. State regulation—Distinction between enforcing a general scheme of maximum rates and order to do a particular act.</p> <p>2549. State regulation — Two-cent fare.</p> <p>2550. Interstate commerce.</p> <p>2551. The interstate commerce commission—Power of commission—Recent amendments.</p> <p>2552. Interstate commerce commission—Findings and orders—Enforcement and review.</p> <p>2553. Railroads engaged in domestic commerce—When a railroad is interstate.</p> <p>2554. Commerce and manufactures — Monopolies — Trusts — Conspiracies.</p> <p>2555. Monopolies and trusts—Sherman act and later acts.</p> <p>2556. Combinations—Pooling.</p> <p>2557. Discrimination—Undue preference—What is under the interstate commerce act.</p> <p>2558. Discrimination or preference in furnishing cars and expediting shipments.</p> <p>2559. Preference — Discrimination—When not unjust—Differences in circumstances and conditions.</p> |
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Sec.	Sec.
2560. Undue preference — Discrimination — Illustrative instances.	2568. Interchange of business—Interchange of cars without breaking bulk.
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2566. Long and short hauls—Changes made by subsequent amendments.	2574. Violations of the interstate commerce act—Indictment.
2567. Group rates.	2575. Remedies and practice.
	2576. Recent decisions under latest acts of congress.
	2577. Recent war acts and decisions.
	2578. Recent controversy in regard to two-cent fares and other rate regulations.

§ 2535 (1662b). **Scope of chapter.**—We have elsewhere considered the subject of governmental control of railroads¹ and also the subject of state railroad commissions.² In this chapter we shall consider unlawful discriminations and preferences in rates and service, both under state laws and under the interstate commerce act, with special reference, however, to the interstate commerce act. We shall also briefly consider remedies and practice under the interstate commerce act and the effect of other acts of Congress regulating railroads and especially the so-called Sherman anti-trust act. But before taking up these subjects in detail it may be well to again call attention to the nature of railroads and the extent to which they are subject to public control, particularly in regard to monopolistic features and duties which they owe to the public as common carriers.

§ 2536 (1662c.) **Duties of railroad companies to public—Monopolies—Control and regulation.**—As elsewhere shown, railroad

¹ See Chapt. xxvii.

² See Chapt. xxviii, also *Sabre v.*

Rutland R. Co., 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C, 1269 and note.

companies are subject to the police power of the states within proper limits, even though they may be instrumentalities of interstate commerce.³ So, as common carriers, they owe a duty to serve the public without unjust discrimination, and are subject to proper statutes enacted for the purpose of regulating and providing for the enforcement of such duties.⁴ Corporations, such as railroad companies, having public duties to perform, may well be subject to limitations not applicable to purely private corporations not "affected with a public interest." It has even been held that it is inconsistent with the duty of such a corporation toward the public, and too much like a monopoly destroying competition and giving an unfair advantage, for it to engage in the business of conducting a public elevator or warehouse for grain and using its exceptional facilities to its own advantage in conducting it;⁵ and the Supreme Court of the United States has

³ See ante, § 781, et. seq. and post, § 2543, et seq; also *Chicago &c. R. Co. v. Arkansas*, 219 U. S. 453, 465, 31 Sup. Ct. 275, 55 L. ed. 290; *Missouri &c. R. Co. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. ed. 1377, L. R. A. 1915E, 942; *Simpson v. Shepherd*, 230 U. S. 352, 34 Sup. Ct. 833, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Chicago &c. Ry. Co. v. State (Okla.)*, 157 Pac. 1039.

⁴ *Great Northern R. Co. v. State*, 238 U. S. 340, 35 Sup. Ct. 753, 59 L. ed. 1337; *Missouri Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. ed. 472; *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 933, 11 Ann. Cas. 398; *Wisconsin &c. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194; *Chicago &c. Ry. Co. v. State (Okla.)*, 157 Pac. 1039. And see numerous authorities cited and illustrations given in vol. I, § 667, et seq.

We do not mean, of course, that a state can invade the domain of congress under the commerce clause. The question as to what constitutes interstate commerce, the jurisdiction and action of congress and the limitation of state action on that account will be considered in other sections of this chapter.

⁵ *Central Elevator Co. v. People*, 174 Ill. 203, 51 N. E. 254, 43 L. R. A. 658; *Hannah v. People*, 198 Ill. 77, 64 N. E. 776. See also *Attorney-General v. Great Northern R.*, 29 L. J. Ch. 794; *Union Pac. R. Co. v. Updike*, 222 U. S. 215, 32 Sup. Ct. 39, 56 L. ed. 171, affirming *Union Pac. R. Co. v. Updike Grain Co.*, 178 Fed. 223; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490. But compare *United States v. Oregon R. &c. Nav. Co.*, 159 Fed. 975; *Illinois Cent. R. Co. v. Wathen*, 17 Ill. App. 582; *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416, 79 N. W. 635; *Roby v. New York*

held that a statute classifying elevators and warehouses on railroad rights of way or grounds, by themselves, and requiring a license from them and not from others, is constitutional, and that the fact that grain is stored in such an elevator to be shipped out of the state does not make the statute, requiring such a license, a regulation of interstate commerce.⁶ So, it has been held that a carrier can not discriminate in favor of itself,⁷ and that it can not become a dealer in a commodity and cut rates for itself, under the interstate commerce law.⁸ The doctrine is well established that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end.⁹ It has

&c. R. Co., 142 N. Y. 176, 36 N. E. 1053; Raleigh &c. R. Co. v. McGuire, 171 N. Car. 277, 88 S. E. 337. And see as to wharfs or docks Coeur D'Alene &c. Transp. Co. v. Ferrell, 22 Idaho 752, 128 Pac. 565, 43 L. R. A. (N. S.) 965, and note.

⁶ W. W. Cargill Co. v. Minnesota &c. R. Com., 180 U. S. 452, 21 Sup. Ct. 423, 45 L. ed. 619.

⁷ Grain Rates of Chicago &c. R., 7 I. C. C. 33. See also United States v. Reading Co. (U. S.), 40 Sup. Ct. 425.

⁸ New York &c. R. v. Interstate Com. Com., 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 515. So, by the amendment of June 29, 1906, section 1, railroad companies are expressly prohibited after May 1, 1908, from transporting commodities in which they are interested, other than timber and products thereof, unless necessary and intended for their own use in their business as common carriers. See also recent Act of Congress upon

the subject, especially the Clayton anti-trust act in 38 Stat. at L. 730, ch. 323; and Transp. Act 1920, §400 cl. (8); Barnes' Fed. Code 1921, Sup. § 7884. And it is also held that it cannot give a bonus or rebate to a certain shipper or on certain commodities for the purpose of getting increased business. United States v. Union Stockyard &c. Co., 226 U. S. 286, 33 Sup. Ct. 83, 57 L. ed. 226; Foster Lumber Co. v. Atchison &c. R. Co., 270 Mo. 629, 194 S. W. 281, L. R. A. 1918A, 768 and note.

⁹ Chicago &c. R. Co. v. Iowa (Chicago &c. R. Co. v. Cutts), 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago &c. R. Co., 94 U. S. 164, 24 L. ed. 97; Chicago &c. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99; Winona &c. R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Stone v. Wisconsin, 94 U. S. 181, 24 L. ed. 102; Ruggles v. Illinois, 108 U. S. 536, 2 Sup. Ct. 832, 27 L. ed. 816; Illinois C. R. Co. v. Illinois, 108 U. S. 541, 2 Sup. Ct. 839, 27 L. ed.

even been held that the power of the state to regulate railroads extends to securing for the public reasonable facilities for making connections with or between different carriers;¹⁰ to file re-

818; *Stone v. Farmers' &c. Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. ed. 636; *Stone v. Illinois C. R. Co.*, 116 U. S. 347, 6 Sup. Ct. 348, 29 L. ed. 650; *Stone v. New Orleans &c. R. Co.*, 116 U. S. 352, 6 Sup. Ct. 349, 391, 29 L. ed. 651; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841, 1 Int. Com. 56; *Charlotte &c. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051; *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. ed. 176; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 665, 16 Sup. Ct. 705, 40 L. ed. 838; *Louisville &c. R. Co. v. Kentucky*, 161 U. S. 677, 695, 16 Sup. Ct. 714, 40 L. ed. 849; *Wisconsin &c. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194; *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; *Chicago &c. R. Co. v. Illinois*, 200 U. S. 561, 584, 26 Sup. Ct. 341, 50 L. ed. 596, 4 Ann. Cas. 1175; *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 27 Sup. Ct. 108, 51 L. ed. 174; *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175; *Atlantic &c. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 591, 51 L. ed. 933, 11 Ann. Cas. 398; *Mobile &c. R. Co. v. State*, 210 U. S. 187, 28 Sup. Ct. 650, 52 L. ed. 1016; *Chesapeake &c. R. Co. v. Public Serv-*

ice Com., 242 U. S. 603, 37 Sup. Ct. 234, 61 L. ed. 520. See also *Platt v. Le Cocq*, 150 Fed. 391; *Robertson v. Wilmington &c. Trac. Co. (Del.)*, 104 Atl. 839; *Traverse City v. Michigan R. Com.*, 202 Mich. 575, 168 N. W. 481; *Grand Rapids &c. R. Co. v. Cobbs*, 203 Mich. 133, 168 N. W. 961. But state cannot authorize commission or court to do what federal Constitution forbids. *Brooks-Scanlon Co. v. Railroad Comm. of La. (U. S.)*, 40 Sup. Ct. 183, reversing 81 So. 729.

¹⁰ *Atlantic &c. R. Co. v. North Carolina Corp. Com.* 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 933, 11 Ann. Cas. 398, affirming 137 N. Car. 1, 49 S. E. 191; *Grand Trunk R. Co. v. Michigan R. R. Comm.*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. ed. 310; *Pittsburgh &c. R. Co. v. R. R. Comm.*, 171 Ind. 189, 86 N. E. 328; *Public Service Comm. v. Northern Cent. R. Co.*, 122 Md. 355, 90 Atl. 105. See also *District of Columbia v. Capital Trac. Co.*, 41 App. D. C. 115; *State v. Pub. Service Comm.*, 76 Wash. 625, 137 Pac. 132. And state may compel street railway to sprinkle streets. *Pacific Gas &c. Co. v. Police Court (U. S.)* 40 Sup. Ct. 79, affirming 152 Pac. 928. See also Acts, power of state commission over street railways, generally, note in 5 A. L. R. 30, 36, et seq.

ports of accidents;¹¹ and, through its railroad commission, to make rules as to reciprocal demurrage.¹²

§ 2537 (1662d). **Private interests of railroads—Limits to governmental control.**—With respect to its private interests and management with which the public have nothing to do, and by which they are not improperly affected, the rights of the company are, within its charter, in general, substantially the same as those of purely private corporations. In a case recently decided by the Supreme Court of the United States, many of the decisions showing the public nature and duties of railroad companies, and their subjection to governmental control, are reviewed, and it is stated that the same principles apply to the use of the station and depot grounds, but it is also said: "It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the ends for which the corporation was created, and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the company holds

¹¹ St. Louis &c. R. Co. v. State, 24 Okla. 805, 105 Pac. 351; Gulf &c. R. Co. v. State, 33 Okla. 378, 125 Pac. 1103. See also Interstate Com. Comm. v. Goodrich Transp. Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. ed. 729.

¹² Yazoo &c. R. Co. v. Keystone Lumber Co., 90 Miss. 391, 43 So. 605, 13 Ann. Cas. 960. See also Michigan Cent. R. Co. v. Michigan R. R. Comm., 183 Mich. 6, 148 N. W. 800, Ann. Cas. 1916E, 695n. But compare Mason v. Chicago &c. R. Co., 12 Int. Com. 70. See also the following recent cases as to power to compel carriers to furnish cars and carry and properly serve the public. Litchfield &c. R. Co. v. Easton, 222

Ill. 242, 78 N. E. 589; Alabama &c. R. Co. v. Railroad Com., 203 U. S. 496, 27 Sup. Ct. 163, 51 L. ed. 289; and compare Kelley v. Great Northern R. Co., 152 Fed. 211; People v. St. Louis &c. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656; State v. Great Northern R. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250n; Baker v. Boston &c. R. Co. 74 N. H. 100, 65 Atl. 386; Railroad Comrs., In re, 79 Vt. 266, 65 Atl. 82. The Texas statute penalizing a company for failure to furnish cars within a specified time after notice, is unconstitutional where applied to interstate shipments. Houston &c. R. Co. v. Mayes, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. ed. 722.

the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects. It is required under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation."¹³ So, as the public power to regulate railways and the private right of ownership of such property co-exist and do not destroy each other, it is settled that the right of ownership of railway property, like other property rights, finds protection in constitutional guaranties, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment.¹⁴

¹³ *Donavan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. 91, 94, 50 L. ed. 192. It was held in this case that, where a railroad company has made sufficient arrangements, it may exclude from its station other hackmen soliciting patronage of its passengers, and enjoin them from so doing. For cases on both sides of this question, see post, § 2812, and second note to that section, also *Rose v. Public Service Comm.*, 75 W. Va. 1, 83

S. E. 85, L. R. A. 1915B, 358, Ann. Cas. 1918A, 700, and note.

¹⁴ *Stone v. Farmers &c. Co.*, 116 U. S. 307, 331, 6 Sup. Ct. 348, 388, 1191, 29 L. ed. 636; *Chicago &c. R. Co. v. Minnesota*, 134 U. S. 418, 455, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400, 36 L. ed. 176, 179; *Reagan v. Farmers &c. Co.*, 154 U. S. 362, 399, 14 Sup. Ct. 1047, 38 L. ed. 1014, 1024, 4 Inters.

§ 2538 (1663). **The source, nature and extent of the federal power over interstate railroads.**—To ascertain and determine the nature and extent of the federal power over interstate railroads two provisions of the national constitution must be considered, namely, (1) that which declares that: "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes,"¹⁵ and (2) that which reads thus: "Congress shall have power to make all laws which shall be necessary and proper for the carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or office thereof."¹⁶ The effect of these provisions is to

Com. 560; *St. Louis &c. R. Co. v. Gill*, 156 U. S. 649, 657, 15 Sup. Ct. 484, 39 L. ed. 567, 570; *Chicago &c. R. Co. v. Chicago*, 166 U. S. 226, 241, 17 Sup. Ct. 581, 41 L. ed. 979, 986; *Smyth v. Ames*, 169 U. S. 466, 512, 18 Sup. Ct. 418, 42 L. ed. 819, 838; *Chicago &c. R. Co. v. Tompkins*, 176 U. S. 167, 172, 20 Sup. Ct. 336, 44 L. ed. 417, 420; *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; *Chicago &c. R. Co. v. Illinois*, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. ed. 596, 609; *Louisville &c. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. ed. 441; *Missouri &c. R. Co. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727, 18 Ann. Cas. 989; *Chicago &c. R. Co. v. State*, 238 U. S. 491, 35 Sup. Ct. 869, 59 L. ed. 1423, L. R. A. 1916A, 1133; *Mississippi R. R. Com. v. Mobile &c. R. Co.*, 244 U. S. 388, 37 Sup. Ct. 602, 61 L. ed. 1216. See also *Brooks v. Southern Pac. Co.*, 148 Fed. 986; *Commonwealth v. Atlantic &c. R. Co.*, 106 Va. 61, 55 S. E. 572, 7 L. R. A.

(N. S.) 1086, 117 Am. St. 983, 9 Ann. Cas. 1124, and note, holding a statute requiring railroad companies to sell mileage books at less than regular rates unconstitutional. See also *Lake Shore &c. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; *Louisville &c. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229. But compare *Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; *Minor v. Erie R. Co.*, 171 N. Y. 566, 64 N. E. 454; and see *Railroad Com. v. Louisville &c. R. Co.*, 140 Ga. 817, 80 S. E. 327, L. R. A. 1915E, 902, Ann. Cas. 1915A, 1018.

¹⁵ Const. art. i, § viii, subdivision 4.

¹⁶ Const. art. i, § viii, subdivision 19. The provisions of the federal constitution are potent enough to authorize congress to establish railroads. *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; *Cherokee Nation v. Southern &c. R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295. See also *Luxton v.*

vest in congress supreme power over all instrumentalities of interstate commerce and to confer upon it the authority to enact such laws as it may deem necessary to the proper and effective exercise of that power. The principal power being granted and authority conferred to adopt measures to carry that power into execution, congress has a plenary discretion as to the choice of means and methods. As said in an early case: "Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."¹⁷ The grant of power is very broad and comprehensive and extends to all matters legitimately connected with "commerce among the several states."¹⁸ It has, indeed, been said that: "The power of congress to regulate an instrumentality of commerce is practically unlimited because it may reach the commerce itself as well as its agencies."¹⁹ The term "commerce" means "commercial intercourse between nations and parts of nations in all its branches."²⁰ This principle requires the conclusion that the constitution extends to and em-

Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. ed. 808; *Mercantile Trust Co. v. Texas &c. Ry. Co.*, 216 Fed. 225. Having power to regulate commerce the United States "may select the appropriate means" of exercising the power. *McCullough v. Maryland*, 4 Wheat. (U. S.) 316, 409, 4 L. ed. 579.

¹⁷ *United States v. Fisher*, 2 Cranch (U. S.) 358, 2 L. ed. 304; *Legal Tender Cases*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. ed. 204. See also *United States v. Great Northern R. Co.*, 145 Fed. 438, 439; *Houston &c. R. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341.

¹⁸ *United States v. Coombs*, 12 Pet. (U. S.) 72, 9 L. ed. 1004.

¹⁹ *Louisville &c. R. Co. v. Railroad Commission*, 19 Fed. 678. And the

term "regulate" has been given a very comprehensive meaning. *Hippolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364 (even amounting to prohibition in some instances.); *Southern R. Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72; *Houston &c. Ry. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 341; *Texas &c. Ry. Co. v. Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. ed. 874; *Clark Distilling Co. v. Western Md. R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, and notes.

²⁰ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. ed. 23. "And interstate commerce, therefore, comprehends intercourse for the purpose of trade in any and all of its forms, including

braces all the branches of commerce “among the several states” and all the agencies and instrumentalities engaged or employed in that commerce.²¹ It has been said that “wherever commerce among the states goes the power of the nation goes with it.”²² It is a matter of history as well as of express adjudication that one of the principal objects of the authors of the constitution

transportation, purchase, sale, and exchange of commodities between the citizens of different states. *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. ed. 290; *Addystone Pipe &c. Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. ed. 136. Therefore, if any commercial transaction reaches an entirety in two or more states, and if the parties dealing with reference to that transaction deal from different states, then the whole transaction is a part of the interstate commerce of the United States. *United States v. Swift*, 122 Fed. 529.” Charge to Grand Jury, *In re*, 151 Fed. 834, 839.

²¹ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. ed. 23; *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. ed. 678; *White’s Bank v. Smith*, 7 Wall. (U. S.) 646, 19 L. ed. 211; *The Daniel Ball*, 10 Wall. (U. S.) 557, 19 L. ed. 999; *State Freight Tax Cases*, 15 Wall. (U. S.) 232, 21 L. ed. 146; *The Montello*, 20 Wall. (U. S.) 430, 22 L. ed. 391; *Smith v. Turner*, 7 How. (U. S.) 283, 12 L. ed. 702; *Pensacola &c. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. ed. 1187; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 392; *Stockton v. Baltimore &c. R.*

Co., 32 Fed. 9; *Corfield v. Coryell*, 4 Wash. (C. C.) 371; *The City of Salem*, 2 Int. Com. 418; *Stanley v. Wabash &c. R. Co.*, 3 Int. Com. 176. See generally *Preston v. Finley*, 72 Fed. 850; *Pierce v. New Hampshire*, 5 How. (U. S.) 554, 12 L. ed. 279; *Woodruff v. Parham*, 8 Wall. (U. S.) 123, 19 L. ed. 382; *Hinson v. Lott*, 8 Wall. (U. S.) 148, 19 L. ed. 387; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. ed. 862; *South Carolina v. Seymour*, 153 U. S. 353, 14 Sup. Ct. 871, 38 L. ed. 742; *Covington &c. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. ed. 430; *Richmond v. Southern Tel. Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. ed. 1162; *Lottery Cases*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. ed. 492; *St. Clair County v. Interstate &c. Co.*, 192 U. S. 454, 24 Sup. Ct. 300, 48 L. ed. 518; *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679; *Cantini v. Tillman*, 54 Fed. 969; *Donald v. Scott*, 67 Fed. 854; *Minor, In re*, 69 Fed. 233; *Hough, Ex parte*, 69 Fed. 330.

²² *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713, 18 L. ed. 96. See also *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 55, 45 L. ed. 126.

was to secure a uniformity, avert the clashing of conflicting state interests and prevent sectional legislation dictated by state jealousy or local prejudice.²³ It is unquestionably true that the framers of the constitution desired to secure uniformity and prevent diversity, and that for the purpose of attaining that object they placed the commerce clause in the constitution. It seems to us, as elsewhere suggested, that the inaction of congress does not authorize action by the states;²⁴ but it can not be safely affirmed that the authorities warrant the broad conclusion suggested, for there are many cases in which the supreme court of the United States has held that a state may act until congress does even where congress has the final right, and the conflict is so great or the line of demarcation so indistinct that as much as can be safely said is that, where the subject is one requiring uniformity of regulation, or action by the state would impose a direct burden upon interstate commerce, inaction on the part of congress does not authorize action by the states, and that there are cases where inaction on the part of congress justifies action by the states.²⁵

²³ *Mobile Co. v. Kimball*, 102 U. S. 691, 26 L. ed. 231; *Welton v. State of Missouri*, 91 U. S. 275, 23 L. ed. 347; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128; *Wabash &c. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244.

²⁴ See also address of Judge Jenkins before the American Bar Association. *Am. Bar Assn. Rep.* for 1906, p. 418. And as to relative rights and powers of state and United States, see the following recent cases: *Kansas v. Colorado*, 206 U. S. 64, 27 Sup. Ct. 655, 51 L. ed. 956; *Louisville &c. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. ed. 416; *New Mexico v. Denver &c. R. Co.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. ed. 78; *Rahrer, In re*, 140 U. S.

545, 11 Sup. Ct. 856, 35 L. ed. 572; *Port Richmond &c. Ferry Co. v. Board of Freeholders of Hudson County*, 234 U. S. 317, 34 Sup. Ct. 821, 58 L. ed. 1330; also address of Senator Knox, 11 *Law Notes*, 89.

²⁵ The decisions of the Supreme Court of the United States are reviewed, and the various holdings as to what the state may and may not do are stated in the elaborate opinion in the *Minnesota Rate cases* (*Simpson v. Shepard*) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, *Ann. Cas.* 1916A, 18n. According to the weight of authority there are three classes of cases, namely, those over which the power of Congress is exclusive, those in which the states may regulate so

It has been held that the United States has no common law, and that when the federal courts do enforce common-law rules they do so only upon the theory that the common law is regarded as

long as Congress does not act, and those in which the power of the state is exclusive. *Western Un. Tel. Co. v. Lee*, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026, 1028; *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703. The first class includes those admitting of only one uniform plan or regulation throughout the country and the principle applied in these cases prevents the states from imposing direct burdens on interstate commerce. *South Covington &c. R. Co. v. Covington*, 235 U. S. 537, 35 Sup. Ct. 158, 59 L. ed. 350, L. R. A. 1915F, 792 and note; *Kansas City &c. R. Co. v. Secretary of Kansas*, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. ed. 617; *Yazoo &c. Co. v. Greenwood Grocery Co.*, 227 U. S. 1, 33 Sup. Ct. 213, 57 L. ed. 389; *Texas &c. R. Co. v. Sabine &c. Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. ed. 442. The second class includes those of such a nature that, although within the term "interstate commerce" they do not require a uniform plan or regulation but admit of a diversity of regulation according to local conditions in each state and in regard to which it is not to be presumed that they were intended by the general grant of power to Congress to go uncontrolled and unregulated until Congress acted. *Missouri Pac. R. Co. v. State*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. ed. 472; *Southern R. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594,

54 L. ed. 868; *Erie R. Co. v. People*, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138, and notes; *Missouri &c. R. Co. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. ed. 1377, L. R. A. 1915E, 942, and note; *Atlantic Coast Line R. Co. v. State*, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. ed. 1312; *Southern R. Co. v. Railroad Com. of Ind.*, 236 U. S. 439, 35 Sup. Ct. 304, 59 L. ed. 661; *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 Sup. Ct. 760, 59 L. ed. 1306; *St. Louis &c. R. Co. v. Arkansas*, 240 U. S. 518, 36 Sup. Ct. 443, 60 L. ed. 776; *Chesapeake &c. R. Co. v. Public Service Com.*, 242 U. S. 603, 37 Sup. Ct. 234, 61 L. ed. 520. But see *Seaboard Air Line Ry. Co. v. Blackwell*, 244 U. S. 310, 37 Sup. Ct. 640, 61 L. ed. 1160, L. R. A. 1917F, 1184; the third class includes those limited to the internal commerce of the state, and in this class reasonable regulations under the police power, or the like, may be valid even though they indirectly or incidentally affect interstate commerce, Post § 2543. See also *Houston &c. R. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341, (but holding that Congress could control intrastate rates, when necessary to prevent discrimination against interstate commerce and rates); *Covington &c. Bridge Co. v. Com.* 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962; *Michi-*

part of the local law of the state.²⁶ If we were to accept as good law the rule that there is no such thing as federal common law the necessary conclusion would apparently be that the rights, duties and liabilities of interstate railroad companies must, so far as regards commerce among the several states, be regulated by federal legislation. It is difficult, however, to reconcile the doctrine of the cases which affirm that there is no federal common law with the doctrine of many other federal decisions.²⁷ It is

gan Cent. R. Co. v. Michigan Railroad Com., 236 U. S. 615, 35 Sup. Ct. 422, 59 L. ed. 750; Chicago &c. R. Co. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. ed. 290; Pennsylvania R. Co. v. Towers, 245 U. S. 6, 38 Sup. Ct. 2, 62 L. ed. 117; Chicago &c. Ry. Co. v. State, 53 Okla. 712, 157 Pac. 1039 L. R. A. 1918C, 492n. But see Houston &c. Ry. Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341; American Exp. Co. v. South Dakota, 244 U. S. 617, 37 Sup. Ct. 656, 61 L. ed. 1352. And compare Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 493, 38 Sup. Ct. 170, 62 L. ed. 270; American Exp. Co. v. South Dakota, 244 U. S. 617, 37 Sup. Ct. 656, 61 L. ed. 1352.

²⁶ Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181; Fenn v. Holme, 21 How. (U. S.) 481, 484, 16 L. ed. 198; Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627; Moore v. United States, 91 U. S. 270, 23 L. ed. 346; Kohl v. United States, 91 U. S. 367, 374, 376, 23 L. ed. 449; Scotland, The, 105 U. S. 24, 32, 26 L. ed. 1001; Atchison &c. Co. v. Denver &c. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; Burrus, In re

136 U. S. 586, 10 Sup. Ct. 850, 34 L. ed. 500; Barry, In re, 42 Fed. 113; but see Murray v. Chicago &c. R. Co., 62 Fed. 24; Swift v. Philadelphia &c. R. Co., 64 Fed. 59; Phipps v. Harding, 70 Fed. 468. In Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. ed. 481, the court relied upon the rules of the common law and of the civil law, saying of one of the common law rules, that: "It lies at the foundation of the administration of our criminal law." If this be true, as unquestionably it is, is there not a federal common law? 2 Elliott's Gen. Pr. § 297; Duncan v. United States, 7 Pet. (U. S.) 435, 8 L. ed. 739; Cox v. United States, 6 Pet. (U. S.) 172, 173, 8 L. ed. 359. See also the recent case of Western Un. Tel. Co. v. Call Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765.

²⁷ Baltimore R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772, and cases following it. Many of the decisions of the Supreme Court of the United States do recognize the fact that there is such a thing "as a general common law." In scores of cases where the question was not local to the state in any sense, as, for instance, such cases as Munn v. Illi-

not easy to perceive how the doctrine can be reconciled with that asserted in the great number of cases which affirm that the federal courts will follow the decisions of the state tribunals upon local questions but not upon questions of general law. Were it not for the decisions of eminent judges affirming that there is no federal common law we should be firmly of the opinion that when the constitution conferred upon the general government supreme power over a subject long known to the law and often passed upon by the courts it carried with the subject the common law. Even as against these decisions we venture the opinion that there is such a thing as unwritten law which forms part of our whole system of jurisprudence, national and state. It is quite difficult for us to conceive how a subject can be expressly and entirely placed under the dominion of the federal government and yet the common law of the subject not go with it. We do not believe that any written statutes can contain all the law there is upon a subject and do believe that recourse must be had to living principles. In American and English jurisprudence those principles are chiefly found in the common law. We can not believe that legislation does or can compass all the principles of right and justice, nor all the principles which govern

nois, 94 U. S. 113, 24 L. ed. 77, the court invokes the common law. If there is a general rule of law not local to the state, as there is in very many of the interstate commerce cases, and that rule influences the decisions of the federal courts it must be a federal common law rule. In admiralty cases general common law rules bring about decisions and in admiralty cases local law is not an element. Constitutions are framed with reference to existing things and upon the theory that there is an organized society governed by laws, and when a subject is provided for in the constitution it is the subject as recognized by organized society and governed by law. All constitutions presume a reign of law,

not a condition of anarchy. See generally *Murray v. Chicago &c. R. Co.*, 62 Fed. 24; *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 511, 546, 7 L. ed. 243; *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, 148, 7 L. ed. 374; *Cox v. United States*, 6 Pet. (U. S.) 172, 8 L. ed. 359; *Duncan v. United States*, 7 Pet. (U. S.) 435, 8 L. ed. 739; *Swift v. Tyson*, 16 Pet. (U. S.) 1, 18, 10 L. ed. 865; *New Jersey &c. Co. v. Merchants' Bank*, 6 How. (U. S.) 344, 390, 12 L. ed. 465; *United States v. Reid*, 12 How. (U. S.) 361, 13 L. ed. 1023; *Watson v. Tarpley*, 18 How. (U. S.) 517, 15 L. ed. 509; *Oates v. National Bank*, 100 U. S. 239, 25 L. ed. 580; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61.

the conduct and business of men or control the administration of justice.²⁸ It seems to us that the general principles of the common law (that is, such principles as are not peculiar to the governmental or social system of England, but such general principles as affect primary rights of persons or property) are part of the law of this nation. In cases far too numerous for citation reference is made to the principles contained in the Magna Charta, the Petition of Right and to the rules laid down by the courts of England, and these references indicate that notwithstanding some declarations to the contrary, the federal courts do, consciously or unconsciously, recognize the fact that there is a federal common law. It is, indeed, almost impossible to exclude it from the mind in considering any case involving great general principles.²⁹ Since the above was written the Supreme Court of

²⁸ In *Pawlet v. Clark*, 9 Cranch (U. S.), 292, 3 L. ed. 735, it was said: "We take it to be a clear principle that the common law in force at the emigration of our ancestors is deemed the birthright of the colonies unless it is inapplicable to their situation or repugnant to their other rights and privileges." See also *Norris v. Harris*, 15 Cal. 226, 232; *Robinson v. Campbell*, 3 Wheat. (U. S.) 212, 4 L. ed. 372. But see *Bucher v. Cheshire Railroad*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. ed. 795; *United States v. Railroad &c. Co.*, 6 McLean (U. S.), 517; *Lorman v. Clarke*, 2 McLean (U. S.), 568.

²⁹ As illustrating the doctrine of the text, see *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346; *Marshall v. Baltimore &c. R. Co.*, 16 How. (U. S.) 314, 14 L. ed. 953; *Fenn v. Holme*, 21 How. (U. S.) 481, 16 L. ed. 198; *Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. ed. 868; *Hanauer v. Doane*, 12 Wall. (U. S.) 342, 20 L. ed. 439; *Thomas v. Richmond*, 12 Wall. (U.

S.) 349, 20 L. ed. 453; *Trist v. Child*, 21 Wall. (U. S.) 441, 22 L. ed. 623; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *United States v. Clark*, 96 U. S. 37, 24 L. ed. 696; *Oates v. National Bank*, 100 U. S. 239, 25 L. ed. 580; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Oscanyan v. Arms Co.*, 103 U. S. 262, 26 L. ed. 539; *Atchison &c. R. Co. v. Denver &c. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 485, 28 L. ed. 291; *Woodstock &c Co. v. Richmond &c. Co.*, 129 U. S. 643, 4 Sup. Ct. 402, 32 L. ed. 819. In *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. ed. 508, it is said that: "There is, however, one clear exception to the statement that there is no national common law." But courts cannot make law, so that if there be law not contained in statutes upon which courts can give judgment it must be the law our ancestors brought from the mother country.

the United States has apparently settled the question in accordance with our views and has held that "the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactments."³⁰

§ 2539 (1664). **Commerce clause of the federal constitution—Generally.**—In other places we have considered the commerce clause of the federal constitution and have spoken of the limitations it imposes upon the power of the states.³¹ As we have shown, the effect of the commerce clause of the federal constitution is to deprive the states of the power to enact statutes, which, no matter what form they may assume, are strictly and in a clear legal effect regulations of interstate commerce.³² It is

³⁰ *Western Un. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765.

³¹ Ante, §§ 771, 781, 782, 786, 789, 812, 833. As to taxation of interstate railroads, see ante, §§ 910, 948. See as to the general power of the federal government, *Debs, In re*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1902; *Gulf & R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910; *Ames v. Union & C. R. Co.*, 64 Fed. 165; *Cuban & C. Co. v. Fitzpatrick*, 66 Fed. 63; *Jervey, Ex parte*, 66 Fed. 957; *Jervey v. The Carolina*, 66 Fed. 1013; *United States v. Cassidy*, 67 Fed. 698; *San Bernardino v. Southern & C. R. Co.*, 107 Cal. 524, 40 Pac. 796, 29 L. R. A. 327; *Solan v. Chicago & C. R. Co.*, 95 Iowa 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. 430; *Frere v. Von Schoeler*, 47 La. Ann. 324, 16 So. 808, 27 L. R. A. 414; *Houston & C. R. Co. v. Williams* (Texas Civ. App.), 31 S. W. 556.

³² Ante, §§ 771, 781. In *Wall v. Norfolk & C. R. Co.*, 52 W. Va. 485,

44 S. E. 294, 64 L. R. A. 501, 509, 94 Am. St. 948 (citing text), it is said: "No matter what the form, mode or means by which such commerce is impeded or obstructed it is void." We do not think that the decision in *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. ed. 166, can be regarded as denying the doctrine of the cases which adjudge that a state cannot enact a statute regulating interstate commerce but it must be confessed that it is difficult to reconcile some of the statements of the opinion with the rulings in other cases. The statement of the text is supported by the cases collected in the notes to the sections above referred to. See *Pembina & C. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *People v. Compagnie & C.* 107 U. S. 59, 2 Sup. Ct. 87.

safe to say that the power to regulate interstate or foreign commerce resides in the federal congress, and that if congress elects to exercise the power the states can not effectively legislate upon the subject. As elsewhere indicated, the questions of doubt and difficulty are those which arise in cases where there is inaction by congress and in cases where the controlling inquiry is whether the state statute is such "a regulation of commerce among the several states" as brings it into conflict with the federal constitution or laws.⁸³ We think it clear that where there is such conflict, that is, where the statute impedes or obstructs commerce between the states, the statute must yield and the commerce clause of the federal constitution prevail.

§ 2540 (1665). State power as limited by the commerce clause of the federal constitution—Generally.—It was said several years ago by one of the justices of the supreme court of the United States that all the decisions upon the power of the states under the commerce clause of the federal constitution were given by a

27 L. ed. 383; *Wabash &c. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; *Bowman v. Chicago &c. R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. ed. 700; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 392; *Houston &c. R. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed 1341; *City of Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 34 Sup. Ct. 826, 58 L. ed. 1337, 52 L. R. A. (N. S.) 574.

⁸³ We venture to say, but not without hesitation and diffidence, that it is difficult for us to accept the doctrine of concurrent power. As power over the subject is, by the paramount law, lodged in the general government, inaction by congress cannot transfer the power nor authorize its exercise by

state legislatures. Whether congress acts or does not act cannot, as we believe, vest a right in the states which, by the constitution is vested in the United States. Where the supreme law places the power there it resides even though it may not be exercised. The failure to exercise the power by the government to which it belongs cannot, as we believe, justify its exercise by a government to which the power does not belong. *Stoutenburgh v. Hennick*, 129 U. S. 141, 148, 9 Sup. Ct. 256, 32 L. ed. 637; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 498, 7 Sup. Ct. 592, 30 L. ed. 694. See also Judge Jenkins' Address in Proceedings of American Bar Assn. for 1906. But, to some extent at least, the doctrine of concurrent power seems to be generally accepted at this time.

divided court, and it is still true that in the majority of cases the court is divided in opinion. Individual notions creep into opinions, for the judge to whom the duty of writing the opinion for the court is delegated very often incorporates in the opinion his individual views or, at least, gives tone and color to the conclusions of the court from his individual conceptions, and this has deepened the confusion. Very able opinions have been written, strong in argument and rich in authority, but the truth remains that there is yet confusion and obscurity. The opinions of the great chief justice, John Marshall, laid with a master's power the foundations of the doctrines of our day, but the expansion of commerce and the changes that time has wrought, have brought into existence new conditions, new agencies, and new situations, so that there are many questions which the earlier cases did not meet or decide. The meaning of the term "regulation of interstate commerce" has not been defined with clearness and distinctness, and it is very difficult to say with precision what meaning should be assigned to the term. The courts, it is true, have adjudged many statutes to be void because they assumed to regulate commerce among the states and have upheld others for the reason that, although they affect interstate commerce, they are not to be regarded as regulations of that commerce within the meaning of the organic law, but yet it is true that there is no authoritative adjudication that will warrant the statement of a definition or rule of general application. In saying, as we have often done, that a state has no power to enact a statute that assumes to establish a regulation of interstate commerce, or a statute that in its effect and operation does make such a regulation, we are not to be understood as affirming that a state may not, in the absence of legislation by congress, legislate upon subjects connected with interstate commerce, but on the contrary, we affirm that the weight of authority is, although there is conflict, that in the absence of legislation by congress a state may legislate upon the subject, although it can not establish a regulation that is in effect and operation "clearly a regulation of interstate commerce." It is, indeed, safe to say that no state has power to establish regulations that so operate as to burden, im-

pede or obstruct³⁴ commerce between the several states,³⁵ but as is evident from what we have said, what is a regulation of interstate commerce within the meaning of the law is not easily determined. The question as to the power of the states to legislate upon subjects connected with interstate commerce has, as

³⁴ *Railroad Co. v. Richmond*, 19 Wall. (U. S.) 584, 22 L. ed. 173; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. ed. 257; *Stone v. Farmers' &c. Trust Co.*, 116 U. S. 307, 334, 6 Sup. Ct. 334, 338, 1191, 29 L. ed. 636; *Wabash &c. Ry. Co. v. People*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; *Bowman v. Chicago &c. R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. ed. 700; *Leisey v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128; *Rahrer, In re*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572; *Illinois &c. R. Co. v. People*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. ed. 107; *State v. United States Exp. Co.*, 164 Iowa 112, 145 N. W. 451; *Wall v. Norfolk &c. R. Co.* 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 509, 94 Am. St. 948; Ante, §§ 775, 782, 785, 791, 800, 811-814. See also *American Exp. Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. ed. 417; citing *Norfolk &c. R. Co. v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. ed. 254; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. ed. 1088; *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. ed. 1100; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. ed. 336; and distinguishing *O'Neil v. Vermont*, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. ed. 450; *Heymann v. Southern R. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. ed. 178, Ann. Cas. 1130,

But see where the effect of the state act was held so indirect as not to violate the commerce clause. *Louisville &c. R. Co. v. Higdon*, 234 U. S. 592, 34 Sup. Ct. 948, 58 L. ed. 1484.

³⁵ The principle stated in the text has often been asserted in tax cases. Ante, §§ 910, 911, 912, 917, 918. See also *Bank Tax Cases*, 2 Wall. (U. S.) 200, 17 L. ed. 793; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. ed. 579; *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. ed. 678; *Weston v. City of Charleston*, 2 Pet. (U. S.) 449, 7 L. ed. 481; *Passenger Cas.* 7 How. (U. S.) 469-482; *Atchison v. Huddleson*, 12 How. (U. S.) 392, 13 L. ed. 993; *Hays v. Pacific &c. Steamship Co.*, 17 How. (U. S.) 596, 15 L. ed. 254; *People v. Commissioners*, 2 Black (U. S.) 620; *Crandall v. State*, 6 Wall. (U. S.) 35, 18 L. ed. 745; *Society for Savings v. Coite*, 6 Wall. (U. S.) 594, 18 L. ed. 897; *Providence &c. v. Massachusetts*, 6 Wall. (U. S.) 611, 18 L. ed. 907; *Waring v. Mayor*, 8 Wall. (U. S.) 110, 19 L. ed. 342; *Hinson v. Lott*, 8 Wall. (U. S.) 148, 19 L. ed. 387; *Woodruff v. Parham*, 8 Wall. (U. S.) 123, 19 L. ed. 382; *Thompson v. Pac. R. Co.*, 9 Wall. (U. S.) 579, 19 L. ed. 792; *Ward v. Maryland*, 12 Wall. (U. S.) 418, 20 L. ed. 449; *Osborne v. Mobile*, 16 Wall. (U. S.) 479, 21 L. ed. 470; *Railroad Co. v. Peniston*, 18 Wall.

we have seen,⁸⁶ often been before the courts, but, notwithstanding this fact, the limitations upon the power of the states have not been precisely marked out, and although it is well settled that there are strong and unbending limitations upon the power of the states it can not be affirmed that the lines which bound the respective spheres of the state and national governments are distinctly known, and hence it can not be known just what state legislation is such a regulation of commerce as cuts into the sphere of the national government, and is, for that reason, to be condemned. It has been held that a state statute requiring a domestic railroad company to provide separate accommodations for white and colored persons is valid,⁸⁷ but the clear implication from the case referred to, and the express statements in other

(U. S.) 5, 21 L. ed. 787; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; and cases cited; *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. ed. 229, and cases cited. See *Western Union &c. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. ed. 49; *Columbus Railway Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. ed. 238; *Western Union &c. Co. v. Taggart*, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671n, and rules stated and authorities collected in *Southern R. Co. v. Railroad Com.*, 179 Ind. 23, 100 N. E. 337.

⁸⁶ Ante, §§ 775, 782-799, 800, 811-814.

⁸⁷ *Bertonneau v. Board of Directors*, 3 Woods (U. S.) 177, 3 Fed. Cas. 1361; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. ed.

256; affirming *Plessy*, Ex parte, 45 La. Ann. 80, 11 So. 948, and citing *State v. McCann*, 21 Ohio St. 198; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Dawson v. Lee*, 83 Ky. 49; *Lehew v. Brummel*, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. 895; *People v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232n. See also *Chesapeake &c. R. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. ed. 244; *Chiles v. Chesapeake &c. R. Co.*, 218 U. S. 71, 30 Sup. Ct. 667, 54 L. ed. 936, 20 Ann. Cas. 980; *Louisville &c. R. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. ed. 734; *McCabe v. Atchison &c. R. Co.*, 235 U. S. 151, 35 Sup. Ct. 69, 59 L. ed. 169 (but not where it authorizes sleeping and dining cars for white persons exclusively without any similar accommodations for negroes); *Southern Kans. R. Co. v. State*, 44 Tex. Civ. App. 218, 99 S. W. 166.

cases, require the conclusion that a statute of that character would be regarded as void if it assumed to regulate commerce between the states. But it has been held that, where the charter or local law prohibited the exclusion of persons on account of their color, the company could not rightfully require colored persons to travel in cars exclusively assigned to such persons, although the cars were as good as those provided for white persons.⁸⁸ It has also been held that a statute of a state providing that interstate carriers shall give to all persons, without distinction of race or color, equal accommodations, is void because it is a regulation of interstate commerce.⁸⁹

§ 2541 (1666). **The interstate commerce act—Generally.**—As the power of the federal government over commerce among the several states is supreme, and as the general government has a free choice of means and methods there can be no doubt as to the validity of the interstate commerce act. That act rests upon solid foundations, so far as the legal aspects of the question are concerned, no matter what may be thought of the policy or expediency of such a law. But there is no necessity nor, indeed any excuse for discussing the question of the validity of the law

⁸⁸ *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, 21 L. ed. 675; *Carrey v. Spencer*, 72 N. Y. St. 108, 36 N. Y. S. 886.

⁸⁹ *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547. In *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. ed. 256, the court said of the case cited, that, "The court in that case, however, disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the states." See also *Louisville &c. R. Co. v. Mississippi*, 133 U. S. 587, 591, 10 Sup. Ct. 348, 33 L. ed. 784; *Chesapeake &c. R. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. ed. 244; *Sue*,

The, 22 Fed. 843; *Logwood v. Memphis &c. R. Co.*, 23 Fed. 318; *McGuinn v. Forbes*, 37 Fed. 639; *Houck v. Southern &c. R. Co.*, 38 Fed. 226; *State v. Hicks*, 44 La. Ann. 770, 11 So. 74; *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62; *State v. Chicago &c. R. Co.*, 125 Minn. 332, 147 N. W. 169; *Louisville &c. R. Co. v. State*, 66 Miss. 662, 6 So. 203, 5 L. R. A. 132, 14 Am. St. 599; *People v. King*, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293n, 6 Am. St. 389; *West Chester &c. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744; *Chesapeake &c. R. Co. v. Wells*, 85 Tenn. 613, 4 S. W. 5; *Heard v. Georgia R. Co.*, 3 Interst. Com. 111, 1 Interst. Com. 428.

since that question is at rest,⁴⁰ and with mere questions of policy and expediency the courts are not concerned. The act is entitled, "An act to regulate commerce,"⁴¹ and it was intended to and does, it has been held, cover the whole field of foreign and interstate commerce.⁴²

⁴⁰ *Canada &c. Co. v. International &c. Co.*, 8 Fed. 190; *United States v. East Tennessee &c. R. Co.*, 13 Fed. 642; *United States v. Boston &c. R. Co.*, 15 Fed. 209; *Pacific &c. Co. v. Board of Railroad Com.*, 18 Fed. 10; *Kaeiser v. Illinois &c. R. Co.*, 18 Fed. 151; *United States v. Louisville &c. R. Co.*, 18 Fed. 480; *Illinois &c. Co. v. Stone*, 20 Fed. 468; *Mobile &c. Co. v. Sessions*, 28 Fed. 592; *Kentucky &c. Co. v. Louisville &c. Co.*, 37 Fed. 567, 2 L. R. A. 289, 2 Interst. Com. R. 351; *Railroad Commissioners v. Railroad Co.*, 22 S. Car. 220; *Ante*, §§ 675, 676. See generally *United States v. Union Pacific R. Co.*, 91 U. S. 72, 23 L. ed. 224; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Louisville &c. R. Co. v. Railroad Com.*, 19 Fed. 679; *Missouri &c. R. Co. v. Texas &c. R. Co.*, 30 Fed. 2. For a history and statement of the general scope and purpose of the act, see *Report of The Commission*, 1 Interst. Com. Com. 260; *Louisville &c. R. Co. v. Nashville &c. R. Co.*, 1 Interst. Com. Com. 64. All the decisions determining questions arising upon the act proceed upon the theory that it is valid.

⁴¹ 24 U. S. Statutes at Large 379, amended in 1889; 25 U. S. Statutes at Large 855; in 1891, 26 Statutes at Large 743; in 1895, 28 Statutes at Large 643, and by Act of June 29,

1906, and joint resolution, approved June 30, 1906, 34 St. at L. 798. See also 27 Statutes at Large, 443; 32 Statutes at Large, 823, 847; 36 Statutes at Large, 854; 30 Statutes at Large, 424; 36 Statutes at Large, 1397; 38 Statutes at Large, 1197; 39 Statutes at Large 441. The amendment of June 18, 1910, (12 U. S. Comp. Stat. Supp. 1911, p. 1301) to section 15, giving the shipper of an interstate shipment the right to designate the route has been held not to apply to such a shipment made in 1907. *Cleveland &c. R. Co. v. Hayes*, 181 Ind. 87, 103 N. E. 839.

⁴² *Texas &c. R. Co. v. Interst. Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. See also *Gulf &c. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910; *Chicago &c. R. Co. v. United States*, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. ed. 305; *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. 936, to the effect that it supersedes and abrogates all conflicting state statutes. But while the statement in the case cited is a very broad one, we suppose that the interstate commerce act can not be regarded as containing the only federal legislation upon the subject of interstate commerce, nor the whole law upon the subject, for there are other statutes upon the subject, as, for in-

§ 2542 (1667). **Construction of the interstate commerce act.**—The American courts have not, so far as our investigation enables us to determine, declared in express terms whether the interstate commerce act is to be construed strictly as against interstate carriers, but, as we shall hereafter see, the courts have, as a rule, given the act such a construction as interferes with the free right of contract and the free use of property as little as it is possible to do and yet protect the public.⁴³ The English courts have construed the English statutes, which is in many respects similar to the American, very liberally in favor of the public.⁴⁴ We think

stance, the act of March, 1873, U. S. Statutes, §§ 4386, 4390, and the act in relation to the regulation of the sale of intoxicating liquors, and other recent acts. See also *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 107. So, in *Western Union Tel. Co. v. Call, Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 54 L. ed. 765, it is said that the principles of the common-law are operative upon interstate commercial transactions except so far as they are modified by congressional enactments. See generally as to its purpose and effect. *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 848, 36 L. ed. 699; *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671; *Interstate Com. Com. v. Chicago &c. R. Co.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946; *New York Cent. R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. ed. 613; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; *New York &c. R. Co. v. Interstate Com. Comm.*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L.

ed. 515. And as to extent, purpose and effect of the Interstate Commerce Act at present see Act of Feb. 28, 1920 (Transportation Act 1920) ch. 91; Barnes' Fed. Code, 1921, Supp. § 7884 et seq.

⁴³ "It is discrimination in fact, and not a mere intention to discriminate that is punishable." *Lehigh Valley R. Co. v. Rainey*, 112 Fed. 487. It is a penal statute and an action thereon to recover thereon for unjust discrimination is an action to recover money in the nature of a penalty. *Ratican v. Terminal R. Assn.*, 114 Fed. 666; *Parsons v. Railroad Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. ed. 231. But it is held that a contract made before the act took effect cannot be enforced after the act took effect if it would have been illegal if made then. *Bullard v. Northern Pac. R. Co.*, 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246; *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559.

⁴⁴ *Caledonian &c. R. Co. v. North British &c. R. Co.*, 3 Nev. & Macq. R. Cas. 403; *Belfast &c. R. Co. v. Great Northern &c. R. Co.*, 3 Nev. & Macq. R. Cas. 419.

that as the act was designed to advance the interests of commerce and promote the public welfare it should be liberally construed in favor of the public, except, perhaps, where it tends to abridge the right of contract or restrict the use of property, and there, while the construction should be reasonable, it should not be so strict as to unnecessarily limit the right to contract. The intent of congress is to be gathered from a consideration of the entire act, and it should not be given such a construction as will prevent the proper enforcement of the legislative purpose.⁴⁵ The act was not designed to benefit carriers, but to promote the public good, and as this is its object it should be liberally construed in favor of the public.⁴⁶ But while the act is to be liberally construed in favor of the public the construction can not justly be such as will unnecessarily abridge the right of the contract or the right to the enjoyment of property. The scope of the act is very broad and comprehensive, and includes all foreign and interstate commerce, and all its instrumentalities and agencies.⁴⁷ The act has not as yet been so fully considered as to justify the statement of many general rules, but many of its provisions have received authoritative construction. Thus, it has been held that a railroad company which enters into an arrangement with other companies and under such arrangement receives goods brought from another state, is part of a continuous line "under a common control, management or arrangement for a continuous carriage

⁴⁵ *Van Patten v. Chicago &c. R. Co.*, 81 Fed. 545, 547. See also *Omaha &c. St. Ry. Co. v. Interstate Commerce Comm.*, 191 Fed. 40, 47.

⁴⁶ *Kentucky Bridge Co. v. Louisville &c. R. Co.*, 37 Fed. 567, 2 L. R. A. 289. See also *Interstate Com. Com. v. Louisville &c. R. Co.*, 118 Fed. 613; *Interstate Com. Com. v. East Tenn. &c. R. Co.*, 85 Fed. 107; *Little Rock &c. R. Co. v. St. Louis &c. R. Co.*, 63 Fed. 775, 26 L. R. A. 192; *Southern Pac. Co. v. Interstate Com. Comm.*, 200 U. S. 536, 26 Sup.

Ct. 330, 50 L. ed. 585; *Texas &c. R. Co. v. United States &c. Com.*, 205 Fed. 380.

⁴⁷ In *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 672, 40 L. ed. 940, the court in speaking of the act said: "It would be difficult to use language more unmistakably signifying that congress had in view the whole field of commerce (excepting commerce wholly within a state), as well that between states and territories as that going to or coming from foreign countries."

or shipment."⁴⁸ It has been held that in construing the act the interest of the interstate carrier is a proper matter for consideration,⁴⁹ and this ruling forbids a construction that would deprive carriers of the right of contract or of the right of property without due process of law. It has been held that the clause "common control, management or arrangement for continuous shipment," was intended to cover all interstate traffic over all railroad lines as well as over part water and part railroad transportation.⁵⁰

⁴⁸ *Cincinnati &c. R. Co. v. Interst. Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935, distinguishing *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912 (4 Interst. Com. 257), and affirming *Interstate Com. Com. v. Cincinnati &c. R.*, 56 Fed. 925. In the case first cited it was said: "All we wish to be understood to hold is that when goods are shipped under a through bill of lading from a point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment, within the meaning of the act to regulate commerce. When we speak of a 'through bill of lading,' we are referring to the usual method in use by connecting carriers, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested." See also *United States v. Wood*, 145 Fed. 405; *United States v. Seaboard R. Co.*, 82 Fed. 563. It has, however, been held that a mere "through booking" is not an

"arrangement" within the meaning of the statute. *Ayr Harbor &c. v. Glasgow R. Co.*, 4 R. & Canal Traf. Cas. 81. See also *Interstate Com. Com. v. Cincinnati &c. R. Co.*, 56 Fed. 925.

⁴⁹ In the case of *Interstate Com. Com. v. Louisville &c. R. Co.*, 73 Fed. 409, 420, it was said: "It was at one time thought doubtful whether the interests of the railway could be taken into consideration but it is now established that they can be. *Interstate Com. Com. v. Baltimore &c. R. Co.*, 43 Fed. 37; *Ames v. Union &c. R. Co.*, 64 Fed. 176; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1047, 38 L. ed. 1028."

⁵⁰ *Railroad Commission v. Clyde &c. Co.*, 5 Interst. Com. Com. 326. But compare *Koehler, Ex parte*, 30 Fed. 869. As to when it does or does not include companies carrying express, see *United States v. Morsman*, 42 Fed. 448; *Southern Ind. Exp. Co. v. United States*, 88 Fed. 659, 92 Fed. 1022. Under late amendments express companies are included and some other carriers are included that did not, perhaps, come within the original act.

§ 2543 (1668). **The police power as affected by the commerce clause.**—We have elsewhere considered the question of the nature of the police power of the states, and, to some extent, discussed the question of the limitations imposed upon the police power by the commerce clause of the federal constitution,⁵¹ but the question requires a somewhat fuller consideration in connection with the subject of this chapter. In a late case it was held that a state statute prohibiting the running of trains on Sunday was a valid exercise of the police power of the state, and was not a violation of the commerce clause of the federal constitution.⁵² There is, we say with deference, some reason for questioning the soundness of the decision of the court in the case referred to, for it is difficult to perceive why the prohibition against run-

⁵¹ Ante, §§ 771, 777-780, 781, 782. See also *State v. Northern Pac. Ry. Co.*, — N. Dak. —, 172 N. W. 324, and authorities cited in both principal and dissenting opinions.

⁵² *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. ed. 166, affirming *Hennington v. State*, 90 Ga. 396, 17 S. E. 1009. The court cited the cases of *Mugler v. Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. ed. 205; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 203, 210, 6 L. ed. 23; *Wilson v. Black Bird &c. Co.*, 2 Pet. (U. S.) 245, 251, 252, 7 L. ed. 412; *Cooley v. Board, The, &c.* 12 How. (U. S.) 299, 13 L. ed. 996; *Owners of Brig. James Gray v. Owners &c.*, 21 How. (U. S.) 184, 16 L. ed. 106; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713, 18 L. ed. 96; *Railroad Co. v. Husen*, 95 U. S. 465, 560, 567, 21 L. ed. 710; *Henderson v. Mayor &c.*, 92 U. S. 259, 23 L. ed. 543; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Pound v. Turck*, 95 U. S. 459, 463, 24 L. ed. 525; Rail-

road Co. v. Husen, 95 U. S. 465, 470, 24 L. ed. 527; *New Orleans &c. Co. v. Louisiana &c. Co.* 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; *Morgan's &c. Co. v. Louisiana Board &c.*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. ed. 237; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. ed. 508; *Nashville &c. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352; *Minnesota v. Barber*, 136 U. S. 313, 320, 10 Sup. Ct. 862, 34 L. ed. 455; *Frolickstein v. Mobile*, 40 Ala. 725; *Scales v. State*, 47 Ark. 476, 482, 1 S. W. 769, 58 Am. Dec. 768n; *Newman, Ex parte*, 9 Cal. 502; *Commonwealth v. Has*, 122 Mass. 40; *State v. Ambs*, 20 Mo. 214; *Bloom v. Richards*, 2 Ohio St. 387, 392; *Specht v. Commonwealth*, 8 Pa. St. 312, 49 Am. Dec. 518; *Nashville v. Linck*, 12 Lea (Tenn.), 499, 515. See also *State v. Railroad Co.*, 24 W. Va. 783, 49 Am. Dec. 290. To the same effect is *Seale v. State*, 126 Ga. 644, 55 S. E. 472.

ning trains on Sunday, where they are interstate trains, is not essentially a regulation of interstate commerce.⁵³ We do not, of course, doubt the power of a state legislature to prohibit the conduct of ordinary business on Sunday, but it does seem to us that interdicting the running of interstate trains on a specified day through a state is a regulation of interstate commerce. If a legislature may prohibit the running of trains on one day, it is not easy to see why it may not, at its pleasure, choose the day, nor why, if it may select one day, it may not select more than one day. If the power to prohibit the running of trains be conceded to the state legislature, then it would seem that the right to select the day or determine the number of days is a matter of legislative discretion. But while there is reason for questioning the soundness of the decision, there is, nevertheless, much force in the argument by which the conclusion of the court is supported. It is true—as the court affirms—that a state statute, although it may affect interstate commerce, is not necessarily a regulation of that commerce, and if the statute was not a regulation of interstate commerce the decision is unquestionably right.⁵⁴ The majority of the court in the case upon which we are commenting proceeded upon the theory that the statute under

⁵³ In the case referred to, Fuller, C. J., in his dissenting opinion, said: "Intercourse and trade between the states by means of railroads passing through several states, is a matter national in its character and admitting of uniform regulation. The power of Congress to regulate it is exclusive, and under the Constitution it is free and untrammelled, except as Congress otherwise provides. This statute, in requiring the suspension of interstate commerce for one day in the week, amounts to a regulation of that commerce, and is invalid because the power of Congress in that regard is exclusive. But it is said that the act is not a regulation of commerce,

but a mere regulation of police, and that the so-called police power of a state is plenary. The result, however, is the same. When a power of a state and a power of the general government come into collision, the former must give way." See also *Louisville &c. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 227, 46 L. ed. 416; *Cleveland &c. R. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. ed. 868; *Mississippi R. R. Co. v. Illinois Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547.

⁵⁴ *Nashville &c. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352; *New Mexico v. Denver &c.*

consideration did not establish a regulation of interstate commerce, and for that reason was not within the constitutional interdiction.⁵⁵ State quarantine regulations have often been upheld as a proper exercise of the police power of the state even though they could not well be effective without operating in some degree at least, upon interstate or foreign commerce;⁵⁶ so have inspection⁵⁷ and pilotage laws.⁵⁸ And where the service is public, like that of a railroad, it is generally held that the state may prescribe a reasonable test or examination to determine the qualifications or fitness of an employe to engage in it.⁵⁹ But a

R. Co., 203 U. S. 38, 27 Sup. Ct. 1, 51 L. ed. 78; *American Exp. Co. v. Southern Ind. Exp. Co.*, 167 Ind. 292, 78 N. E. 1021, 79 N. E. 753; *Louisville &c. R. Co. v. Central Stockyards Co.*, 30 Ky. L. 18, 97 S. W. 778; *State v. Thompson*, 47 Ore. 492, 84 Pac. 476, 4 L. R. A. (N. S.) 480; *Skipper v. Seaboard &c. R.*, 75 S. Car. 276, 55 S. E. 454.

⁵⁵ In the course of the majority opinion it was said: "The argument in behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the constitution, without reference to affirmative action by congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and therefore is void, at least until congress interferes." It was also said: "We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not, for that reason, a needless intrusion upon the domain of federal

jurisdiction, nor strictly a regulation of interstate commerce."

⁵⁶ *Missouri &c. R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. ed. 878; *Compagnie Francaise &c. v. State Bd. of Health*, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. ed. 1209; *Louisiana v. Texas*, 176 U. S. 1, 20 Sup. Ct. 251, 44 L. ed. 347; *Rasmussen v. Idaho*, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. ed. 820; *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. ed. 778, 14 Ann. Cas. 1101. But see Act of June 30, 1914C, 131, 217 Fed. Rep. 144, § 8706a.

⁵⁷ *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. ed. 1182; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. ed. 223; *Paptasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 357, 358, 18 Sup. Ct. 862, 43 L. ed. 191.

⁵⁸ *Cooley v. Port Wardens*, 12 How. (U. S.) 299, 319, 13 L. ed. 996; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 32 Sup. Ct. 626, 56 L. ed. 1047.

⁵⁹ *Nashville &c. R. Co. v. Alabama*, 128 U. S. 98, 9 Sup. Ct. 28, 32 L. ed. 353 (examination of engineers for

state statute making it a misdemeanor for any person to act as a conductor on a railroad train in the state without having previously served for two years as a freight conductor or brakeman is unconstitutional as violating the provisions of the Fourteenth Amendment.⁶⁰

§ 2544 (1668a). Police power—Other cases.—A very important doctrine was declared in another comparatively recent case.⁶¹ In the case to which we refer it was adjudged that a statute of the state of Illinois, which required an interstate railroad passenger and mail train to run three and one-half miles in order to stop at a station for which reasonable facilities had been provided, was void because it was not a reasonable exercise of the police power, and was an unreasonable obstruction of interstate commerce. Other still more recent decisions are to the same effect.⁶²

color blindness); *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. ed. 1002; *Watson v. Maryland*, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. ed. 987.

⁶⁰ *Smith v. Texas*, 233 U. S. 630, 34 Sup. Ct. 681, 58 L. ed. 1129, L. R. A. 1915D, 677n, Ann. Cas. 1915D, 420n; *Cleveland &c. R. Co. v. State*, 26 Ohio C. C. 348, affd. in 70 Ohio St. 506, 72 N. E. 1165. But see *Simpson v. Greary*, 204 Fed. 507.

⁶¹ *Illinois Central R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. ed. 107, reversing *Illinois Central R. Co. v. People*, 143 Ill. 434, 33 N. E. 173. See ante, § 782. In the case cited the court referred to the following cases: *Railroad Co. v. Richmond*, 19 Wall (U. S.) 584, 589, 22 L. ed. 173; *Stone v. Farmers' Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 29 L. ed. 636; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. ed. 508; *Union Pac. Railroad Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428;

Chicago &c. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970. In the case first cited it was said: "The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing that will burden or impede the interstate traffic of the company or impair the usefulness of its facilities for such purpose." See also *Cleveland &c. R. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. ed. 868; *Lake Shore &c. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702; *Atlantic &c. R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. ed. 230; *Missouri &c. R. Co. v. Norfolk*, 25 Okla. 325, 107 Pac. 172, 29 L. R. A. (N. S.) 159 and note. And compare *St. Louis &c. R. Co. v. Langen*, 29 Okla. 691, 119 Pac. 126, 44 L. R. A. (N. S.) 478 and note.

⁶² *Herndon v. Chicago &c. R. Co.*, 218 U. S. 135, 30 Sup. Ct. 633, 54

It seems to follow from the principle asserted in the cases under immediate consideration, and in other cases, that, as elsewhere said,⁶³ the controlling question is as to whether the statute is a regulation of interstate commerce. There can be no doubt that the states neither delegated to the general government the police power, nor surrendered it, but, on the other hand, there can be no doubt that the commerce clause of the federal constitution does carry to the general government the subject of commerce among the several states with all its incidents, so that the conclusion must be that the states can not, by statute professedly passed in the exercise of the police power, defeat the supreme power expressly and entirely vested in the nation.⁶⁴ The power of a state

L. ed. 970; *Atlantic &c. R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. ed. 230. In *Mississippi R. Com. v. Illinois Cent. R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, it is held that interstate commerce is unconstitutionally interfered with by an order of a state railroad commission requiring the railroad company to stop its interstate trains at a specified county seat, where the company had already provided adequate facilities at such station. The authorities are reviewed, and the controlling distinction is stated as follows: "A state railroad commission has the right, under a state statute, so far as railroads are concerned, to compel a company to stop its trains under the circumstances already referred to, and it may order the stoppage of such trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through interstate train actually running, and compel it to stop at a locality named. In such case, in the

absence of congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right; but if the company has furnished all such proper and reasonable accommodation to the locality as fairly may be demanded, taking into consideration the fact, if it be one that the locality is a county seat, and the amount and character of the business done, then any interference with the company (either directly, by statute, or by a railroad commission acting under authority of a statute) by causing its interstate trains to stop at a particular locality in the state is an improper and illegal interference with the rights of the railroad company, and a violation of the commerce clause of the Constitution." See also *Lasater v. St. Louis &c. R. Co.*, 177 Mo. App. 534, 160 S. W. 818.

⁶³ Ante, §§ 771, 781. See also *Geiger-Jones Co. v. Turner*, 230 Fed. 233.

⁶⁴ *United States v. DeWitt*, 9 Wall. (U. S.) 41, 19 L. ed. 593; *Reading*

to enact police regulations is limited, as are all other legislative powers, and, "every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."⁶⁵ A state anti-scalping law, protecting travelers from fraud of ticket brokerage has been held to be such an exercise of the police power and valid, although applicable to tickets of roads without as well as within the jurisdiction.⁶⁶ And a state law requiring the checking of speed at ordinary crossings has been held invalid as a direct burden upon interstate commerce.⁶⁷

Railroad Co. v. Pennsylvania (State Freight Tax), 15 Wall. (U. S.) 232, 21 L. ed. 146; *Slaughter-House Cases*, 16 Wall. (U. S.) 36, 21 L. ed. 394; *Peete v. Morgan*, 19 Wall. (U. S.) 581, 682, 22 L. ed. 201; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *United States v. Stanley* (Civil Rights Cases), 109 U. S. 3, 27 L. ed. 835; *New Orleans &c. Co. v. Louisiana &c. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346; *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. 277, 32 L. ed. 695; *Rahrer, In re*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 451, 39 L. ed. 223; *United States v. Knight Co.*, 156 U. S. 1, 11, 15 Sup. Ct. 249, 39

L. ed. 325; *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. ed. 1105; *People v. Rock Island &c. R. Co.*, 71 Fed. 753; *Loeb, Ex parte*, 72 Fed. 657. See also *Kansas City &c. Ry. Co. v. Kaw Valley Drainage Dist.*, 233 U. S. 75, 34 Sup. Ct. 564, 58 L. ed. 857, and cases cited.

⁶⁵ *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. ed. 256, citing *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220. See also *Hannibal &c. R. Co. v. Husen*, 95 U. S. 465, 472, 473, 24 L. ed. 527.

⁶⁶ *State v. Thompson*, 47 Ore. 492, 84 Pac. 476, 4 L. R. A. (N. S.) 480. See also ante, §§ 868, 2423.

⁶⁷ *Seaboard Air Line Ry. v. Blackwell*, 244 U. S. 310, 61 L. ed. 1160, 37 Sup. Ct. 640, L. R. A. 1917F, 1184n. But see *Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. ed. 897 (speed regulation); *Southern Ry. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. ed. 868; *Lusk v. Town of Dora*, 224 Fed. 650.

§ 2545 (1669). **State statutes held to be regulations of interstate commerce.**—Many of the cases heretofore referred to by us adjudge state statutes to be invalid, and it is not our purpose to again consider those cases, nor, indeed, shall we attempt to consider all the cases not heretofore discussed. The rule in regard to a state statute which assumes to regulate interstate commerce was clearly declared in a case in which it was held that a state statute prescribing a penalty for charging or collecting a greater sum than that specified in the bill of lading was void because it was a regulation of commerce among the several states.⁶⁸ The general question was considered by the supreme court of Iowa, and it was held that a state statute assuming to give a right of action for the recovery of overcharges on shipments of freight in cases of an alleged unjust discrimination was invalid.⁶⁹ It has often been held that state statutes which prohibit the transportation of Texas cattle through the state are regulations of commerce among the several states and are in conflict with the federal

⁶⁸ *Gulf &c. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910; *St. Louis &c. R. Co. v. Carden* (Tex. Civ. App.), 34 S. W. 145.

⁶⁹ *Gatton v. Chicago &c. R. Co.*, 95 Iowa 112, 63 N. W. 589. The court professedly distinguished the cases of *Cook v. Chicago &c. R. Co.*, 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 764, 25 Am. St. 512; *Fuller v. Chicago &c. R. Co.*, 31 Iowa 187, 209, but practically overruled much of the doctrine asserted in *Cook v. Chicago &c. R. Co.* The decision of the court was mainly rested upon the cases of *Wabash &c. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244, and *Hart v. Chicago &c. R. Co.*, 69 Iowa, 485, 29 N. W. 597. Reference was also made to *Carton v. Illinois &c. R. Co.*, 59 Iowa 148, 13 N. W. 67, 44 Am. Rep. 672n, and to Mr. Draper William Lewis' Federal Power

over Commerce, 122, 123. See also *Louisville &c. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. ed. 416. But compare *Louisville &c. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298; *Sullivan v. Minneapolis &c. Ry. Co.*, 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612n. In the course of the opinion the court quoted with approval the statement that: "The inaction of congress with reference to legislation touching interstate commerce is equivalent to a declaration that such commerce shall be free and untrammelled." Compare also *Robinson v. Baltimore &c. R. Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. ed. 288; *Mitchell Coal &c. Co. v. Penna. R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. ed. 1472, and see notes in Ann. Cas. 1913D, 272, and 45 L. R. A. (N. S.) 612.

constitution.⁷⁰ But other statutes giving a right of action for damages in such cases have been upheld,⁷¹ and as shown in the last preceding section proper quarantine regulations and the like may be made. It has been held that a state statute which prohibits interstate railroad companies from charging a greater rate for hauling freight a shorter distance than the rate charged for hauling freight a greater distance on the same line of road violates the federal constitution and is void.⁷² But where the statute applies only to those who own or operate a road within the state, and not to interstate commerce, the fact that it may indirectly affect interstate commerce in some sense, does not necessarily render it void, and such a statute has been held valid in every

⁷⁰ *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. ed. 455; *State v. Klein*, 126 Ind. 68, 25 N. E. 873; *Gilmore v. Hannibal &c. R. Co.*, 67 Mo. 323; *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 638n; *Selvege v. St. Louis &c. R. Co.*, 135 Mo. 163, 36 S. W. 652; *Adams Ex. Co. v. Board &c.*, 65 How. Pr. (N. Y.) 72; *State v. Railroad Co.*, 24 W. Va. 783, 49 Am. Rep. 290. In one of the cases cited, *Bradford v. Floyd*, 80 Mo. 207, was overruled. See, as to judicial knowledge, *Missouri &c. R. Co. v. Finley*, 38 Kans. 550, 16 Pac. 951; *Patee v. Adams*, 37 Kans. 133, 14 Pac. 505. As to the liability of railroad carriers for transporting diseased cattle, see *Frye v. Chicago &c. R. Co.*, 73 Ill. 399. Refusal to receive diseased cattle, see *Chicago &c. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 64n; *Chicago &c. R. Co. v. Gasaway*, 71 Ill. 570. See ante, § 2332. In *State v. Chicago &c. R. Co.* (Minn.), 147 N. W. 103, a statute prohibiting

shipments of cream over any railroad in the state for a greater distance than sixty-five miles was held void as an interference with interstate commerce, and the court distinguished, *Nelson v. Minneapolis*, 112 Minn. 16, 127 N. W. 445, 29 L. R. A. (N. S.) 260n, and *Evans v. Chicago Ry. Co.*, 109 Minn. 64, 122 N. W. 876, 26 L. R. A. (N. S.) 278n.

⁷¹ *Kimmish v. Ball*, 129 U. S. 217, 9 Sup. Ct. 277, 32 L. ed. 695; *Missouri &c. R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. ed. 878. So has the New Mexico law prohibiting carriers from receiving hides that do not bear the evidence of inspection required. *New Mexico v. Denver &c. R. Co.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. ed. 78.

⁷² *McGuigan v. Wilmington &c. R. Co.*, 95 N. Car. 428, 59 Am. Rep. 247. It seems to us that the doctrine of the case cited is in conflict with the doctrine of *Bagg v. Wilmington &c. R. Co.*, 109 N. Car. 279, 14 S. E. 79, 26 Am. St. 569.

respect.⁷³ In a recent case the supreme court of Nebraska fully considered the question of the power of a state to regulate interstate commerce and held void a state statute which assumed to require a railroad company to carry freight over longer lines at the same rates as those charged by companies whose lines were shorter.⁷⁴ So, where the effect of a state statute was to prohibit a carrier from making a less charge for transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a change that would prevent its doing any business between the states in the carrying of tobacco, it was held that it directly affected interstate commerce and was invalid.⁷⁵

§ 2546 (1670). State statutes held not to be regulations of interstate commerce.—It is our purpose to refer to some of the cases in which state statutes, although affecting the agencies of commerce among the several states, have been held valid, and

⁷³ *Louisville &c. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298. See also *New York &c. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. 896, 39 L. ed. 1043; *Louisville &c. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. ed. 953; *Louisville &c. R. Co. v. Central Stockyards Co.*, 30 Ky. L. 18, 97 S. W. 78.

⁷⁴ *State v. Sioux City &c. R. Co.*, 46 Nebr. 682, 65 N. W. 766, 31 L. R. A. 47, citing among other cases, *Ames v. Union &c. R. Co.*, 64 Fed. 65, 4 Interst. Com. 835; *Paxton v. Farmers' &c. Co.*, 45 Nebr. 884, 64 N. W. 343, 50 Am. St. 585, 29 L. R. A. 853.

⁷⁵ *Louisville &c. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. ed. 416. In the course of the opinion the court said: "We fully recognize the rule that the effect of a state con-

stitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident." But see *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, 1179, Ann. Cas. 1916A, 18n. See *State v. Omaha &c. Co.*, 75 Nebr. 637, 110 N. W. 874, 106 N. W. 979. But compare *Byington v. Chicago &c. Ry. Co.*, 96 Nebr. 584, 148 N. W. 520.

this we do for the reason that it is almost impossible to state general rules that will be of any practical utility. It is held in a comparatively recent case that a state statute prescribing a penalty for the failure to promptly deliver telegraph messages coming into the state from another state is valid.⁷⁶ Consolidation of railroad corporations is a matter for state regulation, and a state statute prohibiting the consolidation of companies owning parallel railroads does not violate the commerce clause of the federal constitution.⁷⁷ In a Virginia case it was held that a state statute

⁷⁶ *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. ed. 1105. In the case cited the court distinguished the case of *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. ed. 1187, but it seems to us that there is no distinction and that the last decision is right and the earlier decision is wrong. See *Western Union Tel. Co. v. Lark*, 95 Ga. 806, 23 S. E. 118. Upon the point that the states can not encroach upon the powers of the federal government, the court cited, among others, the cases of *Walling v. Michigan*, 116 U. S. 446, 460, 6 Sup. Ct. 252, 29 L. ed. 691; *Gulf &c. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910. The court also referred to the case of *Covington &c. Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962, where it was said, "The adjudications of this court with respect to the power of the state over the general subject of commerce are divided into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by congress; third, those in which the power of congress is exclusive, and

the state can not interfere at all." The court also distinguishes the case of *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. ed. 883.

⁷⁷ *Louisville &c. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849, affirming *Louisville &c. R. Co. v. Commonwealth*, 17 Ky. L. 427, 31 S. W. 476. The question of the right to prohibit the consolidation of parallel lines is discussed in the cases first above cited, and the cases of *Hancock v. Louisville &c. R. Co.*, 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755; *Pearsall v. Great Northern R.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838, are cited. In the case last named the court very fully considers the question of the right to consolidate, and enforces the rule of strict construction. The case of *Cleveland v. Spencer*, 73 Fed. 559, has an important bearing upon the question of the consolidation of railroad companies. In *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838, it was also held that the grant of an exclusive privilege can not be presumed, citing, among other cases, *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 10 Sup.

providing in substance that a carrier accepting anything for transportation directed to a destination beyond the terminus of its own line or route shall be deemed thereby to assume an obligation for its safe carriage to the place of destination, unless, at the time of such acceptance, the carrier, by a contract signed by the consignor, be released from liability.⁷⁸ We are inclined to regard the decision in the case referred to as very close to the line, for it seems to us that compelling an interstate carrier to assume responsibility for the acts of other interstate carriers is laying a burden upon commerce among the several states,⁷⁹ but it has

Ct. 34, 33 L. ed. 267; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. ed. 939; *Turnpike Co. v. State*, 3 Wall. (U. S.) 210, 18 L. ed. 180. In *E. D. Clough Co. v. Boston &c. R. Co.*, 77 N. H. 222, 90 Atl. 863, Ann. Cas. 1915B, 1195n, it is held that a state statute prohibiting increase of rates by consolidated railroads applies to the aggregate rates for all freight and passenger traffic and not to specific rates for particular commodities or routes.

⁷⁸ *Richmond &c. R. Co. v. Patterson &c. Co.*, 92 Va. 670, 24 S. E. 261, 41 L. R. A. 511, affirmed in 169 U. S. 311, 18 Sup. Ct. 335; (citing *Western U. Tel. Co. v. Tyler*, 90 Va. 297, 18 S. E. 280, 44 Am. St. 910n; *Talbott v. Merchants' &c. Transportation Co.*, 41 Iowa 247, 20 Am. Rep. 589; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819). Much to the same effect is the decision in *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110, affirmed in 174 U. S. 580, 19 Sup. Ct. 755, 43 L. ed. 1093, citing *Solan v. Chicago &c. R. Co.*, 95 Iowa 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. 430; *Bagg v. Wilmington &c. R. Co.*, 109 N. Car. 279, 14 S. E.

79, 14 L. R. A. 596. In the case last cited the court referred to the cases of *Martin v. Hunter*, 1 Wheat. (U. S.) 304, 4 L. ed. 97; *Inman &c. Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Philadelphia &c. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. ed. 368, and other cases; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113n; *State v. Moore*, 104 N. Car. 714, 10 S. E. 143, 17 Am. St. 696. As indicated in the text, we regard the doctrine declared as unsound when not properly limited. See *Central R. Co. v. Murphy*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. ed. 444.

⁷⁹ *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. ed. 1187; *Gulf &c. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910; *Gatton v. Chicago &c. R. Co.*, 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556. And it seems to be conceded that a state can not prevent a carrier from properly limiting liability to its own line, but the statute in question was held not to violate this

been affirmed by the supreme court of the United States. It seems to us that requiring an interstate carrier to assume a burden that does not exist at common law, but is wholly the creation of statute, does "impede and obstruct commerce among the several states," and if it does it certainly is opposed to the rule declared by the decisions of the supreme court of the United States. A requirement that one company shall be responsible for the acts of another company, although the latter company is a corporation of another state, can not, as we conceive, be regarded as a police regulation, but, on the contrary, is a regulation of the right to contract for the transportation of articles of interstate commerce, and, as the regulation directly affects the instrumentalities of commerce, it is one the state has no power to make. A statute requiring an interstate railroad carrier to take upon itself responsibility for the acts of the carrier of another state is essentially different from a statute forbidding carriers to limit their common-law liability. The principle involved is the same as if a state should require an interstate carrier to run trains beyond the state in a designated mode. In a Kentucky case it was held that the provision of the state constitution prohibiting railroad companies from limiting their common-law liability was not in conflict with the commerce clause of the federal constitution.⁸⁰ In the case referred to the court proceeds upon the theory that the state has power to prescribe remedies and to provide what shall or shall not be a valid contract, and this theory seems tenable. The case is close to the line, and some of the statements are probably too broad, but we are inclined to think that the conclusion reached is correct, for the adjudged cases recognize the power of the state to prescribe what contracts may be made with public carriers,⁸¹ and analogous cases have affirmed that state statutes

rule. *Richmond &c. R. Co. v. Patterson &c. Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. ed. 759. The matter would now seem to be governed by the interstate commerce law and amendments.

⁸⁰ *Ohio &c. R. Co. v. Tabor*, 98 Ky. 503, 36 S. W. 18, 34 L. R. A. 685, cit-

ing *Owens v. Louisville &c. R. Co.*, 87 Ky. 626, 9 S. W. 968; *Peik v. Chicago &c. R. Co.*, 94 U. S. 164, 24 L. ed. 97.

⁸¹ In many cases it has been held that statutes forbidding public carriers from limiting their common-law liability are valid. *Liverpool &c. Co.*

regulating contracts may be valid, although they concern subjects over which congress is given jurisdiction.⁸² A similar question arose in a Wisconsin case, and it was held that a state statute forbidding public carriers from limiting their common-law liability did not contravene the provisions of the federal constitution,⁸³ and the same has been held as to a statute requiring carriers to inform consignees of freight charges and to deliver the freight on payment of such charges under penalty for failure to do so.⁸⁴

v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. ed. 788; *McDaniel v. Chicago &c. R. Co.*, 24 Iowa 412; *Hart v. Chicago &c. R. Co.*, 69 Iowa 485, 29 N. W. 597. See also *Missouri &c. R. Co. v. McCann*, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. ed. 1093.

⁸² *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; *Tod v. Wick*, 36 Ohio St. 370; *Haskell v. Jones*, 86 Pa. St. 173. The authorities are reviewed in an able opinion by Baker, J., in *Reeves v. Corning*, 51 Fed. 774. Among the cases there referred to are the following: *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. ed. 253; *Brosnahan, In re*, 18 Fed. 62; *Castle v. Hutchinson*, 25 Fed. 394; *Jordan v. Overseers*, 4 Ohio 295.

⁸³ *Davis v. Chicago &c. R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. 935. The case referred to quotes from the opinion in *Liverpool &c. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 439, 4 Sup. Ct. 469, 32 L. ed. 788, the following: "The

constitutional grant to congress of the power to regulate commerce did not supersede or displace the common law, but conferred upon congress the power to make such regulations as it saw fit; and until congress acts in the premises, the principles of the common law governing such contracts apply, and can not be regarded as obnoxious to the objection that they are regulations of commerce, within the meaning of the constitutional provision. *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123, 134, 22 L. ed. 827; *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 23 L. ed. 872; *Phenix &c. Co. v. Erie &c. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1156, 29 L. ed. 873."

⁸⁴ *Harrill Bros. v. Southern R. Co.*, 144 N. Car. 532, 57 S. E. 383. See also *St. Louis &c. R. Co. v. McGivney*, 19 Okla. 361, 91 Pac. 693; *Skipper v. Seaboard &c. R. Co.*, 75 S. Car. 276, 55 S. E. 454. But compare *Jennings v. Big Sandy &c. R. Co.*, 61 W. Va. 664, 57 S. E. 272. See also as to state statute requiring notice of arrival of trains being valid, *State v. Indiana &c. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; *State v. Pennsylvania Co.*, 133 Ind. 700, 32 N.

So, it has been held that congressional inaction leaves the state free to establish maximum intrastate rates for interstate carriers although the state requirements may disturb existing relations between interstate and intrastate rates as to places within zones of competition crossed by the state boundary line.⁸⁵ It should be observed, however, that some of the regulations referred to in this section while not invalid as imposing a direct burden on interstate commerce, would be invalid if Congress had acted on the subject and in some instances Congress has acted since the cases were decided.

§ 2547 (1670a). State regulations—Recent cases—Reasonable rates—Due process and equal protection.—It has recently been held by the supreme court of the United States that a state may, so far as the federal constitution is concerned, establish a flat rate of 3½ cents per hundred pounds on grain and grain products carried from one point therein to another over one of its roads, where that company, under the guise of a “rebilling rate,” gives any merchant at the first point receiving a carload of grain or grain products over another road a rate of 3½ cents per 100 pounds on any grain he may ship to the second point.⁸⁶ So, it

E. 822. And so as to keeping ticket office open. *Hall v. South Carolina R. Co.*, 25 S. Car. 564. And see as to changing location of stations and compelling maintenance of union depot, *Railroad Comm. v. Alabama &c. R. Co.*, 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98n; *St. Louis &c. R. Co. v. Bellamy*, 113 Ark. 384, 169 S. W. 322, L. R. A. 1915D, 91 and notes to both these cases. As to statutes in regard to mileage tickets, see cases and notes in L. R. A. 1915E, 902, and 7 L. R. A. (N. S.) 1086.

⁸⁵ *Louisville &c. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R.

A. (N. S.) 1151n, Ann. Cas. 1916A, 18n. See also generally *Southern R. Co. v. Railroad Comm.*, 179 Ind. 23, 100 N. E. 337 (reversed in 183 Ind. 580, 109 N. E. 759); *Railroad Comm. of Indiana v. Grand Trunk &c. R. Co.*, 179 Ind. 255, 100 N. E. 852; *Vandalia R. Co. v. Public Service Comm.*, 182 Ind. 297, 106 N. E. 371.

⁸⁶ *Alabama &c. R. Co. v. Railroad Com.*, 203 U. S. 496, 27 Sup. Ct. 163, 51 L. ed. 289. In the course of the opinion the court said: “While it may be true that a local railway’s share of an interstate rate may not be a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate, yet, whenever, under the guise or pretense of a

was lately held by the same court that a state railroad commission may forbid carriers to make their local freight rate for phosphates more than 1 cent per ton per mile without denying due process of law to a railroad company whose transportation of phosphates constitutes about one-sixth of its local freight busi-

rebilling rate, some merchants are given a low local rate, the commission is justified in making that rate the rate for all. It is not bound to inquire whether it furnishes adequate return to the railway company, for the state may insist upon equality, to be enforced under the same conditions against all who perform a public or quasi public service. When voluntarily the Vicksburg company established a local rate of three and one-half per cent. from Vicksburg to Meridian for those who had, within 90 days, made a shipment over the Shreveport road, it estopped itself from complaining of an order making that rate applicable to all shipments, no matter whence they arose, and in favor of all merchants, whether those transporting over the Shreveport road or not. We are not unaware of our decision in *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940, 5 Inters. Com. 405, in which, on review of the interstate commerce act, we held that a mere inequality of rate was not always proof of undue discrimination, but we were passing upon an act of congress, and seeking to ascertain its intent and scope. There was no intimation that it was not within the power of congress to prescribe an absolute equality of rate. In the pres-

ent case we are not construing an act of the state of Mississippi or passing upon the powers which by it are given to the state railroad commission. Those matters are settled by the decision of the supreme court of the state, and the question we have to consider is the power of the state to enforce an equality of local rates as between all parties shipping for the same distance over the same road. That a state has such power cannot be doubted, and it cannot be thwarted by any action of a railroad company; which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the company. Even if a state may not compel a railroad company to do business at a loss, and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet, when it voluntarily establishes local rates for some shippers, it cannot resist the power of the state to enforce the same rate for all. The state may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments by arrangements made with or to favor outside companies."

ness, where the rate so authorized is nearly 2 mills per ton larger than that company's average local freight rate, and that such regulation of local freight rates for shipments to and from the Florida West Shore Railway and over the Seaboard Air Line Railway did not deprive the latter road of its property without due process of law, even if its total receipts from local freight rates were insufficient to meet what can properly be cast as a burden upon that business, where, so far as appears, such regulation may have no other effect than to make the rates on the Florida West Shore Railway the same as those obtaining generally in the state.⁸⁷ Another interesting question has lately been decided by the supreme court of Minnesota⁸⁸ on appeal from an order restraining a railroad company, incorporated under the Minnesota law, from increasing its capital stock without the consent of the railroad commission. It was held that the state had the power to enact statutes regulating the increase of capital stock of such corporations and conferring upon the commission administrative duties of supervision, but that the statute in question was unconstitutional as attempting to delegate legislative powers to the commission. The South Carolina statute providing that railroad companies shall build side tracks connecting industrial enterprises with their main lines has been held uncon-

⁸⁷ *Seaboard Air Line R. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175. So, it is held that the Texas commission may fix passenger rates at a maximum of three cents a mile, and may, in proper cases, fix different rates for different carriers. *Houston &c. R. Co. v. Storey*, 149 Fed. 499. See also for right of state to fix intrastate rates generally. *Chicago &c. R. Co. v. State Public Utilities Com.*, 242 U. S. 333, 37 Sup. Ct. 173, 61 L. ed. 341; *Louisville &c. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229; *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, Ann. Cas.

1916A, 18n. They must not, however, result in unjust discrimination against an interstate rate arising out of the close connection and relationship of the two rates. *Houston &c. R. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341; *Oregon R. &c. Co. v. Campbell*, 230 U. S. 525, 33 Sup. Ct. 1026, 57 L. ed. 1604.

⁸⁸ *State v. Great Northern R. Co.*, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250n. But see *Winchester &c. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692, as to clothing commission with legislative, executive and judicial powers or duties.

stitutional as authorizing the taking of private property for private use.⁸⁹ So, the Virginia statute requiring railroad companies to sell mileage books at less than the rates regularly charged for transportation is invalid as class legislation, depriving them of property without due process of law and denying them the equal protection of the law.⁹⁰ So, city ordinances have been held unreasonable and void as depriving street railway companies of their property without due process of law, or the like in other cases.⁹¹

§ 2548 (1670b). **State regulation—Distinction between enforcing a general scheme of maximum rates and order to do a particular act.**—In determining the validity of the state regulation, a distinction is to be made between cases of different classes. This distinction is noted in a case lately decided by the supreme court of the United States, wherein it was held that an order of a state railroad commission requiring a railroad company to restore the connection at a city in such state with a train of another railroad which afforded the principal means of travel between the eastern and western parts of the state was not so arbitrary and unreasonable as to amount to a denial of due process of law, or to a deprivation of the equal protection of the laws, if other connections were inadequate for the public convenience, although compliance with the order might necessitate operating an extra train at a loss, or extending, with like result, the run of a local train, so long as the income of the railroad company, from its business in the state,

⁸⁹ *Mays v. Seaboard Air Line R.*, 75 S. Car. 455, 56 S. E. 30.

⁹⁰ *Commonwealth v. Atlantic &c. R. Co.*, 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086. See also *Beardsley v. New York &c. R. Co.*, 162 N. Y. 230, 56 N. E. 488; *Lake Shore &c. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858. But compare *Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; *Minor v. Erie R. Co.*, 171 N. Y. 566, 64 N. E. 454, and *Attorney-General v. Boston &c. R. Co.*, 160 Mass. 62, 35 N. E.

252, 22 L. R. A. 112. And see *Railroad Comm. v. Louisville &c. R. Co.*, 140 Ga. 817, 80 S. E. 327, L. R. A. 1915E, 902n, Ann. Cas. 1915A, 1018n (upholding state law as to manner of using mileage books within the state). See also as to stop-over privileges, *Lafarier v. Grand Trunk R. Co.*, 84 Maine 286, 24 Atl. 848, 17 L. R. A. 111.

⁹¹ *Milwaukee Elec. R. &c. Co. v. Milwaukee*, 87 Fed. 577; *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854.

afforded adequate remuneration after allowing for any possible loss resulting from operating either of such trains. The following quotation from the opinion clearly draws the distinction to which we refer: "This case does not involve the enforcement by a state of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitability of the operation of the railroad as an entirety."⁹² This distinction, and the difference between the two classes of cases, is illustrated by the two cases cited below.⁹³

§ 2549 (1670c). State regulation—Two-cent fare.—A few years ago there was much agitation of the subject of "two-cent fares," and statutes were passed in a number of states fixing the maximum rate of fare for passengers at two cents a mile. It has been contended that such statutes are unconstitutional and invalid either because they affect interstate commerce or are obnoxious to the Fourteenth Amendment, or both. The statutes expressly apply only to carriage between points in the state, but

⁹² *Atlantic &c. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 594, 51 L. ed. 933, and see also the opinion on page 595.

⁹³ *St. Louis &c. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567, and *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151. But a general statute fixing a maximum rate is not necessarily unconstitutional. See

Stone v. Farmers Loan &c. Co., 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636; *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 35 Sup. Ct. 729, 57 L. ed 1511, 48 L. R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n; *Shelton v. Erie R. Co.*, 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 118 Am. St. 704, 9 Ann. Cas. 883; *Graham Ice Co. v. Chicago &c. R. Co.*, 153 Wis. 145, 140 N. W. 1097.

it is argued that interstate carriers are included, as to their local traffic in the state; that their through rate may be greater than 2 cents a mile, and that when a through rate exceeds the sum or aggregate of the local rates between the intermediate points it is *prima facie* evidence that the through rate is excessive and unreasonable, and the burden is upon the company to prove the contrary, and hence such a statute unlawfully affects interstate commerce. But the two-cent local rate is made by the statute and not by the carrier, and this would seem to prevent the application of the rule invoked, even if it should be applied where both rates are voluntarily made by the carrier.⁹⁴ It may, also, be argued, along the same line, that such a reduction of the local rate necessarily reduces the rates on interstate business, but this proposition can not be conceded, and the argument is answered by Justice Brewer in a case in which the question was as to the validity of a statute fixing the maximum rate for transportation of freight within the state. "Neither can I understand," he says, "how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, or to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the states does not work a change in interstate rates, any more than an act of congress prescribing interstate rates would legally work a change in local rates."⁹⁵ So, it has been said by the interstate commerce commission that a through rate is not necessarily unreasonable because it is higher than the sum of local rates fixed by the state laws.⁹⁶ We do not perceive any sufficient reason for holding such statutes

⁹⁴ We do not believe that this would unlawfully interfere with interstate commerce even if it were *prima facie* evidence in such a case.

⁹⁵ *Ames v. Union Pac. R. Co.*, 64 Fed. 165, 172, *aff'd* in 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819.

⁹⁶ *Savannah Freight &c. Bureau v. Charleston &c. R. Co.*, 7 I. C. C. 601. But the through rate should

ordinarily be less rather than greater than the sum of the local rates, and, in the absence of any explanation a greater through rate may be unreasonable. *Winona Carriage Co. v. Pennsylvania R. Co.*, 18 I. C. C. 334; *Washington Milling Co. v. Norfolk &c. Ry. Co.*, 37 I. C. C. 546; *Railroad Comrs. v. Eureka Springs R. Co.*, 7 I. C. C. 69.

necessarily unlawful attempts to regulate interstate commerce. As to whether such statutes are invalid as taking property without due process of law or denying the equal protection of the laws, much, we think, must depend upon the facts. A road may be wholly local, not carrying or running outside the state, or it may be interstate, doing both local and interstate business. Some roads haul passengers only, and others, perhaps, haul nothing but freight, although, of course, most railroads carry and may be required to carry both passengers and freight. If a road carries both freight and passengers the question will arise as to whether its return from freight as well as passengers is to be considered, and, if it is interstate, the further question will arise as to whether its business outside the state is to be considered. So, it seems obvious that an arbitrary rate of two cents a mile can not be equally fair and just in every state. In the older and more densely populated states the well-established roads may be able to make a profit at two cents a mile, while in some other states or regions, perhaps, a road could not pay the expenses of passenger traffic at two cents or even three cents a mile. It is well known, indeed, that many, if not most, of the roads make comparatively little profit out of their passenger business and that their principal revenue comes from freight. So, even the same company might be able to make a profit at one time or place at a rate of two cents a mile and lose money at the same rate at another time or place. Some of these suggestions, however, might serve as arguments for leaving the matter to a commission rather than as valid reasons for holding the statutes unconstitutional. And it may be that two-cent fares will, in fact, increase passenger business without proportionately increasing the cost of handling it. We think, therefore, that it can not well be determined in advance whether a particular statute prescribing a two-cent fare is constitutional and valid until something is known of its operation and effect, and the amount of business, cost of service, and the like. As elsewhere shown, it is well settled that a state may fix reasonable rates for such transportation within its jurisdiction;⁹⁷ and we believe that limiting

⁹⁷ See *Houston &c. R. Co. v.* note in 33 L. R. A. 177. *Storey*, 149 Fed. 499 (three cent fare),

the passenger rate to two cents a mile does not necessarily amount to confiscation. The question must be determined, we think, by applying to the facts the rules stated and illustrated in subsequent sections of this chapter.⁹⁸ Since the above was written the question has received consideration by the supreme court of the United States and now seems to be settled in substantial accord with the view we have taken.⁹⁹

§ 2550 (1671). Interstate commerce.—Any commerce which crosses a state line and concerns more states than one is interstate commerce, but unless more than one state is concerned, or the transit is in part over the high seas, the commerce is not interstate, and this has been held to be so, although a state line is crossed, on the theory that commerce which entirely originates and wholly ends in one state is domestic commerce, notwithstanding the fact that in the transit a state line is crossed,¹ but later authorities do not sustain such holding.² If the transit is

⁹⁸ See post, §§ 2577, 2588.

⁹⁹ See *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151; *Allen v. St. Louis &c. R. Co.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. ed. 1625; also *South & No. Ala. R. Co. v. R. R. Comm. of Ala.*, 210 Fed. 465; *Chicago &c. Ry. Co. v. Smith*, 210 Fed. 632. See also post §§ 2592, 2577, 2578 where the question is further considered.

¹ *Dowham v. Alexandria*, 10 Wall. (U. S.) 173, 19 L. ed. 929; *Wabash &c. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; *Louisville &c. R. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. ed. 784; *Lehigh &c. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. ed. 672; *Koehler, Ex parte*, 30 Fed. 867; *Cutting v. Florida &c. R. Co.*, 46 Fed. 641; *Campbell v. Chicago &c.*

R. Co. 86 Iowa, 587, 53 N. W. 351, 17 L. R. A. 443; *Searwell v. Kansas City &c. R. Co.*, 119 Mo. 222, 24 S. W. 1002; *Scammon v. Kansas City &c. R. Co.*, 41 Mo. App. 194; *State v. Western Union Tel. Co.*, 113 N. Car. 213, 18 S. E. 389, 22 L. R. A. 570; *Leavell v. Western Union Tel. Co.*, 116 N. Car. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. 798; *Missouri &c. R. Co. v. Cape Girardeau &c. Co.*, 1 Interest. Com. 607; *Heck v. East Tennessee &c. R. Co.*, 1 Interst. Com. 775; Ante, § 812. See *State v. Chicago &c. R. Co.* 40 Minn. 267, 41 N. W. 1047, 3 L. R. A. 238n, 12 Am. St. 730; *Commonwealth v. Lehigh &c. R. Co.* (Pa. St.), 17 Atl. 179; *New Orleans &c. Exchange v. Cincinnati &c. R. Co.*, 2 Interst. Com. 289; *Sternberger v. Cape Fear &c. Co.*, 29 S. Car. 510, S. E. 836, 2 L. R. A. 105.

² *Hanley v. Kansas City &c. R.*

from one state to another the commerce is interstate, and commerce is not domestic commerce when it is over the high seas.³ And, in a recent case, it is held by the supreme court of the United States that even though the transportation begins and ends in the same state it is interstate commerce when part of the route is through another state or territory.⁴ It is unsafe to affirm, in view of the conflict in the decisions,⁵ and the recent authorities, that the federal power over interstate commerce is

Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. ed. 333; *Ewing v. City of Leavenworth*, 226 U. S. 464, 33 Sup. Ct. 157, 57 L. ed. 303; *United States v. Erie R. Co.*, 166 Fed. 352; *Dear-dorff v. Chicago &c. R. Co.*, 263 Mo. 65, 172 S. W. 333, and other authorities cited in 4, *infra*.

³ *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224; *Cowden v. Pacific &c. Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. 142; *Carpenter v. Schooner Emma Johnson*, 1 Cliff. (U. S. C. C.) 633; *Pacific &c. Co. v. Railroad Commissioners*, 18 Fed. 10. See *Missouri &c. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643, 4 Int. Com. 240. So, the regulation of rates of ferryage of foot passengers across the Hudson river from New Jersey to New York has been held a regulation of interstate commerce and beyond the power of the state of New Jersey. *New York Cent. &c. R. Co. v. Board*, 74 N. J. L. 367, 65 Atl. 860. See also *Wabash &c. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; *Covington &c. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962. But compare *St. Clair County v. Interstate &c. Co.*, 192 U. S. 454, 24 Sup. Ct. 300, 48 L. ed. 518.

⁴ *Hanley v. Kansas City &c. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. ed. 333, distinguishing *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. ed. 672, as a tax case. To the same effect are the following recent cases: *St. Louis &c. R. Co. v. State*, 87 Ark. 562, 113 S. W. 203; *Patterson v. Missouri &c. R. Co.*, 77 Kans. 236, 9 Pac. 138, 15 L. R. A. (N. S.) 733n; *Leibengood v. Missouri &c. R. Co.*, 83 Kans. 25, 109 Pac. 988, 28 L. R. A. (N. S.) 985, and note; *State v. Cumberland &c. R. Co.*, 105 Md. 478, 66 Atl. 458; *Hardwick Farmers' Elevator Co. v. Chicago &c. R. Co.*, 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088; *Frasier v. Charleston &c. R. Co.*, 81 S. Car. 162, 62 S. E. 14. See also *State v. Chicago &c. R. Co.*, 40 Minn. 267, 41 N. W. 1047, 3 L. R. A. 238, 12 Am. St. 730; *Sternberger v. Cape Fear &c. R. Co.*, 29 S. Car. 510, 7 S. E. 836, 2 L. R. A. 105; *United States v. Delaware &c. R. Co.*, 152 Fed. 269; *St. Louis &c. R. Co. v. Hadley*, 168 Fed. 317. Compare *Gulf &c. R. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. ed. 540.

⁵ *Cooley v. Wardens*, 12 How. (U. S.) 299, 13 L. ed. 143; *Welton v. State of Missouri*, 91 U. S. 275, 23 L. ed. 347; *County of Mobile v.*

absolutely exclusive, and that silence or inaction on the part of the general government invariably forbids action by the states, at least where it does not impose any direct burden on interstate commerce, but we think that where the subject is one that requires uniform regulation, inaction or silence on the part of congress does not justify action by the states, since, if there may be action by the states, uniformity is broken and the chief object of the constitution defeated. It is over interstate commerce, and not internal or domestic commerce, that the federal power extends and over interstate commerce the federal power is supreme.⁶ Where the subject is national and admits of only one uniform system, then, as we believe, the federal power is exclusive, and inaction by congress does not authorize action by the states in the form of regulations of commerce among the several states since inaction on the part of congress implies that the commerce shall be free and untrammelled.⁷ The federal power

Kimball, 102 U. S. 691, 26 L. ed. 238; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. ed. 257; *Robbins v. Shelby County &c. District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694; *Bowman v. Chicago &c. R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1092, 31 L. ed. 700; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. ed. 637; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128; *Rahrer, In re*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572; *Western Union &c. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. ed. 1105; *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. ed. 166.

⁶ *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. ed. 678; *United States v. Marigold*, 9 How. (U. S.) 560, 13 L. ed. 257; *Veazie v. Moor*, 14 How. (U. S.) 568, 574, 14 L. ed. 545; *Foster v. Davenport*, 22 How. (U. S.) 244, 16 L. ed. 248; *Sinnot*

v. Davenport, 22 How. (U. S.) 227, 16 L. ed. 243; *New York v. Miln*, 11 Pet. (U. S.) 102, 155, 9 L. ed. 648; *Railroad Co. v. Richmond*, 19 Wall. (U. S.) 584, 22 L. ed. 173; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668; *California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; *Stockton v. Baltimore &c. R. Co.*, 32 Fed. 9; *Iowa v. Chicago R. Co.*, 33 Fed. 391; *The City of Salem*, 37 Fed. 846; *Chicago &c. R. Co. v. Chicago &c. Co.*, 79 Ill. 121, 127; *Council Bluffs v. Kansas City &c. R. Co.*, 45 Iowa 338, 24 Am. Rep. 773; *Ante*, § 812. See *Heiserman v. Burlington &c. R. Co.*, 63 Iowa 732, 18 N. W. 903; also *Baltimore &c. R. Co. v. Interstate Com. Comm.*, 221 U. S. 612, 618, 619, 31 Sup. Ct. 621, 55 L. ed. 878.

⁷ *Chirac v. Chirac*, 2 Wheat. (U. S.) 259, 4 L. ed. 97; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 192, 4 L. ed. 362; *Web-*

extends to all the agencies and inseparable incidents of commerce among the several states.⁸ It seems to be a necessary conclusion from the premises established by the decisions that a state statute which so far constitutes a regulation of interstate commerce as to impede or obstruct that commerce is an invasion of the federal dominion, and for that reason void, but there is some confusion if not conflict in the cases.⁹ Different views have been taken by different members of the highest court of the land, at various times, as to the relative powers of the state and of the United States, in certain instances, in regard to commerce, especially where congress has not yet acted upon the subject. In a comparatively recent case the supreme court of the United States reviewed the earlier decisions upon the subject and said that they were divisible into three classes.¹⁰ The first class con-

ster's Argument, 9 Wheat. (U. S.) 9, 6 L. ed. 25; *Sinnot v. Davenport*, 22 How. (U. S.) 227, 16 L. ed. 307; *Almy v. California*, 24 How. (U. S.) 169, 16 L. ed. 644; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577, 22 L. ed. 417; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. ed. 257; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. ed. 691; *Pickard v. Pullman & Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. ed. 785; *Wabash & Co. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 392; *Federalist*, Nos. xxvi, xlv. See also *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, 1166, 1177, Ann. Cas. 1916A, 18n; *South Covington & Co. St. R. Co. v. City of Covington*,

235 U. S. 537, 59 L. ed. 350, 35 Sup. Ct. 158, L. R. A. 1915F, 792.

⁸ *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 392; *Norfolk & Co. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. ed. 311; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649. See also *Houston & Co. R. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341.

⁹ See *Maine v. Grand Trunk & Co. R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. ed. 994; *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. ed. 166. Compare *Missouri & Co. Ry. Co. v. State*, 245 U. S. 484, 38 Sup. Ct. 178, 62 L. ed. 419, L. R. A. 1918C, 535, with *Gulf & Co. Ry. Co. v. State*, 246 U. S. 58, 38 Sup. Ct. 236, 62 L. ed. 574.

¹⁰ *Covington & Co. Bridge Co. v. Kentucky*, 154 U. S. 205, 14 Sup. Ct. 1087, 38 L. ed. 962.

sists of cases in which the power of the state is exclusive. In the second class were included cases of concurrent jurisdiction wherein it is not the existence, but the exercise of the power of congress that is incompatible with the exercise of the power by the states. In the third class were included cases in which the power of congress is exclusive, and it was the existence and not the exercise of such power in congress that prevented the state from exercising it. But the dividing line between the second and the third classes is somewhat shadowy, and recent cases render it questionable whether any exact line can be drawn. The prevailing view, and, perhaps, all that can be said in a general way, is that the power of congress under the commerce clause is exclusive whenever the subject is national in its nature or admits of only one uniform system or plan of regulation, and that local and limited matters not national in their nature may be regulated, in some respects, by the states in the absence of action by congress.¹¹

§ 2551 (1672). **The interstate commerce commission—Power of commission—Recent amendments.**—We have elsewhere referred incidentally to the nature and powers of the interstate commerce commission, and have said that it can not be considered as a judicial tribunal in the sense that a court is a judicial tribunal.¹² In a recent decision of the supreme court of the

¹¹ See *Atlantic &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. ed. 995; *Cooley v. Wardens*, 12 How. (U. S.) 299, 13 L. ed. 143; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Missouri &c. R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. ed. 878; *Chicago &c. R. Co. v. Solan*, 169 U. S. 133, 137, 18 Sup. Ct. 289, 42 L. ed. 688; *Rasmussen v. Idaho*, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. ed. 820; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. ed. 108; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. ed. 268; *Minnesota*

Rate Cases (Simpson v. Shepard), 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n; *International &c. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. 370, 62 L. ed. 807; *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703.

¹² Ante §§ 796, 797. *Interstate Com. Com. v. Brunson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047; *Kentucky &c. Bridge Co. v. Louisville &c. R. Co.*, 37 Fed. 567, 2 L. R. A. 289; *United States v. Reading Co.*, 183 Fed. 427.

United States it was held that the commission "is a body corporate with legal capacity to be a plaintiff or defendant in the federal courts."¹³ The commission is not in the strict sense either a judicial or legislative tribunal,¹⁴ but is an instrumentality of government belonging to the administrative or ministerial department, created for the purpose of effectively aiding, under the laws of the country, in properly and justly regulating commerce between the several states.¹⁵ We venture to say that, while it is, in a limited sense, a body corporate it is not a corporation in the strict sense of the term. It is the creature of legislation and possesses only such express powers as are conferred upon it by congress and such incidental powers as are necessary to effectuate the principal powers granted. The courts have held that the power of the courts to compel obedience to the "lawful order" of the commission is purely statutory, and that the courts can not modify or amend the orders of the commission, but must either refuse to compel obedience to the order made by the commission or unqualifiedly compel obedience.¹⁶ It must follow from the decision in the case to which we have

¹³ *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. The court referred to the cases of the *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 264, 12 Sup. Ct. 844, 36 L. ed. 699, and *Interstate Com. Com. v. Atchison &c. R. Co.*, 149 U. S. 264, 13 Sup. Ct. 837, 37 L. ed. 727. The decision in the case of *Interstate Com. Com. v. Texas &c. R. Co.*, 57 Fed. 948, was reversed.

¹⁴ *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. In *Interstate Com. Com. v. Louisville &c. R. Co.*, 73 Fed. 409, 414, it was said: "The investigation conducted before the commission and its order thereon are quasi judicial, although it may be considered as settled that the proceed-

ing is not a judicial one, as that term is used with reference to courts of general jurisdiction."

¹⁵ *United States v. Reading Co.*, 183 Fed. 427; *Western New York &c. R. Co. v. Penn Refining Co.*, 137 Fed. 343. It has, however, both executive or administrative and judicial or quasi judicial duties to perform, especially under the amendment of 1906 and later amendments. It seems to occupy at the same time the anomalous position, in some respects, of both prosecutor and court, and it would seem to be difficult for the same body to properly discharge both classes of duties. See address of Commissioner Prouty before American Bar Assn., August, 1907.

¹⁶ *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12

referred, and from general principles as well, that the commission is a special statutory tribunal with such powers as the statutes have granted it. If the powers of the established courts are statutory and special, certainly those of such a tribunal as the interstate commerce commission must be statutory and special, but while this is true the powers of the commission are nevertheless very broad and comprehensive. The commission prior to recent amendments of the interstate commerce act, had no power either express or implied to establish maximum rates of freight.¹⁷ But the amendments give the commission this power.

Sup. Ct. 844, 36 L. ed. 699, 43 Fed. 37, 50; *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935; *Kentucky &c. Co. v. Louisville &c. Co.*, 37 Fed. 567; *Little Rock &c. R. Co. v. East Tennessee &c. R. Co.*, 47 Fed. 772; *Shinkle v. Louisville &c. R. Co.*, 62 Fed. 690; *Interstate Com. Com. v. Delaware &c. R. Co.*, 64 Fed. 723; *Detroit &c. R. Co. v. Interstate Com. Com.*, 74 Fed. 803, reversing *Interstate Com. Com. v. Detroit &c. R. Co.*, 57 Fed. 1005, and citing *Stone v. Detroit &c. R. Co.*, 3 Int. Com. Com. 613. See also *Illinois Com. Com. v. Chicago &c. Ry. Co.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946; *Interstate Com. Com. v. Union Pac. Ry. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308; *Interstate Com. Com. v. Illinois Cent. Ry. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. ed. 280, as to what the court should take into consideration in reviewing the action of the commission.

¹⁷ *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935; *Inter-*

state Com. Com. v. Cincinnati &c. R. Co. (Freight Bureau Com.), 167 U. S. 479, 17 Sup. Ct. 896, 42 L. ed. 243, 56 Fed. 925. The case of *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912, was distinguished. In commenting upon that case it was said: "All we wish to be understood to hold is that when goods are shipped under a through bill of lading from a point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce." The views of Judge Jackson in *Interstate Com. Com. v. Baltimore &c. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699, 43 Fed. 37, were adopted. The opinion of Judge Jackson was thus expressed: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons, or traffic similarly circumstanced, the act leaves common carriers as they were

It has been held that: "no power is given by the act to court or commission, to compel connecting companies to contract with each other to abandon full control of their separate roads or to unite in a joint tariff."¹⁸ A similar doctrine has been declared in other cases.¹⁹ But later amendments provided that the commission may establish through routes and joint rates as the maximum to be charged, and prescribe the division of such rates.²⁰ The Interstate Commerce Commission was also em-

at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." To the same effect is the decision in *Interst. Com. Com. v. Northeastern &c. R. Co.*, 74 Fed. 70; *Interstate Com. Com. v. Lehigh &c. R. Co.*, 74 Fed. 784. Nor could the court fix rates under the act prior to the late amendments. *Southern Pac. R. Co. v. Colorado &c. Co.*, 101 Fed. 779. And probably not now.

¹⁸ Per Brewer, J., in *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912, 915, citing *St. Louis &c. R. Co. v. Southern Ex. Co. (Express Cases)*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. ed. 791; *Kentucky &c. Co. v. Louisville &c. Co.*, 37 Fed. 567; *Little Rock &c. R. Co. v. St. Louis &c. R. Co.*, 41 Fed. 559. See *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935.

¹⁹ *Interstate Com. Com. v. Alabama &c. R. Co.*, 74 Fed. 715, 723; *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; *Cincinnati &c. R.*

Co. v. Interstate Com. Com., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935,

²⁰ *Interstate Com. Com. v. Louisville &c. Ry. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431. See also *Interstate Com. Com. v. Humboldt S. S. Co.*, 224 U. S. 474, 483, 32 Sup. Ct. 556, 56 L. ed. 849; *Interstate Com. Com. v. Chicago &c. R. Co.*, 218 U. S. 88, 36 Sup. Ct. 651, 54 L. ed. 946; *St. Louis &c. R. Co. v. United States*, 245 U. S. 136, 38 Sup. Ct. 49, 62 L. ed. 199; *Louisville &c. R. Co. v. Interstate Com. Com.*, 184 Fed. 118; *Transportation Act 1920*, §§ 418-421; *Barnes' Fed Code*, 1921 Supp., § 7904. Act of June 18, 1910, referred to in *Baltimore &c. R. Co. v. United States*, 195 Fed. 962, and see acts of August 24, 1912, and August 1, 1914; 38 Stat. at L. 730, chap. 323, for various powers of the interstate commerce commission. Additional powers are also given to the commission in regard to making investigations, requiring reports and the like. See § 20 as amended June 29, 1906. The commission is also largely authorized to fix its own practice and rules of procedure before it, and by § 16a, added June 29, 1906, to grant rehearings, although it seems to have exercised this power before. See,

powered by the Hepburn Act of 1906 to prescribe the forms of all schedules of rates and charges required to be filed and published and no changes can be made except after thirty days' notice to the public and the commission unless, in its discretion for good cause shown, it allows changes to be made on less than thirty days' notice. An amendment of August 6, 1917, provided that until January 1, 1920, no increased rate, fare, charge, or classification should be filed except after approval thereof has been secured from the commission, but such approval may, in the discretion of the commission, be given without formal hearing. By an amendment of May 29, 1917, the matter of car service, that is, the rules and regulations governing the movement, exchange, interchange and return of cars, is placed under the jurisdiction of the commission. By the Boiler Inspection Act the commission is given authority over rules and regulations in regard to the inspection of locomotive boilers;²¹ and by the Accident Report Act carriers are required to make monthly reports to it of collisions, derailments and other accidents on forms prescribed by it, and the commission is empowered to investigate and make reports thereof in such manner as it deems proper.²² The substance of the Interstate Commerce Act as it now exists, however, will be found in a subsequent chapter.

§ 2552 (1672a). Interstate commerce commission—Findings and orders—Enforcement and review.—The orders of the com-

generally, as to procedure before it, section 17 as amended March 2, 1889; also later amendments and supplementary acts of 1910 and August 24, 1912, and August 1, 1914, and acts of May 29, 1917, and August 9, 1917. See Proposed Advance of Rates, Matter of, 9 I. C. C. 382; Roth v. Texas &c. R., 9 I. C. C. 602; Hurlburt v. Lake Shore &c. R. Co., 2 Int. Com. 81, and Rules of Practice before the commission. The latest provisions on the whole subject will be found in

the Transportation Act 1920, treated at length in a subsequent chapter.

²¹ 36 Stat. at L. 913.

²² 36 Stat. at L. 350. See also as to annual reports containing specific answers to questions as to which the commission may need information. *United States v. Louisville &c. R. Co.*, 236 U. S. 318, 35 Sup. Ct. 362, 59 L. ed. 598; *Kansas City &c. Ry. Co. v. United States*, 231 U. S. 423, 34 Sup. Ct. 125, 58 L. ed. 296, 52 L. R. A. (N. S.) 1n.

mission must substantially conform to the requirements of the act of congress by which it was created. Upon this principle it was held before the amendments that it is not sufficient to state in a report general conclusions, but the report "should show what the issues in the case are and what facts it finds in regard to such issues," "should make suitable reference to the evidence," and, in short, "should give the parties to be affected, as well as the court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the commission's opinion thereon."²³ The old law provided that the findings of fact of the commission should be prima facie evidence, and they were given by the supreme court of the United States "the strength due to the judgments of a tribunal appointed by law and informed by experience."²⁴ The amendment of June 29, 1906, however, omits the provision for findings of facts and as to their being prima facie evidence, except where damages are awarded, and merely requires that the commission shall state its conclusions, together with its decision, order or requirement in the premises.²⁵ Just what effect this change may have remains to be seen. But it is certain that much more power is given to the commission in fixing rates. By the amendments prior to 1920, it is made the duty of the commission when, after full hearing on complaint, or full hearing under an order for investigation and hearing made on its own initiative, it is of the opinion that rates or regulations or practices of a carrier or carriers affecting the same are unjust or unreasonable, or unjustly discriminatory,

²³ *Interstate Com. Com. v. Louisville &c. R. Co.*, 73 Fed. 409, 414.

²⁴ *Illinois Cent. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 27 Sup. Ct. 700, 704, 51 L. ed. 1128; *Louisville &c. R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309; *East Tenn. &c. R. Co. v. Interstate Com. Com.*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 719. See also *Southern R. Co. v. St. Louis Hay &c. Co.*, 153 Fed. 728. When

concurred in by the circuit court, "they should not be interfered with unless the record establishes that clear and unmistakable error has been committed." *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 206 U. S. 142, 27 Sup. Ct. 648, 653, 51 L. ed. 995.

²⁵ See Act of June 29, 1906, §§ 14, 15, 16, and §§ 15 and 16 were again amended on June 18, 1910. But *infra* note 26.

preferential or prejudicial or otherwise in violation of the act, to determine and prescribe the just and reasonable rate to be thereafter observed in such cases as the maximum and what shall be a just, fair and reasonable regulation or practice, and to make an order that the carrier shall desist from such violation and not thereafter publish, demand or collect any rate in excess of the maximum so prescribed and shall conform to the regulation or practice so prescribed. All such orders, not for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period, not exceeding two years, as shall be prescribed therein by the commission, unless suspended, modified, or set aside by the commission or suspended or set aside by a court of competent jurisdiction.²⁶ The commission is also given power to investigate and make orders as to new schedules, to establish through rates, fix the maximum of joint rates, and to prescribe the division thereof by supplemental order, when carriers do not agree. So, where the owner of property has performed services in connection with its transportation, or furnished any instrumentality used therein, the commission may, after hearing on complaint, determine and fix by appropriate order the maximum to be paid by the carrier therefor.²⁷ Provision is also made for an award of damages, in a proper case, and an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named, and if the carrier does not comply with such an order for the payment of money the complainant or person for whose benefit it was made may file in the circuit court of

²⁶ This seems to give a court merely power to suspend or wholly set aside and not to modify or fix a rate itself. See § 16 as to venue and proceedings to enforce order of commission for payment of damages, and appeal of suits brought in circuit court to enjoin, set aside, or suspend order of commission. And see § 16a as to rehearing by commission. Transportation Act 1920 (Act Feb. 28, 1920), gives the commission

power to fix minimum as well as maximum rate, and omits the two-year limitation as to time the order shall remain in force, and makes a few other changes in the law as stated in this section, but in the main it is the same. That act is considered in a subsequent chapter.

²⁷ This is all provided in § 15 of the Act as amended June 29, 1906, and June 18, 1910.

the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which its road runs, a petition setting forth briefly the causes for which he claims damages, and the order of the commission. Such suit shall proceed like other civil suits for damages, except that on the trial thereof the findings and order of the commission shall be prima facie evidence of the facts therein stated and except that the petitioner shall not be liable for costs in the circuit court nor at any subsequent stage unless they accrue upon his appeal, but if he finally prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs.²⁸ Service of orders and process may be made upon the designated agent of the carrier required to be kept in Washington, and the commission is authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper. A penalty for failure to obey an order is prescribed, recoverable in a civil suit in the name of the United States. It was also provided under the amendment of 1906 that if a carrier fails to obey any order, other than for the payment of money, any party injured thereby, or the commission itself, may petition the circuit court in the district where the carrier has its principal operating office, or in which the violation or disobedience of such order has happened, for an enforcement of the order. Such court shall then prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition.²⁹ If it appears, upon such hearing, that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce such order by writ of injunction, or other proper process, mandatory or otherwise, and shall have the powers ordinarily exercised by it in compell-

²⁸ Section 16 as amended by Acts of June 29, 1906, and June 18, 1910. This section also contains a limitation as to the time of filing the complaint or petition, and as to joinder of parties and service of process.

²⁹ The provision of the old law

that the facts found by the commission shall be prima facie evidence is omitted. As already shown, in this class of cases, where the order is not for payment of money, the commission is no longer required to make a finding of facts.

ing disobedience to its writs of injunction and mandamus. From any action upon such petition an appeal is given to the supreme court of the United States, having priority in hearing over all other cause, except criminal, but such appeal does not vacate or suspend the order appealed from.³⁰ It was also provided in the amendment of 1906 that no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the commission shall be granted, except on hearing after not less than five days' notice to the commission, and an appeal may be taken to the supreme court of the United States from any such decree granting or continuing an injunction.³¹ Somewhat different provisions were made in 1910 when the Commerce Court was established, but that court was abolished by the District Court Jurisdiction Act of October 22, 1913, and the jurisdiction vested in the several district courts of the United States. The venue of suits to enforce, suspend or set aside an order of the interstate commerce commission is therein fixed in the judicial district of the residence of the party or any of the parties upon whose petition the order was made, except that if it does not relate to transportation or is not made upon petition the

³⁰ Act of June 29, 1906, § 16, also post, § 2575. But different provisions were made by the amendment of June 18, 1910, when the commerce court was in existence. And see district court jurisdiction Act of October 22, 1913.

³¹ Act of June 29, 1906, § 16. Upon the general subject of this section Commissioner Prouty made the following statement in his address before the American Bar Assn. in August, 1907: "The act to regulate commerce provides for a proceeding upon the part of the railway to restrain the operation of an order of the commission, but no provision is made for an appeal by a complainant from a decision adverse to him. This is for the reason that if the appeal

were sustained by the court it would be nugatory, since the court could make no order in his behalf. In this respect the complainant and the railway stand exactly alike. As against both the judgment of the commission as such is final but the railway may invoke the aid of the court to protect it from an unconstitutional exercise of regulating authority. It seems to me clear, upon principle, that the federal courts can only interfere with the orders of the Interstate Commerce Commission fixing a rate for the future upon this ground. The extent to which that interference may go is another question which never can be answered definitely."

venue is in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. The procedure in the district courts in respect to such cases shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases is the same as the right of appeal before prevailing under existing law from the Commerce Court. Provision is made for the granting of interlocutory injunctions, but not by the district judge alone, and also for expediting the hearing. An appeal may be taken direct to the supreme court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the supreme court of the United States if appeal to the supreme court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general.⁸²

⁸² See as to jurisdiction of District Court under this act, *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 38 Sup. Ct. 383, 62 L. ed. 831; *Illinois Cent. R. Co. v. Public Utilities Com. of Illinois*, 245 U. S. 493, 38 Sup. Ct. 170, 62 L. ed. 425; *Skin-*

ner &c. Corp. v. United States, 249 U. S. 557, 39 Sup. Ct. 375, 63 L. ed 772; *National Elevator Co. v. Chicago &c. Ry. Co.*, 246 Fed. 588. As to venue in action to enforce reparation order, see *Vicksburg &c. Ry. Co. v. Anderson &c. Co.*, (U. S.) 41 Sup. Ct. 524.

§ 2553 (1673). Railroads engaged in domestic commerce.—
When railroad is interstate.—A railroad company which does not transport freight or passengers beyond the limits of the state, but is wholly engaged in carrying goods from point to point within the state, is not an instrumentality of interstate commerce and is not within the commerce clause of the federal constitution.³⁸ The fact that the lines of a company are wholly within one state does not, however, carry it out of the operation of the federal constitution, nor does it carry it out of the scope of the interstate commerce law. The test is not whether the lines of a railroad company are wholly within the boundaries of a single state, but whether the company carries freight and pas-

Findings of commission are conclusive where the evidence is conflicting and there is sufficient to sustain them. *Louisville &c. R. Co. v. United States*, 245 U. S. 463, 38 Sup. Ct. 141, 62 L. ed. 400; *Seaboard Air Line Ry. Co. v. United States*, 249 Fed. 368. Courts cannot in the first instance determine administrative questions and the unreasonableness of rates conforming to published tariffs. *Baltimore &c. R. Co. v. Carnegie Steel Co.*, 251 Fed. 682; *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457, 38 Sup. Ct. 383, 62 L. ed. 831; *Midway &c. Elevator Co. v. Great Northern Ry. Co.*, 41 N. Dak. 1, 169 N. W. 494. See also *Texas &c. R. Co. v. Abilen Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553. See as to findings of commission in proceeding for redress for unlawful discrimination. *Interstate Com. Com. v. Delaware &c. R. Co.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. ed. 448. State courts have no power to question rates approved by the commission within its authority. *Swift & Co. v. Hocking Valley Ry. Co.*, 93 Ohio St. 143, 112 N. E.

212, L. R. A. 1917E, 916n; *Thacker Coal &c. Co. v. Norfolk &c. Ry. Co.*, 67 W. Va. 448, 68 S. E. 107, 28 L. R. A. (N. S.) 108 and note. But the proper courts have jurisdiction to enjoin without proceedings being first brought before the commission where the claim is not that the rate is unreasonable discriminating or the like but that the commission had no authority to make the order. *Skinner &c. Corp. v. United States*, 249 U. S. 557, 39 Sup. Ct. 375, 63 L. ed. 772.

³⁸ Ante, § 939. See also *Interstate Com. v. Bellaire &c. R. Co.*, 77 Fed. 942; *United States v. Chicago &c. R. Co.*, 81 Fed. 783. But compare *United States v. Colorado &c. R. Co.*, 157 Fed. 321, 15 L. R. A. (N. S.) 167n, 13 Ann. Cas. 893. It is provided, however, in Transportation Act, 1920, that the commission shall not establish any through route, etc., between street electric passenger railways not engaged in the general business of transporting freight in addition to passengers, and railroads of a different character. Act Feb. 28, 1920, ch. 91, § 418.

sengers that are destined to other states or come from other states into the state in which its lines are located.⁸⁴ In other words, a company which receives from connecting lines freight or passengers brought from other states, or a company that receives freight or passengers to be carried to connecting lines and by such lines transported to other states is an interstate railroad company, but a company which does business entirely within one state, is engaged in domestic commerce and is not an interstate railroad company. So, where a state carrier accepts goods for transportation upon a through bill of lading it becomes, at least as to such shipment, an interstate carrier.⁸⁵ In a Virginia case, however, a doctrine which seems to be adverse to that

⁸⁴ *Augusta &c. R. Co. v. Wrightsville &c. R. Co.*, 74 Fed. 522. See also *Norfolk &c. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 349; *Southern Pac. &c. Co. v. Interstate Com. Com.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310; *Railroad Com. of Ohio v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 655, 56 L. ed. 1004; *Texas &c. R. Co. v. Sabine &c. Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 56 L. ed. 1004; *United States v. Wood*, 145 Fed. 405; *Porter v. St. Louis &c. R. Co.*, 78 Ark. 182, 95 S. W. 453. *Mattingly v. Pennsylvania Co.*, 2 Interst. Com. 806, 812. In the case last cited the court said: "What is meant by transportation wholly within the state? The answer seems plain. It is evidently the transportation that is an element of the commerce not subject to the jurisdiction of congress. This commerce the courts say is only that which is 'confined exclusively within the jurisdiction and territory of a state, and does not affect other nations or states or the Indian tribes, that is to say, the purely internal commerce of a state,

the commerce which is wholly confined within the limits of a state.' Under this principle transportation to which the act does not apply must originate and end in the same state."

⁸⁵ *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935, explaining and distinguishing *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912. See also *United States v. Seaboard &c. R.*, 82 Fed. 563; *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; *Louisville &c. R. Co. v. Behlmer*, 175 U. S. 662, 20 Sup. Ct. 209, 44 L. ed. 314; *Interstate Com. Com. v. Louisville &c. R. Co.*, 118 Fed. 613; *United States v. Camden Iron Works*, 150 Fed. 214; *Corcoran v. Louisville &c. R. Co.* 125 Ky. 634, 101 S. W. 1185, and authorities cited in last preceding note; *Houston &c. Co. v. Insurance Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 50 Am. St. 17; *State v. Gulf &c. R. Co.* (Tex. Civ. App.), 44 S. W. 542. And the character of the transportation or service is interstate, it comes within the Interstate Com-

stated by us was declared.³⁶ The decision in the case referred to is that a train of cars prepared and intended for the transportation of freight from a point without the state to a point within the state was not engaged in interstate commerce.³⁷ We think the decision upon the point we are discussing³⁸ is erroneous, or at least very close to the line, for transportation of freight from state to state is, as has been said, "interstate commerce itself." A train used and intended for that purpose whether lying at a station or running over the road, and whether loaded or unloaded at the particular time, may be an instrument of interstate commerce and the train of an interstate commerce road, and, as such, is engaged in interstate commerce.³⁹ The fact that the train prepared for use in conveying property from state to state is for a time within the limits of a particular state does not

merce Act even though no through bill of lading is issued. *United States v. Union Stock Yard &c. Co.*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. ed. 226; *Southern Pac. Term. Co. v. Interstate Com. Com.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310. See also *Baer Bros. Mercantile Co. v. Denver &c. R. Co.*, 233 U. S. 479, 34 Sup. Ct. 641, 58 L. ed. 1055.

³⁶ *Norfolk &c. R. Co. v. Commonwealth*, 93 Va. 749, 24 S. E. 837, 34 L. R. A. 105, 57 Am. St. 827.

³⁷ So, in *Larabee &c. Co. v. Missouri Pac. R. Co.*, 74 Kans. 808, 88 Pac. 72, it is held mainly on the authority of the Virginia case and the case of *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715, therein cited, that "the switching of cars, loaded with freight afterwards transported to another state, which is purely local, which is independently contracted for, which has no relation to the contract of carriage under which the freight is removed beyond the border of the state, which has no

relation to the ultimate destination of the cars, and which begins and ends before the destination of any car handled is fixed, is a mere preliminary incident to interstate commerce, and subject to state control." But see Act of Congress of June 29, 1906.

³⁸ In *Norfolk &c. R. Co. v. Commonwealth*, 93 Va. 749, 24 S. E. 837, the court on the original hearing held that the state statute prohibiting the running of trains on Sunday violated the provisions of the federal constitution, and cited the case of *Norfolk &c. R. Co. v. Commonwealth*, 88 Va. 95, 13 S. E. 340, but, on the petition for a rehearing, following the decision in *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. ed. 166, it overruled the earlier case and held the statute valid.

³⁹ Since the above criticism of the Virginia case was first written, the Supreme Court of the United States has held that a dining car while lying at a station for its next interstate

strip it of its character as the train of an interstate railroad.⁴⁰ If it did, then taxes might be levied upon it in violation of the provisions of the federal constitution and the rights of its owners be limited and controlled according to the pleasure of the state legislature and that this can not be done is well settled.⁴¹ But, cars owned by a railroad company and delivered by it to other companies, loaded with freight, to be transported over their lines to another state and then returned, either loaded or empty, are subject to attachment under the laws of such other state into

trip, whether empty or loaded, was an instrument of interstate commerce. *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. ed. 363, reversing the judgment of the lower court, which was based on the Virginia case and the case of *Coe v. Errol*, cited in the last preceding note, and distinguishing the latter case on the ground that it related to merchandise, which might or might not become an article of interstate commerce, while the car was an instrument regularly moved in interstate commerce, and only stopped temporarily. See also *Davis v. Cleveland &c. R. Co.*, 146 Fed. 403, 412; *United States v. Southern R. Co.*, 135 Fed. 122; *United States v. Colorado &c. R. Co.*, 157 Fed. 321, 15 L. R. A. (N. S.) 167n, 13 Ann. Cas. 893; *Voelker v. Chicago &c. R. Co.*, 116 Fed. 867; *United States v. Great Northern R. Co.*, 145 Fed. 438.

⁴⁰ *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Sands v. Manistee &c. Co.*, 123 U. S. 288, 8 Sup. Ct. 113, 31 L. ed. 149; *Louisville &c. R. Co. v. Railroad Commission*, 19 Fed. 679. *The Daniel Ball*, 10 Wall. (U. S.) 557, 19 L. ed. 999. In the case last cited it was said: "We are unable to draw any clear and dis-

tinct line between the authority of congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If the authority does not extend to any agency in such commerce when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of the state, and leaving it at the boundary line of the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter." See ante, §§ 911, 913.

⁴¹ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 229, 6 L. ed. 23; *Reading R. Co. v. Pennsylvania* (State Freight Tax), 15 Wall. (U. S.) 279, 21 L. ed. 163; *Pensacola &c. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. ed. 708; *Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143; *Gloucester &c. Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715; *Wabash*

which they are taken by such other companies in pursuance of the agreement for continuous carriage of interstate shipments.⁴² A provision in the charter of a railroad company declaring that it shall be subject to the laws applicable to common carriers does not affect the character of the company as an agency of interstate commerce, and if it accepts goods for transportation to another state it engages in interstate commerce and is within the dominion of the federal government under the commerce clause of the constitution.⁴³

§ 2554 (1674). Commerce and manufactures—Monopolies—Trusts—Conspiracies.—The extent or scope of the federal power under the commerce clause of the national constitution was

&c. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244; Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. ed. 888; California v. Central &c. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; Stockton v. Baltimore &c. R. Co., 32 Fed. 9. See ante, §§ 771, 781, 796. As to taxation, see ante, §§ 910, 948.

⁴² Davis v. Cleveland &c. R. Co., 217 U. S. 157, 30 Sup. Ct. 463, 54 L. ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907. But compare Davis v. Cleveland &c. R. Co., 146 Fed. 403 (reversed in case above cited); Wall v. Norfolk &c. R. Co., 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. 948; Connery v. Quincy &c. R. Co., 92 Minn. 20, 99 N. W. 365, 64 L. R. A. 624, 104 Am. St. 659; Geo. D. Shore Bro. v. Baltimore &c. R. Co., 76 S. Car. 472, 57 S. E. 526, 11 Ann. Cas. 909. It was also held, by the lower court in the first case cited, that the share of compensation of the initial non-resident carrier for the carriage of freight is as much a part of interstate commerce as the actual carriage of property,

and is not subject to attachment or garnishment in the hands of the terminal carrier by which it is collected. But this decision was reversed on appeal. See also Southern Flour &c. Co. v. Northern Pac. R. Co., 127 Ga. 626, 56 S. E. 742, 9 L. R. A. (N. S.) 853, 119 Am. St. 356, 9 Ann. Cas. 437; Iroquois &c. Co. v. DeLaney &c. Co., 205 U. S. 354, 27 Sup. Ct. 509, 51 L. ed. 836.

⁴³ Houston &c. Co. v. Insurance Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 50 Am. St. 17, reversing Houston &c. Co. v. Insurance Co., 31 S. W. 560. Upon the point that the acceptance of freight for carriage to another state constitutes a railroad company an interstate carrier the court cited Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715; Koehler, Ex parte, 30 Fed. 867; Greene, In re, 52 Fed. 104; Missouri &c. R. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; Harmon v. City of Chicago, 140 Ill. 374, 29 N. E. 732; Foster v. Davenport, 22 How. (U. S.) 244, 16 L. ed. 248.

marked out and defined by the supreme court of the United States in the case in which the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," came under consideration.⁴⁴ It was held in the case referred to that the statute did not cover cases where manufacturers entered into combinations or trusts, and the sale was a mere incident to the manufacture, and that the power to prevent such combinations resided in the states, and was not delegated to the national government.⁴⁵ But it was also held that combinations so far in restraint of commerce as to create a monopoly might be suppressed by the federal power. And in recent cases various combinations of manufacturers and others forming a trust in restraint of commerce have been held within the act and illegal.⁴⁶ There can, therefore, be no doubt that a combination or conspiracy of interstate carriers for the purpose of improperly or unduly restraining commerce would come within the statute. If the restraint imposed or assumed to be imposed is of such a

⁴⁴ *United States v. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. ed. 325, affirming *United States v. Knight Co.*, 60 Fed. 934. See also *Booth v. Davis*, 127 Fed. 875; *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454.

⁴⁵ It was said in the case cited: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state." It was also said: "Commerce succeeds to manufacture and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is

governed, or whenever the transaction is itself a monopoly of commerce." See *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346.

⁴⁶ *Addyston Pipe & Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. ed. 136; *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. ed. 608; *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518; *United States v. Jellico & Co.*, 46 Fed. 432; *United States v. Coal Dealers' Assn.*, 85 Fed. 252; *United States v. Chesapeake & Co.*, 105 Fed. 83; *Gibbs v. McNeeley*, 118 Fed. 120, 60 L. R. A. 152; *United States v. Swift*, 122 Fed. 529; *United States v. McAndrews & Co.*, 149 Fed. 823. See also *Debs, In re*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092, 64 Fed. 724; *Charge to Grand Jury, In re*, 151 Fed. 834.

character as to create or, perhaps, even to tend to create a monopoly of commerce,⁴⁷ the combination would be clearly unlawful. And in several recent cases combinations between interstate railroads for the suppression of competition have been held within the act and unlawful.⁴⁸ So, a "holding corporation" to hold and control the shares of competing interstate railroad companies has been held illegal.⁴⁹ But it has been held that agreements or regulations providing and charging for local facilities and merely incidentally and remotely affecting interstate commerce are not within the act.⁵⁰

§ 2555 (1674a). Monopolies and trusts—Sherman Act and later acts.—In a recent case of great importance the supreme court of the United States laid down what is called the "rule of reason in determining the construction and effect of the Sherman Anti-Trust Act,"⁵¹ and held that the statute does not apply where there is no unreasonable or undue restraint of trade.⁵² Even under this construction, however, it has been held that carriers

⁴⁷ It was further said in the opinion in the case referred to that: "Again all the authorities agree that, in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." But compare *United States v. United States Shoe &c. Co.*, 247 U. S. 32, 38 Sup. Ct. 473, 62 L. ed. 968; *Board of Trade v. United States*, 246 U. S. 231, 38 Sup. Ct. 242, 62 L. ed. 683, Ann. Cas. 1918D, 1207.

⁴⁸ *United States v. Trans-Missouri &c. Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007, 53 Fed. 440; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. ed. 259. See also *United States v. Terminal R. Assn.*, 224 U. S. 383, 32 Sup.

Ct. 507, 56 L. ed. 810; *United States v. Union Pac. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. ed. 124. But compare *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 619, 34 L. R. A. (N. S.) 835n, Ann. Cas. 1912D, 734n.

⁴⁹ *Northern &c. Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679.

⁵⁰ *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. ed. 300. Compare also *Yazoo &c. R. Co. v. Crawford*, 107 Miss. 355, 65 So. 462, L. R. A. 1915C, 250; *Thompson's Exp. &c. Co. v. Whitmore*, 88 N. J. Eq. 535, 102 Atl. 692.

⁵¹ 26 Stat. at L. 269, chap. 647; U. S. Comp. Stat. 1901, p. 3201.

⁵² *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502,

having a substantial monopoly of the transportation facilities between the anthracite deposits in Pennsylvania and tide-water distributing points, and also controlling, with the aid of their subsidiary coal-mining and selling companies, most of the annual supply of anthracite, must be deemed to have combined to restrain interstate trade, contrary to the Sherman Act, where, with the purpose and result of defeating the construction of a projected independent competing railway line, and thus preserve their existing monopoly of transportation, they purchased, through another corporation whose capital stock they first obtained, the coal properties and collieries controlled by independent coal operators who were the main supporters of the projected railway, although under the local law, the acquisition of such property, considered alone, may have been lawful.⁵³ But, although this and other decisions show that the Sherman Act

55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734n. See also *United States v. United Shoe &c. Co.*, 247 U. S. 32, 38 Sup. Ct. 473, 62 L. ed. 968.

⁵³ *United States v. Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. ed. 243. See also *United States v. Union Pac. R. Co.*, 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. 53; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. ed. 488. We quote also from the syllabus in the first case as reported in the Supreme Court Reporter as follows: "An undue and unreasonable restraint of interstate commerce forbidden by the Act of July 2, 1890, results from the concerted scheme of railway carriers possessing a substantial monopoly of the transportation facilities between the anthracite deposits in Pennsylvania and tide-water distributing points, and also controlling, with the aid of their subsidiary coal-mining and selling companies, nearly three-

fourths of the annual supply of anthracite, whereby a large number of the independent coal operators were induced to enter singly into uniform perpetual agreements for the sale to some one of such carriers, or its subsidiary coal company, of the entire output of their several mines and any others they might thereafter acquire, at a fixed percentage of the general average price prevailing at tidewater points at or near New York, which would net the operator slightly more than if he shipped and sold on his own account, the necessary result being to secure to the carriers the control at tidewater markets of the sale of a large part of the independent output." This case arose before the amendment to the Interstate Commerce Act in 1906, containing the commodities clause, otherwise facts would also seem to show a violation of that act. See *Delaware &c. R. Co. v. United States*, 231 U. S. 363, 34 Sup. Ct. 65, 58 L. ed. 269; *United*

and Interstate Commerce Act have a wide scope and application even under the rule announced in the Standard Oil Company case, Congress has passed other recent acts intended to make it more stringent. These are the so-called Clayton Anti-Trust Act and the Federal Trade Commission Act.⁵⁴

§ 2556 (1675). **Combinations—Pooling.**—The interstate Commerce Act until 1920 contained stringent provisions against pooling contracts,⁵⁵ but we very much doubt whether the act essentially and very materially changes the common-law rule by these particular provisions, and Transportation Act 1920

States v. Lehigh Valley R. Co., 220 U. S. 257; *Chicago &c. R. Co. v. Minneapolis &c. Com. Assn.*, 247 U. S. 490, 62 L. ed. 1229, 38 Sup. Ct. 553. Since the above was written it has been so decided. *United States v. Reading Co.*, 253 U. S. 26, 40 Sup. Ct. 425, distinguishing *United States v. Delaware &c. R. Co.*, 213 U. S. 366, 413, 53 L. ed. 836, 29 Sup. Ct. 527.

⁵⁴ 38 Stat. at L. 730, chap. 325 (Claytin Act); 38 Stat. at L. 717, chap. 311 (Trade Commission Act). Carriers are not within the jurisdiction of the latter commission, but the Interstate Commerce Commission is given jurisdiction under the Claytin Act to enforce provisions that affect carriers. See also amendments of August 24, 1912, to Interstate Commerce Act.

⁵⁵ Section 5. For a discussion of the common law rules upon the subject of "pooling arrangements," see ante, §§ 420, 421, 422. See also *Nashau &c. Corp. v. Boston &c. Corp.*, 19 Fed. 804; *Woodstock Iron Co. v. Richmond &c. Co.*, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. ed. 819; *Gibbs v. Consolidated Gas Co.*, 130 U. S.

396, 9 Sup. Ct. 553, 32 L. ed. 979; *Pullman &c. Co. v. Texas &c. R. Co.*, 11 Fed. 625; *Menacho v. Ward*, 27 Fed. 529; *Jackson v. McLean*, 36 Fed. 213; *Santa Clara &c. Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. 211; *Central &c. R. Co. v. Collins*, 40 Ga. 582; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Eclipse &c. Co. v. Ponchartrain R. Co.*, 24 La. Ann. 12; *Morrill v. Boston &c. R. Co.*, 55 N. H. 531; *Manchester &c. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. 582; *Stanton v. Allen*, 5 Denio (N. Y.) 434; *Central Ohio &c. Co. v. Guthrie*, 35 Ohio St. 666; *Gulf &c. R. Co. v. State*, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. 815; *Charlton v. Newcastle &c. R. Co.*, 5 Juris, N. S. 1100; *Hare v. London &c. R. Co.*, 2 Johns & H. 80; *Midland R. Co. v. London &c. R. Co.*, L. R. 2 Eq. 524; *Shrewsbury &c. R. Co. v. London &c. R. Co.*, 2 Mac. & G. 324. For definition of pooling, and to the effect that both a physical pooling and a money pooling is prohibited, see *Pooling Freights*, In re, 115 Fed. 588.

now places the matter very largely under the control of the Interstate Commerce Commission. We do not doubt that the act did forbid a combination entered into for the purpose of suppressing competition or for the purpose of creating a monopoly, but if there were no authority upon the subject we would doubt whether it prevented arrangements entered into by several carriers in good faith and for the honest purpose of maintaining just, reasonable and fair rates and preventing ruinous competition. If fair, just and reasonable rates are established, and no monopoly is created or intended to be created, we can see no very good reason why a combination or association should per se be condemned as illegal.⁵⁶ It is, however, with much hesitation that we venture to express an opinion, and in view of the broad terms of the act and the scant authority upon the immediate question,⁵⁷ we feel that not much weight can be assigned to our opinion. Our conclusion is, however, supported by a case in which the authorities were very carefully reviewed, and the conclusion reached by the court is well sustained by the reasoning of the court.⁵⁸ But this

⁵⁶ *Duncan v. Atchison &c. R. Co.*, 4 Interst. Com. 385. See also *Southern Pac. R. Co. v. Interstate Com. Com.*, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. ed. 585.

⁵⁷ There are, as we have seen, many decisions upon the question under the common law rule, but very few upon the question under the statute.

⁵⁸ *United States v. Trans-Missouri &c. Assn.*, 58 Fed. 58, reversed in 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007, distinguishing *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 533, 32 L. ed. 979; *West Virginia &c. Co. v. Ohio &c. Co.*, 22 W. Va. 600, 46 Am. Rep. 550; *Chicago &c. R. Co. v. People's &c. Co.*, 121 Ill. 530, 13 N. E. 169; 2 Am. St. 124; *Western Union Tel. Co. v.*

American &c. Co., 65 Ga. 160, 38 Am. Rep. 781n. In the opinion of the circuit court in the case first cited it was said, in speaking of the cases reviewed: "But we think in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy and an unlawful restraint of trade. No case, we believe, has yet gone to that extent or has declared that the business of transporting freight and passengers by rail is of such a character that no restraint whatever upon

decision has been reversed by the supreme court of the United States⁵⁹ in a decision by a divided bench, and it may, perhaps, be said that the general rule sustained by the highest authority is that, ordinarily at least, a combination or an arrangement, whether oral or written, which has for its purpose, and eventuates in, the pooling of freights of different and competing railroads, is within the prohibition of the interstate commerce act.⁶⁰ While there is conflict upon the general question we think the weight of authority—and sound reason as well—supports the conclusion that the law does not intend to prevent railroad carriers from entering into every arrangement which to some extent may limit competition. We think that the mere fact that an arrangement is made which in some measure restrains or regulates competition is not of itself sufficient to bring the combination under the condemnation of the law, but that if the purpose or effect of the arrangement is to fetter or stifle competition, or to create a monopoly, or to secure or maintain unjust or unreasonable rates, or in any way to disable the railroad carrier from freely and justly performing its duty to the public the com-

petition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has often been applied that the test of their validity was not the existence but the reasonableness of the restriction imposed. *Oregon &c. Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64, 22 L. ed. 315; *Chicago &c. R. Co. v. Pullman &c. Co.*, 139 U. S. 79, 11 Sup. Ct. 409, 35 L. ed. 97; *Mogul &c. Co. v. McGregor &c. Co.* L. R., 21 Q. B. Div. 544; *Manchester &c. Co. v. Concord &c. Co.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 40 Am. St. 582; *Wiggins Ferry Co. v. Chicago &c. R. Co.*, 73 Mo. 389, 39 Am. Rep. 519." See *United States v. Trans-Missouri*

&c. Assn., 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007, 53 Fed. 440; *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390; *Beal v. Chase*, 31 Mich. 490; *Greene, In re*, 52 Fed. 104, 115.

⁵⁹ *United States v. Trans-Missouri &c. Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007, 53 Fed. 440. This decision on appeal has, however, in turn, been modified and limited. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, 857, 858, Ann. Cas. 1912D, 734n.

⁶⁰ See *Pooling Freights, In re*, 115 Fed. 588; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. ed. 259; *Northern &c. Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679.

bination is illegal and should be condemned.⁶¹ An agreement which empowers an association of companies to make discriminating rates for or against one of the companies has been held to be unlawful,⁶² and, in our judgment, this ruling is right, for no railroad company can disable itself from freely and effectively performing its duties, but where there is nothing more than an association of companies, and the agreement between them has no tendency to create a monopoly, to suppress competition, or to enable the companies, or any one of them, to make discriminations or to establish unreasonable rates, the combination or association is not unlawful. The section of the interstate commerce act is not to be considered as an isolated or detached fragment separate and apart from the other provisions of the act, but, on the contrary, is to be considered in connection with all the other provisions of the act, and so, too, the purpose of the act and the object it was intended to accomplish must also receive consideration.⁶³ It is unquestionably true that the chief objects of the act is to promote the interests of commerce,⁶⁴ and

⁶¹ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979; *Chicago &c. R. Co. v. Wabash &c. R. Co.*, 61 Fed. 993, citing *Cleveland &c. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754n, 22 Am. St. 593; *Sayre v. Louisville &c. Association*, 1 Duv. (Ky.) 143, 85 Am. Dec. 613n; *Texas &c. R. Co. v. Southern &c. R. Co.*, 41 La. Ann. 970, 6 So. 888, 17 Am. St. 445; *Hooker v. Vandewater*, 4 Denio (N. Y.) 349; *State v. Standard &c. Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541; *Morris &c. Co. v. Barclay &c. Co.*, 68 Pa. St. 173, 8 Am. Rep. 159; *Gulf &c. R. Co. v. State*, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. 815. See generally *Homer v. Ashford*, 3 Bing. 322; *Leather Cloth Co. v. Lorisont*, 9 Eq. 345. In *Tift v. Southern R. Co.*,

138 Fed. 753, 761, it is said that "pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them afterwards."

⁶² *Missouri &c. R. Co. v. Texas &c. R. Co.*, 30 Fed. 2. See also *Interstate Com. Com. v. Southern Pac. Co.*, 123 Fed. 597, 132 Fed. 829. And division of territory seems to be forbidden. *Freight Bureau v. Cincinnati &c. R. Co.*, 4 Int. C. C. 592, 6 I. C. C. 195. But see *Ives v. Smith*, 55 Hun 606, 8 N. Y. S. 46.

⁶³ *Reiche v. Smythe*, 13 Wall. (U. S.) 162, 20 L. ed. 566.

⁶⁴ *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940.

an association of companies which has in view the promotion of those interests can not, as it seems to us, be adjudged to be unlawful. The existence and successful operation of railroads is essential to commerce, and an agreement which simply prevents injury to a competing company and does no injustice to the public can not, it seems to us, be regarded as illegal, although it may to some extent, but not to an extent injurious to the public, restrain the right of competition.⁶⁵ And in a comparatively recent case it is held that the adoption by common carriers as part of an agreement for a through rate from California to the East, for oranges and the like, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as a condition of guaranteeing through rates to the shipper, even though such carrier promises fair treatment to the connecting lines, and carries out such promise, is not such pooling as is forbidden, at least where such rule served, as was intended, in breaking up rebating and the shippers are not injured.⁶⁶ But the amendments of 1906 and 1910 in regard to through routes and joint rates and their division apparently rendered this decision no longer controlling and changed the common law allowing carriers in general to make such arrangements for them-

⁶⁵ See *Duncan v. Atchison &c. R. Co.*, 6 I. C. C. 85; *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 619, 34 L. R. A. (N. S.) 834n, Ann. Cas. 1912D, 734n; *Cincinnati &c. Packet Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. ed. 428; *Transportation of Immigrants, In re*, 10 I. C. C. 13; *Lytle v. Galveston &c. R. Co.*, 100 Tex. 292, 99 S. W. 396, 10 L. R. A. (N. S.) 437. See also as to charge for local facilities. *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. ed. 290.

⁶⁶ *Southern Pac. Co. v. Interstate Com. Com.*, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. ed. 585. In the course of the opinion it is said: "We must re-

member the general purpose of the act, which is, as has been said, to obtain fair treatment for the public from the roads, and reasonable charges for the transportation of freight, and the honest performance of duty, with no unjust preference or discrimination. Under such circumstances, the court ought not to adopt such a strict and unnecessary construction of the act as thereby to prevent an honest and otherwise perfectly legal attempt to maintain joint through rates, by destroying one of the worst abuses known in the transportation business. The effort to maintain the published through joint tariff rates is entirely commendable."

selves.⁶⁷ As we have already intimated, however, the law has again been changed by the Transportation Act 1920, which will be considered in another chapter, and the commission may authorize pooling in a proper case.

§ 2557 (1676). **Discrimination—Undue preference—What is under the interstate commerce act.**—We have elsewhere said that the common-law forbids unjust discrimination,⁶⁸ and much that has been said applies to the subject here under immediate mention for the reasons that the courts look to the common law to aid them in determining what is or is not an unjust discrimination, or an undue preference under the federal statute. The American courts very often refer to the English cases, and while it can not be justly affirmed that the English cases are implicitly followed since there are important differences between the English and American statutes, it is, nevertheless, true that they do exert an important, if not a controlling influence upon the decisions of our courts.⁶⁹ Neither at common law nor under the federal statute does the mere fact that there is a difference in rates necessarily constitute an unjust discrimination since there

⁶⁷ Ante § 2551. And authority of the Interstate Commerce Commission to make preliminary determination of administrative questions is not limited to particular rate or practice but includes any practice of carrier which gives rise to application of rate, such as practice of routing, intrastate shipments over the carrier's interstate line. *Northern Pac. Ry. Co. v. Solan*, 247 U. S. 477, 38 Sup. Ct. 550, 62 L. ed. 1221. See also *Chestnut Ridge Ry. Co. v. United States*, 248 Fed. 791.

⁶⁸ Ante, §§ 2215, 2216, 2367. See also *Great Western &c. R. Co. v. Sutton*, L. R. 4 H. of L. 226; *Bayles v. Kansas &c. R. Co.*, 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480; *Christie v. Missouri &c. Co.*, 94 Mo. 453, 7 S. W. 567; *Concord &c. Co. v. For-*

saith, 59 N. H. 122, 47 Am. Rep. 181. We think that the terms "unjust discrimination" and "undue preference," have substantially the same meaning.

⁶⁹ *Interstate Com. Com. v. Louisville &c. R. Co.*, 73 Fed. 409; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699, 43 Fed. 37. See also *Pitcairn Coal Co. v. Baltimore &c. R. Co.*, 165 Fed. 113. In the case of *Interstate Com. Com. v. Baltimore &c. R.*, 145 U. S. 263, 12 Sup. Ct. 284, 36 L. ed. 699, it was said that the English statutes were not so comprehensive as the American, and that acts which would not constitute an unjust discrimination under English statutes might do so under the American.

is no such discrimination in cases where the conditions and circumstances are essentially different. It is the English rule that in passing upon the question of undue or unreasonable preferences various facts and circumstances must be considered, and that an undue preference, within the meaning of the statute, is not shown by mere evidence of a difference in charges.⁷⁰ The federal courts have substantially adopted the rule declared by the English courts.⁷¹ It is safe to say that there is no undue preference where there is

⁷⁰ *Denaby &c. Co. v. Manchester &c. Co.*, L. R. 11 App. Cas. 97, 55 L. J. Q. B. 181, 26 Am. & Eng. R. Cas. 293; *Phipps v. London &c. R. Co.*, L. R. (1892) 2 Q. B. 229; *Budd v. London &c. R. Co.*, 4 R. & Canal Tr. Cas. 393; *London &c. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Harris v. Cockermouth &c. R. Co.*, 1 Nev. & McN. 97; *Ransom v. Eastern &c. R. Co.*, 1 Nev. & McN. 63; *Nicholson v. Great Western &c. R. Co.*, 5 C. B. (N. S.) 366; *Baxendale v. Great Western &c. R. Co.*, 5 C. B. (N. S.) 336, 28 L. J. C. P. 81; *Hozier v. Caledonian R. Co.*, 1 Nev. & McN. 27. The English cases are reviewed in *Interstate Com. Com. v. Louisville &c. R. Co.*, 73 Fed. 409, and copious extracts are made from the opinions of the judges, and so they are in *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699. See generally *State v. Adams*, 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93n; *Spofford v. Boston &c. R. Co.*, 128 Mass. 326; *Ragan v. Aiken*, 9 Lea (Tenn.) 609, 42 Am. Rep. 684; *Menacho v. Ward*, 27 Fed. 529; *Benson, Ex parte*, 18 S. Car. 38, 44 Am. Rep. 564; *Avinger v. South Carolina &c. R. Co.*, 29 S. Car. 265, 13 Am. St.

716; *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.) 393.

⁷¹ *United States v. Chicago &c. Ry. Co.*, 127 Fed. 785 (quoting and approving text). The text is also quoted in *State v. Missouri &c. Ry. Co.*, 262 Mo. 507, 172 S. W. 35, 41. In the case of *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699, the court said: "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and change of circumstances justifies an inequality of charge." See generally as to what constitutes unlawful preference or discrimination, note to *Gamble-Robinson Commission Co. v. Chicago &c. Ry. Co.*, 168 Fed. 161. The act of an agent in guaranteeing that passengers will reach their place of destination at a specified time does not constitute an undue preference or unjust discrimination. *Foster v. Cleveland &c. R. Co.*, 56 Fed. 434. But compare *Chicago &c. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct., 648, 56 L. ed 1033, Ann. Cas. 1914A, 501n.

such a difference in circumstances and conditions as constitutes an inequality that renders the discrimination just,⁷² but what constitutes such a difference in circumstances and conditions is a question not so easily answered. Where there is a privilege granted to a favored shipper, which gives him an undue advantage over his rivals, the fact that the carrier may withdraw the privilege at its pleasure does not make the preference lawful, but, notwithstanding that fact, such a preference constitutes an undue preference within the meaning of the law.⁷³ The object of the federal statute is to prevent unjust discrimination against places as well as against persons, and it has been held that the

⁷² Union Pac. R. Co. v. United States, 117 U. S. 355, 6 Sup. Ct. 772, 29 L. ed. 920; Cincinnati &c. R. Co. v. Interstate Com. Com., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935; Texas &c. R. Co. v. Interstate Com. Com., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; Junod v. Chicago &c. R. Co., 47 Fed. 290; Interstate Com. Com. v. Atchison &c. R. Co., 50 Fed. 295; Interstate Com. Com. v. Cincinnati &c. R. Co., 56 Fed. 925; Butchers &c. Co. v. Louisville &c. R. Co., 67 Fed. 35; Interstate Com. Com. v. Alabama &c. R. Co., 69 Fed. 227; Interstate Com. Com. v. Louisville &c. R. Co., 73 Fed. 409; Interstate Com. Com. v. Alabama &c. R. Co., 74 Fed. 715; Detroit &c. R. Co. v. Interstate Com. Com., 74 Fed. 803. See also Interstate Com. Com. v. Chicago &c. R. Co., 141 Fed. 1003, aff'd. in 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705; United States v. Wells-Fargo Exp. Co., 161 Fed. 606; Union Pac. R. Co. v. Updike Grain Co., 178 Fed. 223; Interstate Com. Com. v. Chicago &c. R. Co., 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705; Interstate Com. Com. v. Diffenbaugh, 222 U. S. 42,

32 Sup. Ct. 22, 56 L. ed. 83; Chicago &c. R. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417. Carrier must judge in first instance. Interstate Com. Com. v. Alabama &c. R. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414. But its action is subject to revision. Louisville &c. R. Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309; Interstate Com. Com. v. East Tenn. &c. R. Co., 85 Fed. 107. See also Interstate Com. Com. v. Louisville &c. R. Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. ed. 1047. And see as to carrier not having power under amendment of 1910 to determine the question as to similar or dissimilar conditions in fixing different rate for long and short hauls, United States v. Atchison &c. R. Co., 234 U. S. 476, 34 Sup. Ct. 986, 58 L. ed. 1408; United States v. Union Pac. R. Co., 234 U. S. 495, 34 Sup. Ct. 995, 58 L. ed. 1426.

⁷³ Butchers' &c. Co. v. Louisville &c. R. Co., 67 Fed. 35; Interstate Com. Com. v. Alabama &c. R. Co., 74 Fed. 715; Detroit &c. R. Co. v. Interstate Com. Com., 74 Fed. 803.

district attorney of the United States may maintain a suit to enjoin a railroad company from making an unjust discrimination against a city.⁷⁴ The cost of producing an article of commerce, as for instance, coal, can not be considered as excusing or justifying a discrimination in favor of the producer.⁷⁵ Nor will a release of the carrier from an unliquidated claim for damages justify a discrimination in favor of the person who executes the release.⁷⁶ It has also been held that differences as to competition between coal intended for railway use and other coal, and in the manner of delivery, depending on difference in facilities of the railway company and other consignees, do not make the interstate traffic therein dissimilar in circumstances and conditions so as to justify a lower rate for the transportation of the coal for railway use.⁷⁷

§ 2558 (1676a). Discrimination or preference in furnishing cars and expediting shipment.—Discrimination against persons or localities in furnishing cars may also be unlawful under the interstate commerce act. Many instances of such unlawful dis-

⁷⁴ *United States v. Missouri Pac. R. Co.*, 65 Fed. 903. Different sections of the act, however, apply. *Interstate Com. Com. v. Western & C. R. Co.*, 88 Fed. 186. But one act or rate may violate each of the first four sections. *Interstate Com. Com. v. Western & C. R. Co.*, 93 Fed. 83.

⁷⁵ *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. ed. 896; *Union & C. R. Co. v. Taggart*, 149 U. S. 698, 13 Sup. Ct. 977, 37 L. ed. 905. See also *Pennsylvania R. Co. v. International Coal & C. Co.*, 173 Fed. 1; *Philadelphia & C. R. Co. v. Interstate Com. Com.*, 174 Fed. 687; *Interstate Com. Com. v. Delaware & C. R. Co.*, 220 U. S. 235, 31 Sup. Ct. 326, 55 L. ed. 448 (ownership or non-ownership of shipper does not make dissimilarity).

⁷⁶ See preceding section, also *Lamson v. Grand Trunk R. Co.*, 1 Int. Com. 369. Compare also *Louisville & C. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671; *Phillips v. Grand Trunk & C. R. Co.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. ed. 774.

⁷⁷ *Interstate Com. Com. v. Baltimore & C. R. Co.*, 225 U. S. 326, 32 Sup. Ct. 742, 56 L. ed. 1107, Ann. Cas. 1914A, 504. See also *New York & C. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 515. Nor can discrimination be made and a rebate given merely because it will increase the carrier's business. *Foster Lumber Co. v. Atchison & C. R. Co.*, 270 Mo. 629, 194 S. W. 281, L. R. A. 1918A, 768, and other cases there cited in note.

crimination or preference are found in the reported cases.⁷⁸ So, it has been held that an undue and unreasonable preference is created by a special agreement of the carrier with a particular shipper, who is charged the regular joint through rate, to expedite a carload shipment of horses over its own lines so that it will reach the point of connection with the next carrier in time to be carried by a special fast stock train, and that the shipper can not recover for a breach of such special agreement.⁷⁹

§ 2559 (1677). Preference—Discrimination—When not unjust—Difference in circumstances and conditions.—As we have shown a mere difference in charges does not necessarily prove that there was an unjust discrimination or an undue preference, for in determining whether there was an unjust discrimination or an undue preference the conditions and circumstances of the particular case must be considered. Thus, it is proper, at least under the third and fourth sections of the act, to consider whether there were competitive rates, and this is so whether the traffic originated in foreign ports or within the limits of the United

⁷⁸ *American &c. Timber Co. v. Kansas &c. R. Co.*, 175 Fed. 28; *United States ex rel. Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497; *Majestic Coal &c. Co. v. Illinois Cent. R. Co.*, 162 Fed. 810; *Pitcairn Coal Co. v. Baltimore &c. R. Co.*, 165 Fed. 113; *Hawkins v. Wheeling &c. R. Co.*, 9 I. C. R. 212; *Hawkins v. Lake Shore &c. R. Co.*, 9 I. C. R. 207; *Glade Coal Co. v. Baltimore &c. R. Co.*, 10 I. C. R. 226; *Paxton Tie Co. v. Detroit &c. R. Co.*, 10 I. C. R. 422; *Hillsdale Coal &c. Co. v. Penna. R. Co.*, 19 I. C. R. 356. See also *Anderson v. Chicago &c. Ry. Co.*, 208 Mich. 424, 175 N. W. 246; *Puritan Coal Min. Co. v. Penna. R. Co.*, 237 Pa. St. 420, 85 Atl. 426, Ann. Cas. 1914B, 37. But compare *Ferrell &c. Co. v. Great Northern R. Co.*, 119 Minn. 302, 138 N. W. 284;

Parks v. Cincinnati &c. R. Co., 10 I. C. R. 47; *Wagner v. Detroit &c. R. Co.*, 13 I. C. R. 150. See, generally, note in L. R. A. 1918D, 274. It is held, however, that a suit for damages or reparation in such a case can not be maintained without first applying to the Interstate Commerce Commission. *Morrisdale Coal Co. v. Penna. R. Co.*, 176 Fed. 748, 183 Fed. 929, affd. in 230 U. S. 304, 33 Sup. Ct. 938, 57 L. ed. 1094; *Baltimore &c. R. Co. v. United States*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. ed. 292 (nor will mandamus lie in advance of such application or ruling).

⁷⁹ *Chicago &c. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033, Ann. Cas. 1914A, 501, followed in *Clegg v. St. Louis &c. R. Co.*, 203 Fed. 971.

States.⁸⁰ So, the cost of the particular service is a proper matter for consideration,⁸¹ and so are many other facts and circumstances.⁸² The fact that a joint through rate is less to a particular place than a local rate does not prove that there was an

⁸⁰ *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; *East Tenn. &c. Ry. Co. v. Interstate Com. Com.*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 719; *Interstate Com. Com. v. Chicago &c. Ry. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705; *Interstate Com. Com. v. Louisville &c. R. Co.*, 73 Fed. 409; *Detroit &c. R. Co. v. Interstate Com. Com.*, 74 Fed. 803; *Imperial &c. Co. v. Pittsburg &c. R. Co.*, 2 *Interstate Com. Com.* 618. See generally *Parker v. Great Western R. Co.*, 7 *Man. & G.* 253; *Pegler v. Monmouthshire Canal Co.*, 6 *Hurl. & N.* 644; *Palmer v. London &c. R. Co.*, L. R. 6 C. P. 194; *Parkinson v. Great R. Co.*, L. R. 6 C. P. 554; *Liverpool &c. Assn. v. London &c. R. Co.*, L. R. (1891) 1 Q. B. Div. 120; *Manchester &c. R. Co. v. Denaby &c. Co.*, L. R. 13 Q. B. Div. 674, L. R. 14 Q. B. Div. 209; *Gar-ton v. Great Western R. Co.*, 5 C. B. (N. S.) 669; *Palmer v. Great Western R. Co.*, L. R. 6 C. P. 194. But see, under second section, *Interstate Com. Com. v. Alabama &c. R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. ed. 258; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 225 U. S. 326, 32 Sup. Ct. 742, 56 L. ed. 1107, *Ann. Cas.* 1914A, 504, 508. See generally as to what does or does not constitute an unjust discrimination. *Parsons v. Chicago &c. R. Co.*, 63 Fed. 903; Chi-

cago &c. R. Co. v. Hubbell, 54 *Kans.* 232, 38 *Pac.* 266; *Michigan &c. Co. v. Flint &c. R. Co.*, 28 *Chicago Legal News*, 6 *Int. Com. Com.* 335; *Kelly v. Chicago &c. R. Co.*, 93 *Iowa* 436, 61 *N. W.* 957; *St. Louis &c. R. Co. v. McGill*, 64 *Fed.* 165; *Little Rock &c. R. Co. v. St. Louis &c. R. Co.*, 63 *Fed.* 775, 26 *L. R. A.* 192.

⁸¹ *Penn Refining Co. v. Western N. Y. &c. R. Co.*, 208 U. S. 208, 28 Sup. Ct. 268, 52 L. ed. 456; *Interstate Com. Com. v. Texas &c. R. Co.*, 52 *Fed.* 187; *Interstate Com. Com. v. Lehigh &c. R. Co.*, 74 *Fed.* 784; *Chicago &c. R. Co. v. People*, 67 *Ill.* 11, 16 *Am. Rep.* 599; *Harris v. Cocker-mouth &c. R. Co.*, 1 *Nev. & McN.* 97; *Girardot v. Midland &c. R. Co.*, 4 *R. & Canal Traf. Cas.* 291. See generally *Foreman v. Great Eastern &c. R. Co.*, 2 *Nev. & McN.* 202; *Lots-perch v. Central &c. R. Co.*, 73 *Ala.* 306, 18 *Am. & Eng. R. Cas.* 490; *Nit-shill &c. Co. v. Caledonian R. Co.*, 2 *Nev. & McN.* 39; *Bellsdyke &c. Co. v. North British R. Co.*, 2 *Nev. & McN.* 105; *Bell v. London &c. R. Co.*, 2 *Nev. & McN.* 185; *Holland v. Festiniog &c. R. Co.*, 2 *Nev. & McN.* 278; *Providence &c. Co. v. Providence &c. R. Co.*, 1 *Int. Com.* 363; *Burton &c. Co. v. Chicago &c. R. Co.*, 1 *Int. Com.* 329. Compare *Chicago &c. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033, *Ann. Cas.* 1914A, 501.

⁸² *Religious Teachers, Re*, 1 *Int. Com.* 21; *Interstate Com. Com. v.*

unjust discrimination or an undue preference, for "it never follows as a matter of law, that an undue preference has been given to a person or locality, because a disparity is shown to exist between a local rate and a joint rate."⁸³ Nor does it follow that rates are illegal because the charge for carriage between the same points in opposite directions is not the same.⁸⁴

§ 2560 (1678). Undue preference—Discrimination—Illustrative instances.—Cartage furnished free to some shippers and denied to others, where circumstances and conditions are not substantially dissimilar, has been held to constitute an undue preference.⁸⁵ But it has been held that cartage may be "an accessorial service" and that circumstances and conditions may be such as to render free cartage proper and prevent it from constituting an undue preference.⁸⁶ The English courts hold that where

Alabama &c. R. Co., 74 Fed. 715; Houston &c R. Co. v. Rust, 58 Tex. 98; Butchers &c. Co. v. Louisville &c. R. Co., 67 Fed. 35. See also cases cited in United States v. Oregon R. &c. Co., 159 Fed. 975, 980.

⁸³ Parsons v. Chicago &c. R. Co., 63 Fed. 903, affirmed in 167 U. S. 447, 17 Sup. Ct. 887, 42 L. ed. 231; St. Louis &c. Co. v. Illinois Cent. R. Co., 11 I. C. C. 486. See also Allen v. Oregon &c. R. Co., 98 Fed. 16; Chicago &c. R. Co. v. Osborne, 52 Fed. 912; Coeur D'Alene &c. R. Co. v. Union Pac. R. Co., 49 Wash. 244, 95 Pac. 71. Nor is a through rate necessarily reasonable because it does not exceed the sum of the local rates. Minneapolis &c. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151.

⁸⁴ Macloon v. Boston &c. R. Co., 9 I. C. C. 642; Hewins v. New York &c. R. Co., 10 I. C. C. 221; Duncan v. Atchison &c. R. Co., 6 Int. Com. 85; James v. East Tenn. &c. R. Co., 2 Int. Com. 609; Scull &c. Co. v. At-

lantic &c. R. Co., 144 N. Car. 180, 56 S. E. 876.

⁸⁵ Interstate Com. Com. v. Detroit &c. R. Co., 57 Fed. 1005, but see Detroit &c. R. Co. v. Interstate Com. Com., 74 Fed. 803, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. ed. 306; Evershed v. London &c. R. Co., L. R. 3 Q. B. D. 134; London &c. R. Co. v. Evershed, L. R. 3 App. Cas. 1029; Thompson v. London &c. R. Co., 2 Nev. & Mac. 115; Hezel &c. Co. v. St. Louis &c. Co., 5 Int. Com. Com. 57; Macloon v. Chicago &c. R. Co., 3 Int. Com. 711; Stone v. Detroit &c. R. Co., 3 Int. Com. Com. 613; 3 Int. Com. 60. See also American Sugar Refin. Co. v. Delaware &c. R. Co., 200 Fed. 652.

⁸⁶ Detroit &c. R. Co. v. Interstate Com. Com., 74 Fed. 803, reversing Interstate Com. Com. v. Detroit &c. R. Co., 57 Fed. 1005, and affirmed in 167 U. S. 633, 17 Sup. Ct. 986, 42 L. ed. 306. And as to switching charges, Seaboard Air Line Ry. Co. v. United States (U. S.), 41 Sup. Ct. 24; State

some shippers have side tracks or switches connecting with their elevators, warehouses or the like, it is not an unlawful discrimination to make a reasonable allowance to such shippers on account of the saving to the carrier in the expense of loading and

v. Florida East Coast R. Co., 69 Fla. 491, 68 So. 761, L. R. A. 1918A, 158, and cases cited in opinion and note. In the case first cited it was said: "These English cases abundantly establish three propositions in relation to this subject: (1) That the collecting and delivery of goods is a separate and distinct business, notwithstanding the confusion to which we have adverted; (2) that the railroad companies undertaking to do for themselves this separate business can not, by consolidating the compensation for each, avoid the restrictions that have been imposed upon them in respect of unlawful discriminations, and it is amply within the power of the railroad commissions and the courts, according to the facts of each particular case, to separate the two in order to prevent such an unlawful discrimination; (3) that notwithstanding the separable and independent character of the two services, both whether in the hands of the same or separate carriers, are subject to the rules and regulations prescribed by law to prevent unlawful discriminations." The court cited *Pickford v. Grand Junction &c. R.*, 10 Mees. & W. 399; *Atchison &c. R. Co. v. Denver &c. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; *Northern &c. R. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092; *Koehler, Ex parte*, 23 Fed. 529, 25 Fed. 73; *Little Rock &c. R. Co. v. St. Louis &c. R. Co.*,

41 Fed. 559; *Little Rock &c. R. Co. v. East Tennessee &c. R. Co.*, 47 Fed. 771, 776; *Ayres v. Chicago &c. R. Co.*, 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226; *Parker v. Great Western R. Co.*, 7 Man. & G. 253; *Baxendale v. North &c. R. Co.*, 3 C. B. (N. S.) 324; *Gaston v. Bristol &c. R. Co.*, 1 Best. & S. 112; *Pegler v. Monmouthshire Canal Co.*, 6 Hurl. & N. 644; *Palmer v. London &c. R. Co.*, L. R. 1 C. P. 588; *West v. London &c. R. Co.*, L. R. 5 C. P. 622; *Parkinson v. Great Western &c. R. Co.*, L. R. 6 C. P. 554; *Liverpool &c. Assn. v. London &c. R. Co.*, L. R. (1891) 1 Q. B. Div. 120; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 264, 12 Sup. Ct. 844, 36 L. ed. 699; *Catherham R. Co., In re*, 1 C. B. (N. S.) 410; *Lancashire &c. R. Co. v. Greenwood*, L. R. 21 Q. B. Div. 215; *Imperial Coal Co. v. Pittsburgh &c. R. Co.*, 2 Int. Com. Com. 618; *Railroad Com. v. Clyde &c. Co.*, 5 Int. Com. Com. 327; *Gerke &c. Co. v. Louisville &c.*, 5 Int. Com. Com. 596. See also *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. ed. 300; *Mitchell Coal &c. Co. v. Penna. R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. ed. 1472; *Baltimore &c. R. Co. v. United States*, 200 Fed. 779; *United States v. Baltimore &c. R. Co.*, 231 U. S. 274, 34 Sup. Ct. 75, 58 L. ed. 218; *People v. Knight*, 171 N. Y. 354, 64 N. E.

unloading,⁸⁷ and, although the English statutes are somewhat different from the American, and it is unsafe to always implicitly follow the English decisions, the rule in this country seems to be to the same effect, provided the transaction is not a cloak to evade the law.⁸⁸ The English rule is that granting the use of side tracks to some shippers and denying the use of them to others is an unjust discrimination,⁸⁹ and this is doubtless the

152, 98 Am. St. 610, affirmed in 192 U. S. 21, 24 Sup. Ct. 202, 48 L. ed. 325. And in *Michie v. New York &c. R. Co.*, 151 Fed. 694, a demurrage or car service charge for cars left standing on tracks at a suburban station at Boston was held not to be discriminative because at South Boston, which was the terminal of the road in the city, a hay shed was provided where hay was unloaded and stored at request of consignees at a somewhat less rate, the charge being the same at the two places where hay was left in the car. Compare also *United States v. Baltimore &c. R. Co.*, 231 U. S. 274, 34 Sup. Ct. 75, 58 L. ed. 218; *New York Hay Exch. Assn. v. Penna. R. Co.*, 14 I. C. C. 178; *In re Demurrage Charges*, 25 I. C. C. 314.

⁸⁷ *Bell v. London &c. R. Co.*, 2 Nev. & Mac. 185; *Lees v. Lancashire &c. R. Co.*, 1 Nev. & Mac. 352. See *Robertson v. Midland &c. R. Co.*, 2 Nev. & Mac. 409; *Thomas v. North Staffordshire R. Co.*, 3 Nev. & Mac. 1; *Locke v. North Eastern R. Co.*, 3 Nev. & Mac. 44; *Hall v. London &c. R. Co.*, L. R. 15 Q. B. D. 505; *Watkinson v. Wrexham &c. R. Co.*, 3 Nev. & Mac. 5. While it is true that there are in some respects essential differences between the American and English statutes, still, as has

often been decided, the federal courts will look to the English decisions. *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. ed. 269; *McCool v. Smith*, 1 Black (U. S.), 459; *Pennock v. Dialogue*, 2 Pet. (U. S.) 1.

⁸⁸ *Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 32 Sup. Ct. 39, 56 L. ed. 171; *Penn. Refining Co. v. Western &c. R. Co.*, 208 U. S. 208, 28 Sup. Ct. 268, 52 L. ed. 456; *Interstate Com. Com. v. Dittenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. ed. 83; *Chicago &c. R. Co. v. United States*, 156 Fed. 558, 26 L. R. A. (N. S.) 551, *affd.* in 212 U. S. 563, 29 Sup. Ct. 689, 53 L. ed. 649. See, also, as to other similar facilities. *United States v. Oregon R. &c. Co.*, 159 Fed. 975 and cases cited; *Cedar Rapids &c. Light Co. v. Chicago &c. R. Co.*, 145 Iowa 528, 124 N. W. 323. But compare *Southern Pac. Term. Co. v. Interstate Com. Com.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310.

⁸⁹ *Beeston &c. Co. v. Midland R. Co.*, 5 R. & Canal Traf. Cas. 53; *Girardot v. Midland R. Co.*, 5 R. & Canal Traf. Cas. 60. See *Lancashire &c. R. Co. v. Gidlow*, L. R. 7 Eng. & I. App. 517; *Oxlade v. Northeastern &c. R. Co.*, 1 C. B. (N. S.) 454; *East &c. Co. v. Shaw &c. Co.*, L. R. 39 Ch. Div. 524.

rule under the federal statutes in cases where the circumstances and conditions are not substantially dissimilar.⁹⁰ It should also be noted that it is provided in the amendment of June 19, 1906, that the term "railroad" as used in the interstate commerce act shall include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depôts, yards, and grounds used or necessary in the transportation or delivery of any of said property, and the term "transportation" also seems to be given a broader meaning than in the original act.⁹¹ Classification arbitrarily made in cases where there is no substantial dissimilarity in circumstances or conditions will not enable a carrier to evade the provisions of the act,⁹² nor can

⁹⁰ *State v. Missouri &c. R. Co.*, 29 Nebr. 550, 45 N. W. 785; *Hoyt v. Chicago &c. R. Co.*, 93 Ill. 601; *Chicago &c. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Chicago &c. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824. See also *Southern Pac. Terminal Co. v. Interstate Com. Com.* 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310; *Pennsylvania Co. v. United States*, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616; *Louisville &c. R. Co. v. United States*, 238 U. S. 1, 35 Sup. Ct. 696, 59 L. ed. 1177; *Vincent v. Chicago &c. R.*, 49 Ill. 33. But see cases cited in last preceding note, and also compare *State v. Florida East Coast R. Co.*, 69 Fla. 491, 68 So. 761, L. R. A. 1918A, 158. As to the remedy by mandamus, see *People v. Louisville &c. R. Co.*, 120 Ill. 48, 10 N. E. 657; *County of Pike v. State*, 11 Ill. 202; *Ottawa v. People*, 48 Ill. 233; *Union Pac. R. Co. v. Hall*, 91 U. S. 343. See also *United States v. Baltimore &c. R. Co.*, 154 Fed. 108; *Interstate Com. Com. v. Delaware &c. R. Co.*, 216 U. S. 531, 30 Sup. Ct. 415, 54 L. ed. 605.

⁹¹ See *Pennsylvania Co. v. United States*, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616; and compare also *Interstate Stockyards Co. v. Indianapolis &c. R. Co.*, 99 Fed. 472; *Louisiana &c. R. Co. v. United States*, 209 Fed. 244; *Southern Pac. Co. v. Interstate Com. Com.*, 188 Fed. 241. See also later amendments, and compare *Interstate Com. Com. v. Atchison &c. R. Co.*, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. ed. 1319. As to discrimination in switching charges, see *State Public Utilities Com. ex rel. v. Illinois Cent. R. Co.*, 283 Ill. 425, 119 N. E. 294, 2 A. L. R. 582 and note.

⁹² *Nitshill v. Caledonian &c. R. Co.*, 2 Nev. & Mac. 39; *Hurlburt v. Lake Shore &c. R. Co.*, 2 Int. Com. 81; *Harvard Co. v. Pennsylvania Co.*, 3 Int. Com. 257; *Coxe v. Lehigh &c. Co.*, 3 Int. Com. 460; *Squire v. Michigan &c. R. Co.*, 3 Int. Com. 515; *Brownell v. Columbus &c. R. Co.*, 4 Int. Com. 285. See also *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *Cincinnati &c. R. Co. v. Interstate Com. Com.* 206

a carrier arbitrarily and unreasonably deprive a shipper of the natural advantages of location and surroundings.⁹³ Classifications must be made on a reasonable basis and not so made as to result in unreasonable charges, undue preferences, or unjust discriminations.⁹⁴ The motive of the shipper, as, for instance,

U. S. 142, 27 Sup. Ct. 648, 51 L. ed. 995; *Interstate Com. Com. v. Delaware &c. R. Co.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. ed. 448; *Alabama &c. R. Co. v. Mississippi R. R. Com.*, 203 U. S. 496, 27 Sup. Ct. 163, 51 L. ed. 289; *Bates v. Pennsylvania Co.*, 2 Int. Com. 715.

⁹³ *State ex rel. v. Adams Exp. Co.*, 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93n; *Harris v. Cocker-mouth &c. R. Co.*, 3 C. B. (N. S.) 693, 27 L. J. C. P. 162; *Ransome v. Eastern &c. R. Co.*, 4 C. B. (N. S.) 135, 1 Nev. & Mac. 109; *Diphwys v. Festiniog R. Co.*, 2 Nev. & Mac. 73. See also *Interstate Com. Com. v. Diefenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. ed. 83.

⁹⁴ *Reynolds v. Western &c. R. Co.*, 1 Int. Com. 685; *Pyle v. East Tennessee &c. R. Co.*, 1 Int. Com. 767; *Proctor v. Cincinnati &c. R. Co.*, 3 Int. Com. 131; *Rice v. Western &c. R. Co.*, 3 Int. Com. 162; *Duncan v. Southern &c. R. Co.*, 4 Int. Com. 385; *Ouerbacker Coffee Co. v. Southern Ry. Co.*, 18 I. C. C. 566; *Sunderland Bros. Co. v. St. Louis &c. R. Co.*, 23 I. C. C. 259, 262. See generally *Warner v. New York &c. R. Co.*, 3 Int. Com. 74; *Railway Co. v. Bruce*, 55 Ark. 65, 17 S. W. 363; *St. Louis &c. R. Co. v. Hill*, 4 Brad. (Ill. App.) 579; *Louisville &c. R. Co. v. Crown &c. Co.*, 43 Ill. App. 228; *Sargent v. Boston &c. R. Co.*, 115 Mass. 416; *Spofford v. Boston*

&c. R. Co., 128 Mass. 326; *Andrews &c. Co. v. Pittsburgh &c. Co.*, 3 Int. Com. 77; *Chappelle v. Louisville &c. R. Co.*, 19 I. C. C. 56; *Sligo Iron &c. Co. v. Atchison &c. R. Co.*, 17 I. C. C. 139; *McClung &c. Co. v. Southern Ry. Co.*, 22 I. C. C. 582; *Kauffman &c. Co. v. Missouri &c. R. Co.*, 3 Int. Com. 400. As to unlawful discriminations against hackmen, draymen and carters, see *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. ed. 192; *Colorado Springs v. Smith*, 19 Colo. 554, 36 Pac. 540; *Pennsylvania R. Co. v. Chicago &c. R. Co.*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. 274; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *New York &c. R. Co. v. Flynn*, 74 Hun 124, 26 N. Y. S. 859; *State v. Union Depot Co.*, 71 Ohio St. 379, 73 N. E. 633, 68 L. R. A. 792, where reference to other cases and notes in that series will be found. Most of the conflicting decisions on both sides are also cited in the opinion of the circuit court in *Donovan v. Pennsylvania Co.*, 120 Fed. 215, 61 L. R. A. 140, and in *Kates v. Atlantic Baggage &c. Co.*, 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431. See also note in 54 Cent. Law Jour. 27, and *Oregon Short Line R. Co. v. Davidson*, 33 Utah 370, 94 Pac. 10, 16 L. R. A.

the desire to open a new avenue of trade, has been held not to be such a circumstance or condition as will authorize a discrimination in his favor.⁹⁵

§ 2561 (1678a).—Discrimination—Undue preference—Classification.—As shown in the preceding sections, proper classification is not only permitted, but, indeed, fairness to the shipper as well as fairness and convenience to the carrier would require some classification of commodities.⁹⁶ The interstate commerce act itself recognizes this and requires the schedule to contain “the classification of freight in force.”⁹⁷ Absolute uniformity

(N. S.) 777n, 14 Ann. Cas. 489; Union Depot &c. Ry. Co. v. Meeking, 42 Colo. 89, 94 Pac. 16, 126 Am. St. 145, and ante, § 2537. In the note to McConnell v. Pedigo, 5 Am. R. & Corp. 715, many authorities are collected upon the subject of the power of a railroad company to make reasonable rules for the government of depots and ground. Among the cases cited are Kalamazoo &c. Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. 693n; Landrigan v. State, 31 Ark. 50, 25 Am. Rep. 547; Commonwealth v. Power, 7 Metc. (Mass.) 596; Old Colony &c. R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. 661; Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106; Montana &c. R. Co. v. Langlois, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753, 18 Am. St. 745; Barker v. Midland &c. R. Co., 18 C. B. 46; Marriott v. London &c. Co., 1 C. B. (N. S.) 499; Beadell v. Eastern R. Co., 2 C. B. (N. S.) 509.

⁹⁵ Denaby &c. Co. v. Manchester &c. R. Co., L. R. 11 App. Cas. 97; London &c. R. Co. v. Evershed, L. R. 3 App. Cas. 1029; Oxlade v. North Eastern &c. R. Co., 1 C. B. (N. S.)

454, 1 Nev. & Mac. 72; Budd v. London &c. Co., 4 R. & Canal Tr. Cas. 393; Ransome v. Eastern &c. R. Co., 4 C. B. (N. S.) 135, 1 Nev. & Mac. 109; Great Western &c. R. Co. v. Sutton, L. R. 4 H. L. 226; Twells v. Pennsylvania R. Co., 3 Am. Law Reg. (N. S.) 728. See Missouri &c. R. Co. v. Texas &c. R. Co., 30 Fed. 2; Armour Pack. Co. v. United States, 209 U. S. 57, 28 Sup. Ct. 428, 52 L. ed. 681; Texas &c. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553, 9 Ann. Cas. 1075. For cases in which there was held to be no undue preference, see Delaware &c. R. Co. v. Kutter, 147 Fed. 51, and cases cited; Foster v. Cleveland &c. R. Co., 56 Fed. 434; Little Rock &c. R. Co. v. St. Louis R. Co., 63 Fed. 775.

⁹⁶ See F. Schumacher Milling Co. v. Chicago &c. R. Co., 6 I. C. C. 61; Coxe v. Lehigh Valley R. Co., 3 Int. Com. 460; Grain Shippers Assn. v. Illinois Cent. R. Co., 8 I. C. C. 158. Report of Interstate Com. Com. for 1888, page 34.

⁹⁷ Section 6, of Amendment of June 29, 1906, and Amendment of June 18, 1910. See also Coxe v. Le-

of classification is, perhaps, impossible, and any classification is necessarily somewhat imperfect.⁹⁸ It must almost of necessity be somewhat general and not too minute. The classification is usually divided into about six general classes or groups. There are also extra class divisions in exceptional cases and special low rates, in some instances, for commodity rates.⁹⁹ Bulk and convenience and care required in transportation, value, liability to damage, and similar matters are proper to be considered, and analogous or similar articles should usually be placed in the same class.¹ The foundation principle in classifying seems to be that traffic should be so classified and charges so fixed that the burdens of transportation will be reasonably and justly dis-

high Valley R. Co., 3 Int. Com. 460. As to exclusive initial jurisdiction of Interstate Commerce Commission to suspend or annul proposed changes in classification, see *Director General v. Viscose Co.* (U S.), 41 Sup. Ct. 151.

⁹⁸ See *Proctor &c. Co. v. Cleveland &c. R. Co.*, 3 Int. Com. 131; *F. Schumacher Mill Co. v. Chicago &c. R. Co.*, 6 I. C. C. 61; *Forest City Freight Bureau v. Ann Arbor R. Co.*, 18 I. C. C. 205, 206.

⁹⁹ See *Anthony Salt Co. v. Missouri Pac. R. Co.*, 4 Int. Com. Com. 1; *Indianapolis Freight Bureau v. Cleveland &c. Ry. Co.*, 15 I. C. C. 367; *Southern Pac. Co. v. Interstate Com. Com.*, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. ed. 585; *Interstate Com. Com. v. Chicago &c. R. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705.

¹ *Cannon Falls &c. Co. v. Chicago &c. R. Co.*, 10 I. C. C. 650; *Myer v. Cleveland &c. R. Co.*, 9 I. C. C. 78; *Forest City Freight Bureau v. Ann Arbor R. R. Co.*, 13 I. C. C. 109; *United States Leather Co. v. Southern Ry. Co.*, 21 C. C. A. 323; *Ford*

Co. v. Michigan Cent. R. Co., 19 I. C. C. 507; *Metropolitan Pav. Brick Co. v. Ann Arbor R. Co.*, 17 I. C. C. 197, 204; *Warner v. New York &c. R. Co.*, 4 I. C. C. 32; *Page v. Delaware &c. R. Co.*, 6 I. C. C. 548; *Blumenstein v. P. & R. Ry. Co.*, 21 I. C. C. 90; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. 1; *New York Board of Trade v. Penna. Co.*, 3 Int. Com. 417. See also *Tift v. Southern R. Co.*, 138 Fed. 153. A difference may also be made between car load lots and less than car load lots. *Harvard Co. v. Pennsylvania R. Co.*, 4 I. C. C. 212, 3 Int. Com. 257. But compare *Paine v. Lehigh Valley R. Co.*, 7 Int. Com. 218; *Tecumseh Celery Co. v. Cincinnati &c. R. Co.*, 4 Int. Com. 318; *Thurber v. New York &c. R. Co.*, 2 Int. Com. 742; *Planters Compress Co. v. Cleveland &c. R. Co.*, 11 Int. Com. 382. As a general rule where a package contains articles taking different rates, the entire package goes at the rate applicable to the highest rated of the articles. *Oak Grove &c. Creamery v. Adams Exp. Co.*, 19 I. C. C. 454, 455.

tributed among the articles carried.² This involves the relation of commodities to one another and a proper comparison.³ In a recent case it was held that unlawful preferences and discriminations were created by fixing the freight rate for common soap in less than car-load lots in a new classification adopted to govern in official classification territory at 20 per cent less than third class, but not less than fourth class, at which that commodity had previously been rated, where disturbance in the relations between rates for soap in car-load and less than car-load lots was created by advancing the former from class six to class five and the latter from class four to class three and the result of applying this classification to the varying rates was to leave soap in less than car-load lots in the fourth class to a considerable extent in one of the subdivisions of such classification territory, and in a higher class in the other subdivision.⁴

§ 2562 (1679). Undue preference—Question one of mixed law and fact.—In some of the decisions the question as to whether there is an undue preference is treated as one of law and not of fact. Recent decisions of the supreme court of the United States, however, hold that the question is purely one of fact.⁵ It seems

² *National Hay Assn. v. Lake Shore &c. R. Co.*, 9 I. C. C. 264; *Page v. Delaware &c. R. Co.*, 4 Int. Com. 525, 6 I. C. C. 148; *Myer v. Cleveland &c. R. Co.*, 9 I. C. C. 78. See also *Interstate Com. Com. v. Lake Shore &c. R. Co.*, 134 Fed. 942.

³ *Eau Claire &c. v. Chicago &c. R. Co.*, 4 Int. Com. 65, 5 I. C. C. 264; *Michigan Box Co. v. Flint &c. R. Co.*, 6 I. C. C. 335. *Page v. Delaware &c. R. Co.*, 6 I. C. C. 548; *Proctor &c. Co. v. Cincinnati &c. R. Co.*, 9 I. C. C. 440. See also *Nucoa Butter Co. v. Erie R. Co.*, 20 I. C. C. 174; *Myers v. Pennsylvania Co.*, 2 Int. Com. 403; *Brownell v. Columbus &c. R. Co.*, 4 Int. Com. 285.

⁴ *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 206 U. S. 142, 27 Sup.

Ct. 648, 51 L. ed. 995. But compare *Albree v. Boston &c. R. Co.*, 22 I. C. C. 303; *Carstens Packing Co. v. O. S. L. R. Co.*, 17 I. C. C. 324, as to carload lots and bulk freight.

⁵ *Pennsylvania Coal Co. v. United States*, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616; *Texas &c. R. Co. v. Interstate Com. Com.* 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. In the second case cited it was said: "And as there is nothing in the act which defines what shall be due or undue, reasonable or unreasonable, such questions are questions not of law but of fact." But see *New York &c. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 515. It certainly has been uniformly held in analogous cases that whether a pe-

clear, under the later amendments at least, that the question can not, ordinarily, be a pure question of law. We venture the opinion, however, but with great deference, that, in strictness, the question is generally one of mingled law and fact. Whether certain facts have or have not been established is, of course, a question of fact, but the effect of the facts when found is, as we believe, ordinarily a question of law, at least when but one reasonable inference can be drawn from them, so that an ultimate judgment can not be reached without deciding both the questions of law and the questions of fact. When facts are ascertained their legal effect is determined by applying to them the rules of law, and, ordinarily, until the rules of law are applied the effect of the facts can not be justly determined. We suppose that if a tribunal should determine that there was an undue preference in a case where the costs of the particular service, or the like, rendered proper a legal conclusion that there was no undue preference, the decision could not stand, although the particular or tangible facts were correctly found.⁶ It may be true in a loose sense that whether there is or is not an undue preference is a question of fact, but we think that in strict accuracy it is a question in which the elements of law and fact are component parts.⁷

§ 2563 (1680). **Rebates as affected by the interstate commerce act.**—Devices designed to enable an interstate railroad carrier to unjustly discriminate in favor of some shipper or shippers against another shipper or other shippers are forbidden by the statute.⁸ And a contract by the carrier to pay a shipper for land

riod of time or an act is reasonable or unreasonable is ordinarily a mixed question of law and fact. And even in the case from which we have quoted, as well as in others, the question, when the facts were certain, became one of law. See, also, *Louisville &c. R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309; *Interstate Com. Com. v. Alabama &c. R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414.

⁶ The decision in *Interstate Com. Com. v. Alabama &c. R. Co.*, 74 Fed. 715, treats the question as one purely of fact.

⁷ Quoted with approval in *Little Rock &c. R. Co. v. Oppenheimer*, 64 Ark. 271, 43 S. W. 150, 153, 44 L. R. A. 353.

⁸ For examples of such devices and rebates, see charge to Grand Jury, *In re*, 66 Fed. 146; *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. 822,

purchased as a right of way a specified per cent of the rates paid for the shipment of lumber has been held illegal even though the amount of the rebate is less than the value of the land.⁹ It has been held, however, that: "A rebate, drawback or special rate is not of itself unjust discrimination, for it does not necessarily follow that a like rebate, drawback or special rate has not been extended to all the patrons of the carrier."¹⁰ It seems quite clear upon principle and authority¹¹ that a railroad carrier does not necessarily violate the statute, at least as orig-

42 L. ed. 258; *Armour Pack. Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681; *Fourche River Lumber Co. v. Bryant Lumber Co.*, 230 U. S. 316, 33 Sup. Ct. 887, 57 L. ed. 1498; *United States v. Milwaukee &c. R. Co.*, 142 Fed. 247; *United States v. Chicago &c. R. Co.*, 148 Fed. 646; *Armour Pack. Co. v. United States*, 153 Fed. 1, 14 L. R. A. (N. S.) 400 and note; *Providence Coal Co. v. Providence &c. Co.*, 1 Int. Com. 363; *Rice v. Western &c. R. Co.*, 3 Int. Com. 162; *Shamberg v. Delaware &c. R. Co.*, 3 Int. Com. 502. It is held in the case first cited, as well as in others, that giving a free pass is forbidden as a rebate and the Act of June 29, 1906, goes still further in prohibiting free passes. In *Illinois Cent. R. Co. v. Missouri*, 240 U. S. 395, 36 Sup. Ct. 368, 60 L. ed. 709, a personal injury case, it is held a violation of the interstate commerce law for a person to ride free on a locomotive engine by permission of the engineer. But it is held in *Mottley v. Louisville &c. R. Co.*, 150 Fed. 406, that it does not invalidate a contract made long before to issue a pass to a party during his natural life, in consideration of a release of damages for personal in-

juries to him. This case, however, was reversed and dismissed and in a later case between the same parties the Supreme Court of the United States held that such amendment of June 28, 1906, invalidated the contract. *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671. See also *New York &c. R. Co. v. United States*, 212 U. S. 500, 29 Sup. Ct. 309, 53 L. ed. 624.

⁹ *Fourche River Lumber Co. v. Bryant Lumber Co.*, 230 U. S. 316, 33 Sup. Ct. 887, 57 L. ed. 1498. See also *Chesapeake &c. R. Co. v. Standard Lumber Co.*, 174 Fed. 107.

¹⁰ *United States v. Hanley*, 71 Fed. 672, 673; *Christie v. Missouri &c. R. Co.*, 94 Mo. 453, 7 S. W. 567; *Root v. Long Island R. Co.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331n, 11 Am. St. 643n. See also *Laurel Cotton Mills v. Gulf &c. R. Co.*, 84 Miss. 339, 37 So. 134, 66 L. R. A. 453; *American Sugar Refin. Co. v. Delaware &c. R. Co.*, 207 Fed. 733.

¹¹ Ante, § 2367. *Benson, Ex parte*, 18 S. Car. 38, 44 Am. Rep. 564n; *Cowdrey v. Railroad Co.*, 1 Wood (U. S.), 331, 335; *Laurel Cotton Mills v. Gulf &c. R. Co.*, 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

inally passed, by giving a rebate to one shipper, but if the rebate be given to one, and, where circumstances and conditions are substantially the same, denied to others, or if the intention is to evade the statute by discriminating in favor of one shipper and against others and a rebate is agreed upon for the purpose of carrying that intention into effect, then there would be an unjust discrimination within the meaning of the law.¹² And a later statute makes it unlawful to offer, grant, give, solicit, accept or receive any rebate whereby the property shall be transported at a less rate than that named in the published tariffs or whereby any advantage is given or discrimination practiced.¹³ Under this act a departure from the published rate whereby a carrier is shown to have given any shipper less than that rate is an offense on the part of both the carrier and such shipper, and it is not necessary to show that one shipper was charged more than another. And it seems that this act applies when a railroad company has filed a schedule of rates on interstate shipments to points beyond its own lines as well as where the rates are between points on its own road, and a consignee as well as the consignor may be chargeable with a violation of the act by receiving rebates or concessions through the cancellation of terminal charges at the point of destination, forming a part of the tariffs so published.¹⁴ It has been held, however, that a bill of lading is not vitiated by the granting of a rebate in violation of

¹² *Providence Coal Co. v. Providence &c. Co.*, 1 Int. Com. Com. 107; *Martin v. Southern &c. R. Co.*, 2 Int. Com. Com. 1; *Kentucky Bridge Co. v. Louisville &c. R. Co.*, 37 Fed. 657; *Louisville &c. R. Co.*, In re, 5 Int. Com. Com. 466. See generally *Great Western &c. R. Co. v. Sutton*, L. R. 4 H. L. 226; *Merry v. Glasgow &c. R. Co.*, 4 R. & Canal Tr. Cas. 383; *Nitshill &c. Co. v. Caledonian &c. R. Co.*, 2 Nev. & Mac. 39; *Hezel &c. Co. v. St. Louis &c. R. Co.*, 5 Int. Com. Com. 57; *Federal Sugar Refin. Co. v. Baltimore &c. R. Co.*, 20 I. C. C. 200; *Chicago &c. R. Co.*

v. United States, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. ed. 305.

¹³ Act of Feb. 19, 1903 (*Elkins' Act*), § 1, as amended by Act of June 29, 1906, § 6; *Armour Pack. Co. v. United States*, 209 U. S. 50, 71, 28 Sup. Ct. 428, 52 L. ed. 681. See also amendment of June 18, 1910; *Nichols &c. Lumber Co. v. United States*, 212 Fed. 588; *Grand Rapids &c. R. Co. v. United States*, 212 Fed. 577; *Illinois Cent. R. Co. v. Holman*, 106 Miss. 449, 64 So. 7. And see *Transportation Act 1920*, § 104, *Barnes' Fed. Code 1921 Supp.*, § 7885.

¹⁴ *United States v. Standard Oil*

the interstate commerce act, nor does the granting of a rebate in violation of the original statute preclude a recovery against the carrier in the event of a loss of the property.¹⁵

§ 2564 (1681). Formation of connecting lines—Preference—Terminal facilities.—The federal courts hold or did hold before the amendment of the Interstate Commerce Act in 1906, that a railroad company may, for itself, determine with what other company or companies it will make traffic contracts, and that in making a contract with one company for the formation of a through line it does not transgress the interstate commerce act.¹⁶ The law does not require a railroad company to treat all companies alike without regard to its own interests either as to terminal facilities or other matters; but while this is true, it is also true that one railroad company can not arbitrarily refuse to transport freight or passengers destined to points upon its own line. It is no doubt true, as said in one of the cases cited, in speaking of a common carrier, that, "He certainly may select his own agencies and associates for doing his own work," but it can not be true that one railroad company may refuse to receive freight or passengers simply because such freight or passengers are brought to it by some company other than the one with

Co., 148 Fed. 719, also holding that the joint resolution of June 30, 1906, did not prevent the Act of June 29, 1906, from going into effect on its approval by the President and that section 10 of the rate law of June 29, 1906, did not operate to relieve prior offenders under the old law from subsequent indictment and prosecution. And see, especially, *United States v. Standard Oil Co.*, 155 Fed. 305; also *Standard Oil Co. v. United States*, 179 Fed. 614, 623; *Armour Pack. Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681; *Chicago &c. R. Co. v. United States*, 209 U. S. 90, 28 Sup. Ct. 439, 52 L. ed. 698.

¹⁵ *Merchants &c. Co. v. Insurance Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. ed. 195.

¹⁶ *Atchison &c. Co. v. Denver &c. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; *Pullman &c. Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499; *St. Louis &c. R. Co. v. Southern Express Co. (Express Cases)* 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. ed. 791; *Little Rock &c. R. v. St. Louis &c. R. Co.*, 41 Fed. 559; *Little Rock &c. Co. v. St. Louis &c. R. Co.*, 63 Fed. 781; *St. Louis &c. Co. v. Louisville &c. Co.*, 65 Fed. 39; *Oregon &c. R. Co. v. Northern Pac. R. Co.*, 51 Fed. 465. In the case last cited

which it has made a traffic contract. The right to refuse passengers or freight can not be made to depend upon contracts between carriers themselves except in cases where there is no duty to carry, as, for instance, where the carrier is required to transport goods beyond its own line, for where there is a duty to carry the carrier can not by contract with other carriers escape from that duty, and the later amendments, including that of June 29, 1906, make the duty of the carrier, in furnishing terminal facilities and in through routing much more extensive and place the whole matter largely under the control of the Interstate Commerce Commission.¹⁷

§ 2565 (1682). Long and short hauls—Prior to amendment of 1910.—Section four of the interstate commerce act originally pro-

it was said: "It follows from this that the common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more lines without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by consideration of what is best for its own interests." See post, § 2568. See *Allen v. Oregon R. & Co.*, 98 Fed. 165; *United States v. Union Pac. R. Co.*, 188 Fed. 102; *Interstate Com. Com. v. Northern Pac. R. Co.*, 216 U. S. 608, 30 Sup. Ct. 417, 54 L. ed. 635; also *Central Stockyards Co. v. Louisville & Co. R. Co.*, 118 Fed. 113, affd. in 192 U. S. 568, 24 Sup. Ct. 340, 48 L. ed. 565. But compare *Pennsylvania R. Co. v. United States*, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616. And see as to right of top lines to participate in joint through rates. *United States v. Louisiana & Co.*

R. Co., 234 U. S. 1, 34 Sup. Ct. 741, 58 L. ed. 1185, Ann. Cas. 1913D, 880; *United States v. Butler County R. Co.*, 234 U. S. 29, 34 Sup. Ct. 748, 58 L. ed. 1196.

¹⁷ See *Pennsylvania Co. v. United States*, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616; *United States v. Union Stockyards & Co.*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. ed. 226; ante § 2551. But compare *Smith v. Louisville & Co. R. Co.*, 131 Tenn. 531, 175 S. W. 557, L. R. A. 1916A, 1107. See also *Southern R. Co. v. St. Louis & Co.*, 153 Fed. 728, 734, to the effect that carrier by engaging in a business which it could not have been compelled to undertake brings itself within the requirements of the interstate commerce act. But compare where company undertakes a service it is not bound to undertake. *Yazoo & Co. R. Co. v. Crawford*, 107 Miss. 355, 65 So. 462, L. R. A. 1915C, 250n. Transportation Act 1920 is especially strong and comprehensive in giving control to the Interstate Commerce Commission.

vided that, except as authorized by the interstate commerce commission, it shall be unlawful to charge or receive any greater compensation in the aggregate for transportation, under substantially similar circumstances and conditions, "for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance."¹⁸ It is also provided that this section shall not be construed as authorizing any common carrier "to charge and receive as great compensation for a shorter as for a longer distance." This section was intended to maintain and promote, rather than to destroy or neutralize, commercial advantages resulting from location.¹⁹ The prohibition in the original act was limited to cases in which the circumstances and conditions are substantially similar.²⁰ Among the things which were held to make the circumstances and conditions dissimilar and justify an equal or greater charge

¹⁸ 24 U. S. St. L. 379, '1 Supp. U. S. Rev. St. 529, 530. The history of this section is given in *Southern R. &c. Assn. Re*, 1 Int. Com. 278. For somewhat similar state statutes as to railroads and carriage within the state, and the construction of such statutes, see *Wabash &c. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 20 L. ed. 244; *People v. Wabash &c. R. Co.*, 104 Ill. 476; *Illinois Cent. R. Co. v. People*, 121 Ill. 304, 12 N. E. 670; *Hines v. Wilmington &c. R. Co.*, 95 N. Car. 434, 59 Am. Rep. 250. See also *Interstate Com. Com. v. Western &c. R. Co.*, 88 Fed. 186; *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 220, 16 Sup. Ct. 666, 40 L. ed. 940; *Interstate Com. Com. v. East Tenn. &c. R. Co.*, 85 Fed. 107; *Interstate Com. Com. v. Western &c. R. Co.*, 93 Fed. 83.

¹⁹ *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. 857; *Chamber of Commerce v. Great Northern R. Co.*, 4 Int. Com. 230; *Eau Claire &c. v.*

Chicago &c. R. Co., 4 Int. Com. 65; *James v. Canadian Pac. R. Co.*, 4 Int. Com. 274; *Ransome v. Eastern Counties R. Co.*, 4 C. B. N. S. 135. See also *Anthony Salt Co. v. Missouri Pac. R. Co.*, 4 Int. Com. 33. And the carrier is not to equalize advantages. *Crews v. Richmond &c. R. Co.*, 1 Int. Com. 703; *Wichita v. Missouri Pac. R.*, 10 I. C. C. 35, and other cases above cited. See also *State ex rel. v. Adams Exp. Co.*, 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93n.

²⁰ *Louisville &c. R. Co.*, In re, 1 Int. Com. Com. 31, 53; *Interstate Com. Com. v. Cincinnati &c. R. Co.*, 56 Fed. 925; *Southern R. &c. Assn. Re*, 1 Int. Com. 278; *Interstate Com. Com. v. Alabama &c. R. Co.*, 69 Fed. 227; *Louisville &c. R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309. But it seems to have been held that in case of doubt it should be resolved in favor of the law and the circumstances and con-

for a short haul than for a long haul is competition with carriers which are not subject to the provision of the statute, particularly with carriers by water.²¹ It was also held that competition of controlling force and amount with foreign railroads or those which are wholly within one state, and free from the operation of the statute, may justify such a charge as well as competition with carriers by water,²² and the interstate commerce commission originally made another exception in "rare and peculiar" cases of competition with other railroads subject to the statute where a strict application of the general rule would be destructive of legitimate competition.²³ But the view afterwards taken

ditions treated as substantially similar. *Missouri Pac. R. Co. v. Texas &c. R. Co.*, 31 Fed. 862. See also *San Bernardino &c. v. Atchison &c. R. Co.*, 3 Int. Com. 138. But in *Detroit &c. R. Co. v. Interstate Com. Com.*, 74 Fed. 803, 839, it is denied that there is any presumption against the carrier.

²¹ *Koehler, Ex parte*, 25 Fed. 73, 31 Fed. 315; *Interstate Com. Com. v. Atchison &c. R. Co.*, 50 Fed. 295; *Behlmer v. Louisville &c. R. Co.*, 71 Fed. 835; *Business Men's Assn. v. Chicago &c. R. Co.*, 2 Int. Com. Com. 52; *Lehmann v. Southern Pac. R. Co.*, 3 Int. Com. 80; *Rice v. Atchison &c. R. Co.*, 3 Int. Com. 263; *King v. New York &c. R. Co.*, 3 Int. Com. 272; *New Orleans &c. v. Illinois Cent. R. Co.*, 3 Int. Com. Com. 534. See also *Louisville &c. R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309; *Interstate Com. Com. v. Clyde &c. Co.*, 181 U. S. 29, 21 Sup. Ct. 512, 45 L. ed. 729. But where the only real competition is by rail it seems that the fact that water competition is also possible will not make the circumstances and conditions dissimilar. *Boston &c. R. Co.*

v. Boston &c. Co., 1 Int. Com. Com. 158; *San Bernardino &c. v. Atchison &c. R. Co.*, 3 Int. Com. 138; *Harwell v. Columbus &c. R. Co.*, 1 Int. Com. Com. 236; *Merchants' Union v. Northern Pac. R. Co.*, 4 Int. Com. 183; *Perry v. Florida Cent. R. Co.*, 3 Int. Com. 740.

²² *Louisville &c. R. Co., In re*, 1 Int. Com. Com. 31, 57; *Interstate Com. Com. v. Alabama &c. R. Co.*, 69 Fed. 227, affirmed in 74 Fed. 715; *Texas &c. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. See also *Interstate Com. Com. v. Clyde &c. Co.*, 181 U. S. 29, 21 Sup. Ct. 512, 45 L. ed. 729. But even a state carrier, by engaging in interstate commerce and becoming part of a continuous line, may come within the statute. *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935. See for other things that may cause dissimilarity in circumstances or conditions, *Detroit &c. R. Co. v. Interstate Com. Com.*, 74 Fed. 803; *Interstate Com. Com. v. Louisville &c. R. Co.*, 73 Fed. 409.

²³ *Southern &c. R. Co., Re*, 1 Int.

is that, while such "rare and peculiar" cases will justify the commission in affording relief or permitting such charges, it is not a matter for the railroad companies to determine even in the first instance.²⁴ It is held, however, by the Supreme Court of the United States that it is not necessary to apply to the commission for relief where the circumstances are clearly dissimilar.²⁵ In a comparatively recent case the United States Supreme Court stated the elements which should be considered by the commission and the rules by which it should be governed in determining questions arising under the third and fourth sections of the interstate commerce act, and held that ocean competition beyond the seaboard of the United States should be considered in determining whether a difference in rates between import and domestic traffic from the seaboard is not justified by reason of the dissimilar conditions and circumstances.²⁶ So, while it was held that a trade center can not demand, as matter of right, that the rates from a common source of supply shall be made up of the rate to itself and the rate thence to the smaller town,²⁷ and the arbitrary "basing point" system has been condemned in some instances by the interstate commerce commission,²⁸ yet it has been held that where the "basing point" was already a large distributing center and the competition by

Com. 278. See also as to competition being sufficient dissimilarity, *East Tenn. &c. R. Co. v. Interstate Com. Com.*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 719; *Interstate Com. Com. v. Alabama &c. R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; *Interstate Com. Com. v. Southern R. Co.*, 122 Fed. 800.

²⁴ *Trammell v. Clyde &c. Co.*, 4 Int. Com. 120.

²⁵ *East Tenn. &c. R. Co. v. Interstate Com. Com.*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 719. See also *Detroit &c. R. Co. v. Interstate Com. Com.*, 74 Fed. 803.

²⁶ *Texas &c. R. Co. v. Interstate*

Com. Com., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. But compare *James v. East Tenn. &c. R. Co.*, 3 Int. Com. Com. 225; *New York Produce Exch. v. New York Cent. &c. R. Co.*, 2 Int. Com. 553.

²⁷ *Martin v. Chicago &c. R. Co.*, 2 Int. Com. Com. 25.

²⁸ *Tariffs &c.*, In re, 3 Int. Com. Com. 19; *Hamilton v. Chattanooga &c. R. Co.*, 3 Int. Com. 482. But see *Interstate Com. Com. v. Louisville &c. R. Co.*, 190 U. S. 273, 23 Sup. Ct. 687, 47 L. ed. 1047; *Interstate Com. Com. v. Chicago &c. Ry.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946.

water and otherwise is great such a combination rate made by adding to the competitive through rate to such center the local rate from such center to a local station beyond is not in violation of the statute.²⁹ So, it has been held that freight rates from a city in Louisiana to La Grange in Georgia, arrived at by charging the through rate from Atlanta to La Grange are not obnoxious to the provision against undue discrimination and a greater charge for a shorter than for a longer haul, because stations between La Grange and Atlanta, to which the same rule is applied, receive lower rates from such city in Louisiana, where the same rates, if based on the nearest competitive point south, with the local rate from such point added, would be still higher.³⁰ And the system of basing points is not necessarily illegal.³¹ The interstate commerce act refers to compensation "in the aggregate" and does not prohibit a reasonable and proper local rate, less in the aggregate than the through rate, although greater in proportion per mile than the through rate. Many elements or influences may affect the one which have no bearing on the other, and the fact that the local rate is greater in proportion than the through rate, or greater than the carrier's share of a joint rate, does not of itself necessarily make it illegal.³² But it has been held that it is not a sufficient justification

²⁹ *Interstate Com. Com. v. Alabama &c. R. Co.*, 69 Fed. 227, affirmed in 74 Fed. 715. But see *Gerke &c. Co. v. Louisville &c. Co.*, 4 Int. Com. 267 (lines converging from one point).

³⁰ *Interstate Com. Com. v. Louisville &c. R. Co.*, 190 U. S. 273, 23 Sup. Ct. 687, 47 L. ed. 1047; also holding that the possibility of competition arising at a particular point does not render freight rates at that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the provision against a greater charge for a shorter than for a longer haul.

³¹ *Interstate Com. Com. v. Alabama Midland R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; *Interstate Com. Com. v. Chicago &c. R. Co.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946; *Interstate Com. Com. v. Clyde S. S. Co.*, 181 U. S. 29, 21 Sup. Ct. 512, 45 L. ed. 729.

³² *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912; *Tozer v. United States*, 52 Fed. 917; *Parsons v. Chicago &c. R. Co.*, 63 Fed. 903, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. ed. 231; *Martin v. Chicago &c. R. Co.*, 2 Int. Com. Com. 25; *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com.

for a greater charge in the aggregate for a shorter than for a longer haul over the same line in the same direction, the shorter being included in the longer distance, that the traffic for which the greater charge is made is local traffic, while the other is not; nor, unless in exceptional cases, that the short haul traffic is more expensive to the carrier; nor that the lesser charge for the longer haul has for its motive the encouragement of manufacturing, or the like, or the building up of business or trade centers; nor that it is merely the continuation of the favorable rates under which industrial establishments or trade centers have been built up.³³ It was held by one of the circuit courts that furnishing free cartage at one city and not at another upon the company's line at a less distance and through which the goods pass to reach the former place, where the rates are the same, is a violation of the long and short haul clause of the interstate commerce act,³⁴ but this ruling has been reversed in

Com. 584; *McMorran v. Grand Trunk R. Co.*, 2 Int. Com. 604; *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. 460. See also *Interstate Com. Com. v. Nashville &c. R.*, 120 Fed. 934; *Commercial Club v. Omaha &c. R. Co.*, 7 I. C. C. 386; *Bellsdyke &c. Co. v. North British R.*, 2 R. Can. L. Cas 105; *Brewer v. Central &c. R. Co.*, 84 Fed. 258; *Interstate Com. Com. v. Western &c. R. Co.*, 88 Fed. 186; *Allen v. Oregon R. &c. Co.*, 98 Fed. 16. But compare *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935; *Eau Claire &c. v. Chicago &c. R. Co.*, 4 Int. Com. 65; *Interstate Com. Com. v. East Tenn. &c. R.*, 85 Fed. 107. As to the meaning of the phrase "in the aggregate," see *Detroit &c. R. Co. v. Interstate Com. Com.*, 74 Fed. 803, where it is given rather an unusual application if not construction. See

also *Ragan v. Aiken*, 77 Tenn. 609, 42 Am. Rep. 684, 8 Am. & Eng. R. Cas. 201; *St. Louis &c. R. Co. v. Hill*, 14 Ill. App. 579; *Illinois Cent. R. Co. v. People*, 121 Ill. 304, 12 N. E. 670; *King v. New York &c. R. Co.*, 4 Int. Com. Com. 251.

³³ *Trammell v. Clyde &c. Co.*, 4 Int. Com. 120; *Southern &c. Assn., Re*, 1 Int. Com. 278. See also *Chicago &c. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Illinois Cent. R. Co. v. People*, 121 Ill. 304, 12 N. E. 670.

³⁴ *Interstate Com. Com. v. Detroit &c. R. Co.*, 57 Fed. 1005, 4 Int. Com. 722. See also *Stone v. Detroit &c. R. Co.*, 3 Int. Com. Com. 613. In *Junod v. Chicago &c. R. Co.*, 47 Fed. 290, 3 Int. Com. 663, it was held a violation of the law to forward grain from Nebraska through places in Iowa to Chicago at a less rate than charged from Chicago to such

an elaborate opinion by the circuit court of appeals.³⁵ It will be observed that the prohibition in this clause is directed in the original act against a greater compensation for a shorter than for a longer distance over the same line, in the same direction, and controversy has arisen as to the meaning and effect of the phrase "over the same line." It has been held in several cases that the joint use of the same track by different companies does not necessarily make it the same line within the meaning of this clause so as to compel either company to grade its tariff by that of the other,³⁶ and that where two companies owning connecting lines make a joint through tariff the two lines do not thereby become the "same line" within the meaning of the statute, and the joint through rate is not the standard by which the separate tariff of either is to be measured in determining its validity under the statute, for it may lawfully charge a greater local rate on its own line than its share of the joint rate for a longer haul.³⁷ But these cases are distinguished in a comparatively recent decision by the United States Supreme Court, in which it is held that "when goods are shipped under a through bill of lading from a

points in Iowa. See also *Detroit Board &c. v. Grand Trunk R. Co.*, 2 Int. Com. 199. So, in *James v. East Tenn. &c. R. Co.*, 2 Int. Com. 609, it was held that a difference in bulk and value of lumber did not justify a greater charge for shorter distance where the carriers in their rate sheets had put the lumber in the same class and at the same rate. For other instances in which it was held that the conditions and circumstances did not justify a less rate for a longer haul or a greater charge for a shorter haul, see *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. 857; *Chicago &c. R. Co., Re*, 2 Int. Com. 137 (competition between two roads and unreasonably low rate between two points by com-

petitor); *Northwestern Iowa &c. Assn. v. Chicago &c. R. Co.*, 2 Int. Com. 431 (road consisting of main line and branch lines to same terminus); *James &c. Co. v. Cincinnati &c. Co.*, 3 Int. Com. 682 (roads forming a continuous line).

³⁵ *Detroit &c. Co. v. Interstate Com. Com.*, 74 Fed. 803, affirmed in 167 U. S. 633, 17 Sup. Ct. 986.

³⁶ *Interstate Com. Com. v. Cincinnati &c. R. Co.*, 4 Int. Com. 332, 56 Fed. 925. But see the last two notes to this section.

³⁷ *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912, 4 Int. Com. 257, 53 Am. & Eng. R. Cas. 18; *Parsons v. Chicago &c. R. Co.*, 63 Fed. 903; *Tozer v. United States*, 52 Fed. 917; *United States v. Mellen*, 53 Fed. 229, 4 Int. Com. 247.

point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce;" and that it is "within the jurisdiction of the commission to consider whether the said company, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the greater being included within the longer distance, was or was not transporting property, in transit between states under substantially similar circumstances and conditions."³⁸ It seems to have been assumed, however, rather than expressly decided, that the line formed by the several railroads was "the same line" within the meaning of the fourth section of the statute.³⁹ It has also been held that whether a haul is shorter or longer is determined by the length of the shortest route in each case.⁴⁰

³⁸ *Cincinnati &c. R. Co. v. Interstate Com. Com.* 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935. See also *Interstate Com. Com. v. Louisville &c. R. Co.*, 118 Fed. 613; *Corcoran v. Louisville &c. R. Co.*, 125 Ky. 634, 101 S. W. 1185; ante, § 2553. See also as to when a railroad wholly within one state is subject to the interstate commerce act. *Augusta &c. Co. v. Wrightsville &c. Co.*, 74 Fed. 522; *Mattingly v. Pennsylvania Co.*, 3 Int. Com. Com. 592, 609; *United States v. Seaboard &c. R.*, 82 Fed. 563.

³⁹ The effect of the term "same line" in the fourth section of the act is not referred to in the opinion, but the decree of the circuit court of appeals, which was affirmed, upheld that portion of the order of the interstate commerce commission which required the carrier to desist from charging or

receiving any greater compensation, in the aggregate, "for the shorter distance over the line formed by their several railroads" from Cincinnati to Social Circle, "than they charge or receive for the transportation of said articles for the longer distance over the same line" from Cincinnati to Augusta. The circuit court held that the new line formed by the separate carriers was not "the same line." Its decision was reversed by the circuit court of appeals, whose judgment was affirmed by the supreme court. See *Interst. Com. Com. v. Cincinnati &c. R. Co.*, 56 Fed. 925. This question is apparently settled by the amendment of June 18, 1910, adding the words "or route."

⁴⁰ *Ulric v. Lake Shore &c. R. Co.*, 9 I. C. C. 495.

§ 2566 (1682a). Long and short hauls—Changes made by subsequent amendments.—Several important changes were made in section four by the amendment of June 18, 1910, clearing up some of the disputed points shown in the decisions cited in the last preceding section. The clause “under substantially similar circumstances and conditions,” used in the original act and apparently constituting a limitation under that act, is omitted and the words “or route” are added after the words “over the same line.” A provision is also added making it unlawful “to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act.” And the section now closes with the additional provision that “whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.” The imperative enforcement of the prohibition against charging a lesser rate for a longer than for a shorter haul, when the Interstate Commerce Commission has refused an application for relief from the application of the long and short haul clause, does not render the amendment unconstitutional.⁴¹ And a carrier, on application to the commission, may in special cases, after investigation, be authorized by it to charge less for longer than for shorter distances for the transportation of passengers or property, and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of section 4, which is the section containing the above provision.⁴²

⁴¹ *United States v. Atchison &c. R. Co.*, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. ed. 1408; *United States v. Union Pac. R. Co.*, 234 U. S. 495, 34 Sup. Ct. 995, 58 L. ed. 1426. And see generally as to relieving power of the Commission, *In re Application of the Southern Pac. R. Co.*,

22 I. C. C. 366; *Bluefield Shippers' Assn. v. Norfolk &c. Ry. Co.*, 22 I. C. C. 519; *City of Spokane v. Northern Pac. Ry. Co.*, 21 I. C. C. 400; *Railroad Comm. of Nevada v. Southern Pac. Co.*, 21 I. C. C. 329.

⁴² See authorities cited in last preceding note; also *United States*

§ 2567 (1683). **Group rates.**—It has been held that the making of a “group rate,” although it resulted in charging the same for a short as for a long haul, was not illegal under a state statute providing that no unjust discrimination shall be made against any person or place and that “it shall be prima facie evidence of an unjust discrimination for any railroad company to demand or receive from one person, firm or company a greater compensation than from another for the transportation in this state of any freight of the same kind or class, in equal or greater quantities, for the same or a less distance.”⁴³ So, it seems to be settled that grouping rates upon such products as coal, milk or similar commodities for which a large demand exists, so as to give all in a certain producing district or within a certain distance a uniform rate and place them upon an equality among themselves and with those in other districts who compete in the same market, is not necessarily a violation of section three of the interstate commerce law, prohibiting unjust discrimination nor of section four, making it unlawful, under certain circumstances, to charge more for a shorter than for a longer distance.⁴⁴ It must be unreasonable or result in undue prejudice

v. Merchants &c. Assn., 242 U. S. 178, 37 Sup. Ct. 24, 61 L. ed 233; Louisville &c. R. Co. v. United States, 245 U. S. 463, 38 Sup. Ct. 141, 62 L. ed. 400; United States v. Louisville &c. R. Co., 236 U. S. 318, 35 Sup. Ct. 363, 59 L. ed. 598. See Transportation Act 1920, § 406, Barnes’ Fed. Code 1921 Supp., § 7887.

⁴³ Texas &c. R. Co. v. Kuteman, 54 Fed. 547, distinguishing Texas &c. R. Co. v. Kuteman, 79 Tex. 465, 14 S. W. 693, in which it was held, among other things, that the provision against charging more for a less than a greater distance applies although the freight is not being transported between the same points.

⁴⁴ Howell v. New York &c. R. Co., 2 Int. Com. 162, 2 Int. Com. 272; Rend v. Chicago &c. R. Co., 2 Int. Com. 313, 2 Int. Com. 540; Coxe v. Lehigh Valley R. Co., 3 Int. Com. 460, 4 Int. Com. 535. See also Rice v. Atchison &c. R. Co., 3 Int. Com. 263 (“blanket rate” on oil); Cedar Hill Coal &c. Co. v. C. & S. R. Co., 16 I. C. C. 387; Thropp v. Penna. R. Co., 23 I. C. C. 497; Hinchman Coal &c. Co. v. Baltimore &c. R. Co., 16 I. C. C. 512; American Coal Co. v. Baltimore &c. R. Co., 17 I. C. C. 149; In Re Transportation of Wool &c., 23 I. C. C. 151; Tariffs of Transcontinental Lines, Re, 2 Int. Com. 203; Ransome v. Eastern Counties R. Co.,

or injury in order to render it unlawful.⁴⁵ Thus, it has been held proper to make a group rate to a large number of mines, composing practically a single coal mining district, although some of the mines were many miles apart.⁴⁶ So, it has been held lawful to group stations, although from twenty-five to one hundred miles apart, or even further, and charge a common rate to each from some far distant point, the distance from such point to each being regarded as "practically the same in the large view of the subject;"⁴⁷ and a uniform rate upon milk shipped to New York City from all stations within two hundred miles upon railroads running west of the Hudson River to Jersey City has been held not to constitute unjust discrimination.⁴⁸ But the grouping

4 C. B. N. S. 135; *Denaby Main Colliery Co. v. Manchester &c. R. Co.*, L. R. 11 App. Cas. 97, 26 Am. & Eng. R. Cas. 293; *Lloyd v. Northampton &c. R. Co.*, 3 Nev. & Mac. 259. And *Interstate Com. Com. v. Louisville &c. R. Co.*, 190 U. S. 273, 23 Sup. Ct. 687, 47 L. ed. 1047; *Detroit &c. R. Co. v. Interstate Com. Com.*, 74 Fed. 803.

⁴⁵ *Imperial Coal Co. v. Pittsburgh &c. R. Co.*, 2 Int. Com. 436, 2 Int. Com. Com. 618. See as to rates or grouping unreasonable or unduly prejudicial or discriminating, *Sun Co. v. I. S. R. Co.*, 22 I. C. C. 194, 197; *Ferguson Saw Mill Co. v. St. Louis &c. Ry. Co.*, 18 I. C. C. 391; *Commercial Club of Salt Lake City v. Atchison &c. Ry. Co.*, 19 I. C. C. 535; *Southwestern Missouri Millers Club v. Missouri &c. Ry. Co.*, 22 I. C. C. 422.

⁴⁶ *Rend v. Chicago &c. R. Co.*, 2 Int. Com. 313, 2 Int. Com. Com. 540. But see *Denaby Main Colliery Co. v. Manchester &c. R. Co.*, 3 Nev. & Mac. 426.

⁴⁷ See *Int. Com. Com. v. Detroit*

&c. R. Co., 57 Fed. 1005, 1010, 1015, 1018; *Mutual Rice &c. Assn. v. I. & G. N. R. Co.*, 23 I. C. C. 219; *Arlington Heights Fruit Exch. v. Southern Pac. R. Co.*, 21 I. C. C. 389; *Thropp v. Penna. R. Co.*, 23 I. C. C. 497 (grouped points from 316 to 432 miles from typical producing point); *Kansas City Transp. Bureau v. Atchison &c. Ry. Co.*, 16 I. C. C. 195. See also *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935. Judge Taft also held in the first case that such a grouping of stations was a conclusive admission that the transportation from the point from which the group rate was made to the warehouse of the company at each of such stations was under substantially similar circumstances and conditions; but Judge Severns dissented as to this proposition, and the latter's view was taken by the court of appeals. *Detroit &c. R. Co. v. Interstate Com. Com.*, 74 Fed. 803.

⁴⁸ *Howell v. New York &c. R.*

must be reasonable.⁴⁹ It is said by the United States Supreme Court, in a comparatively recent case, that the question as to what constitutes an undue preference or advantage, under the third section of the interstate commerce act, is one of fact, and that, in considering questions of discrimination between localities or questions arising under the fourth section, relating to long and short hauls, the welfare of the locality to which the goods are sent must be taken into account, as well as the welfare of the locality where the traffic originates, or where the goods are placed on the cars.⁵⁰

§ 2568 (1685).—**Interchange of business—Interchange of cars without breaking bulk.**—It is difficult to lay down any definite rule as to the rights of railroad companies in cases where there is an interchange of business. The provisions of the interstate commerce act⁵¹ have been held not to necessarily prevent a railroad company from requiring a company tendering it freight to break bulk and transfer the freight to the cars of the company to which the freight is tendered.⁵² It is, perhaps, safe to say

Co., 2 Int. Com. 162, 2 Int. Com. Com. 272. See also *Atchison & Ry. Co. v. United States*, 203 Fed. 56.

⁴⁹ See *State v. Minneapolis & R. Co.*, 80 Minn. 191, 83 N. W. 60, 89 Am. St. 514; *Sun Co. v. I. S. R. Co.*, 22 I. C. C. 194, 197; *Milk Producers' Assn. v. Delaware & R. Co.*, 7 I. C. C. 92. See also as to this general subject and the system of "basing points." *Interstate Com. Com. v. Louisville & R. Co.*, 190 U. S. 273, 23 Sup. Ct. 687, 47 L. ed. 1047; *Interstate Com. Com. v. Chicago & R. Co.*, 218 U. S. 89, 30 Sup. Ct. 651, 54 L. ed. 946, and ante, § 2565. And see as to "proportional rates," *Kansas City & R. Co. v. Albers Com. Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. ed. 556; *Kansas City Transp. Bureau v. Atchison & Ry. Co.*, 16 I. C. C.

195; *Baltimore Chamber of Com. v. Baltimore & R. Co.*, 22 I. C. C. 596; *Bascom v. Atchison & R. Co.*, 17 I. C. C. 354; *Southern Ill. Millers' Assn. v. Louisville & R. Co.*, 23 I. C. C. 672; *Sioux City Term. & R. Co. v. Chicago & R. Co.*, 23 I. C. C. 98.

⁵⁰ *Texas & R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. Interest of general public as well as that of carrier is to be considered. *Louisville & R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309. And so must the welfare of the carriers. *Interstate Com. Com. v. Alabama & R. Co.*, 74 Fed. 715.

⁵¹ *Interstate Com. Act*, § 3.

⁵² Ante, § 2099. See also *Little Rock & R. Co. v. St. Louis & R.*, 63 Fed. 775; *Oregon & R. Co.*

that, subject to the prohibitions against unjust or unreasonable charges and against unjust discrimination and the provisions of the amendments of 1906 and 1910 and later as to through routing, railroad companies are free to make contracts respecting the interchange of freight.⁵³ We also think that the authorities require the conclusion that while a railroad company can not unjustly discriminate against another company, yet it may make reasonable rules and regulations respecting the interchange of freight, and is not under a duty to surrender its station buildings or the like to the use of another company.⁵⁴ We are not, however, to be understood as affirming that a railroad company may refuse to interchange freight or that it can make unjust discriminations, but we do think that the right to use its own property for its own legitimate purposes is not abridged to any greater extent than is necessary to prevent unjust discrimination and secure the free and fair interchange of freight.⁵⁵ It has been held that the provision of the act respecting the interchange of business does not require one company to yield its terminal facilities to another.⁵⁶ But the weight of authority is to the effect that the

v. Northern Pac. R. Co., 51 Fed. 465, 61 Fed. 158; *Central Stockyds. Co. v. Louisville &c. R. Co.*, 118 Fed. 113, 63 L. R. A. 213, *affd.* in 192 U. S. 568, 24 Sup. Ct. 339, 48 L. ed. 565. But through routing may be required under the amendments of 1906 and 1910 and latest amendment.

⁵³ *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699, 43 Fed. 37. See *State v. Sioux City &c. R. Co.*, 46 Nebr. 682, 65 N. W. 766, 31 L. R. A. 47, 53; *Atchison &c. R. Co. v. Denver &c. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; *Pullman &c. Co. v. Missouri &c. R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194,

29 L. ed. 499; *Paxton v. Farmers' &c. Co.*, 45 Nebr. 884, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. 585; *Joint Water and Rail Lines, Re*, 2 Int. Com. 486; *Rice v. Cincinnati &c. R. Co.*, 3 Int. Com. 841.

⁵⁴ *Ilwaco &c. Co. v. Oregon &c. R. Co.*, 57 Fed. 673; authorities cited in preceding note to this section. See also *Pittsburgh &c. R. Co. v. Hunt*, (Ind.) 86 N. E. 328.

⁵⁵ *St. Louis &c. R. Co. v. Southern Express Co.*, (Express Cases), 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. ed. 791; *Little Rock &c. R. Co. v. St. Louis &c. R. Co.*, 41 Fed. 559; *Kentucky &c. Co. v. Louisville &c. Co.*, 37 Fed. 567.

⁵⁶ *Little Rock &c. Co. v. St. Louis &c. R. Co.*, 59 Fed. 400; *Ilwaco &c. Co. v. Oregon &c. R. Co.*, 57 Fed. 673. See also *Central*

state or government may require interchange of cars and reasonable facilities for the public to make connection with or between different carriers.⁵⁷ And, under the amendments a railroad company that interchanges carload freight with one connecting carrier within its switching limits and transports it over its own terminals to a destination thereon, is guilty of unjust discrimination if it denies the same service to another railroad company whose tracks connect with it, and the Interstate Commerce Commission may order it to desist from such discrimination.⁵⁸

§ 2569 (1686). **Joint tariffs—Through rates.**—The trend of the cases, as we have elsewhere shown, is against undue or unnec-

Stockyds. Co. v. Louisville &c. R. Co., 118 Fed. 113, 63 L. R. A. 213, *affd.* in 192 U. S. 568, 24 Sup. Ct. 339; 48 L. ed. 565; and § 3 of Interstate Com. Act. But see New York &c. R. Co. v. New York &c. R. Co., 50 Fed. 867.

⁵⁷ Atlantic &c. R. Co. v. North Carolina Corp. Com., 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 933; Peoria &c. R. Co. v. Chicago &c. R. Co., 109 Ill. 135, 50 Am. Rep. 605; Burlington &c. R. Co. v. Dey, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477; Louisville &c. R. Co. v. Central Stockyards Co., (Ky.) 97 S. W. 778; Louisville &c. R. Co. v. Pittsburgh &c. Co., 111 Ky. 960, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. 447; Michigan &c. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Jacobson v. Wisconsin &c. Co., 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 392, 70 Am. St. 358. See also Thomas v. Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980; Atchison &c. R. Co. v. Denver &c. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; Hocking Val R. Co.

v. New York Coal Co., 217 Fed. 727. Through routing may be required in interstate commerce and reasonable rules and regulations for exchange, interchange and return of cars under the amendments of 1906 and 1910 and Transportation Act 1920.

⁵⁸ Pennsylvania R. Co. v. United States, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616; Louisville &c. R. Co. v. United States, 238 U. S. 1, 35 Sup. Ct. 696, 59 L. ed. 1177. See also Southern Pac. Terminal Co. v. Interstate Com. Com., 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310. But it may give exclusive privileges to third parties at stations and terminals which do not affect or discriminate against the travelers or shippers and merely add to their convenience before or after transportation is completed. Donovan v. Penna. Co., 199 U. S. 279, 26 Sup. Ct. 91, 50 L. ed. 192; Chicago &c. R. Co. v. Pullman So. Car. Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. ed. 97.

essary restrictions upon the rights of contract and of property, and, in accordance with that general doctrine, it has been held that a railroad carrier can not be compelled to yield control of its road or make local rates to suit another carrier.⁵⁹ But, as we have also shown, proper state laws and orders of commissions as to connections and terminal facilities within the state have been upheld, and the Interstate Commerce Commission now has considerable authority over the making of connections and the establishment of through routes and joint rates.⁶⁰ And where a railroad company becomes part of a continuous line, "under a common control, management or arrangement for a continuous carriage," it can not limit the control of the commission, "in respect to foreign traffic, to certain points on its road and to exclude other points."⁶¹ Where there is a continuous line, although composed of the roads of two or more companies, the

⁵⁹ *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699, 43 Fed. 37; *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935; *Kentucky &c. Co. v. Louisville &c. R. Co.*, 37 Fed. 567, 2 L. R. A. 289; *Chicago &c. R. Co. v. Osborne*, 52 Fed. 912; *Little Rock &c. R. Co. v. East Tennessee &c. R. Co.*, 2 Int. Com. 454; *Capehart v. Louisville &c. R. Co.*, 3 Int. Com. R. 278. See also *Atchison &c. R. Co. v. Denver &c. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. ed. 291; *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. ed. 1110; *Southern Pac. Co. v. Interstate Com. Com.*, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. ed. 585. But a state statute compelling a joint arrangement has been upheld. *State v. Minneapolis &c. R. Co.*, 80 Minn. 191, 83 N. W. 60.

⁶⁰ Section 15 of Interstate Commerce Act as amended in 1910; ante § 2551. This section of the

act also gives the shipper the right to select through routes and rates properly established and determine, where competing lines of railroad constitute portions of a through line or route, over which of such competing lines his freight shall be transported. Transportation Act 1920, to be considered in a subsequent chapter gives the Interstate Commerce Commission large latitude.

⁶¹ *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935. See *Boston &c. Exch. v. New York &c. R. Co.*, 3 Interst. Com. 493, 604; *Mattingly v. Pennsylvania Co.*, 2 Int. Com. 806; *Tranmell v. Clyde &c. Co.*, 4 Int. Com. 120; *Atlanta &c. R. Co., Re*, 2 Int. Com. 461; *Hamilton v. Chattanooga &c. R. Co.*, 3 Int. Com. 482. See also *Louisville &c. R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309; *Interstate Com. Com. v. Indianapolis &c. Co.*, 99 Fed. 472;

through rates must be reasonable.⁶² Railroad companies can not, by breaking a haul in two and assuming to be separate or independent carriers, evade the provisions of the act.⁶³ Joint tariffs and joint through rates have been held to be matters of contract, express or implied, between the different companies.⁶⁴ But, as already shown, it is provided by the amendment to the interstate commerce law that every carrier subject to its provisions shall establish through routes and just and reasonable rates

Baer Bros. Mercantile Co. v. Denver &c. R. Co., 233 U. S. 479, 34 Sup. Ct. 641, 58 L. ed. 1055. See also as to what is a "common arrangement," Mutual Transit Co. v. United States, 178 Fed. 664; Chicago &c. Ry. Co. v. United States, 157 Fed. 831; Fisher v. Great Northern Ry. Co., 49 Wash. 205, 95 Pac. 77.

⁶² Brady v. Pennsylvania Co., 2 Int. Com. 78; James &c. Co. v. Cincinnati &c. R. Co., 3 Int. Com. 682; Tranmell v. Clyde &c. Co., 4 Int. Com. 120, 139; Chamber of Commerce v. Flint &c. R. Co., 2 Int. Com. Com. 553; Passenger Tariffs, In re, 2 Int. Com. Com. 649. See generally Clark, In re, 3 Int. Com. Com. 649. See also Central &c. R. Co. v. Great Western &c. R. Co., 4 R. & Canal Traf. Cas. 110; Greenock &c. R. Co. v. Caledonian R. Co., 3 Nev. & Mac. 145; East &c. R. Co. v. Great Western &c. R. Co., 1 Nev. & Mac. 331; Hammans v. Great Western &c. R. Co., 4 R. & Canal Traf. 181; Warwick &c. Co. v. Birmingham &c. Co., 5 L. R. Exch. Div. 1.

⁶³ Brady v. Pennsylvania R. Co., 2 Int. Com. Com. 131; Brady v. Pennsylvania R. Co., 2 Int. Com. 78; Board &c. v. Alabama &c. R. Co., 4 Int. Com. 348; Grand Trunk R. Co., In re, 2 Int. Com. 496. See

also § 7 of the act. Baer Bros. Mercantile Co. v. Denver &c. R. Co., 233 U. S. 479, 34 Sup. Ct. 641, 58 L. ed. 1055. And a concerted advance by interstate carriers in the rate upon a particular commodity may be held unreasonable and unjust by the commission, and by a Federal Court in subsequent proceedings to enforce the order of the commission, although such rate may be a mere division of a through rate. Illinois Cent. R. Co. v. Interstate Com. Com., 206 U. S. 441, 27 Sup. Ct. 700, 51 L. ed. 1128.

⁶⁴ Kentucky &c. Co. v. Louisville &c. R. Co., 37 Fed. 567, 2 L. R. A. 289; Gulf &c. R. Co. v. Miami S. S. Co., 86 Fed. 407; Cincinnati &c. R. Co. v. Int. Com. Com., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935; Chicago &c. R. Co. v. Osborne, 52 Fed. 912; Duncan v. Atchison &c. R. Co., 4 Int. Com. 385. See Gulf &c. R. Co. v. Nelson, 5 Tex. Civ. App. 387. See generally upon the subject of through rates. La Crosse &c. Co. v. Chicago &c. R. Co., 2 Int. Com. 9; Business Men &c. Assn. v. Chicago &c. R. Co., 2 Int. Com. 41; Lippman v. Illinois Central R. Co., 2 Int. Com. 414; Lehmann v. Texas &c. R. Co., 2 Int. Com. 548; Perry v. Florida &c. Co., 3 Int. Com. 740;

applicable thereto.⁶⁵ Rate sheets or schedules must be printed and published, as the act requires, and must be adhered to by the carriers.⁶⁶ Advances and reductions in rates must be made in accordance with the provisions of the act.⁶⁷

Board v. Alabama &c. R. Co., 4 Int. Com. 348; *Tomlinson v. London &c. R. Co.*, 8 R. & Corp. L. J. 328. Compare also *Bracht v. San Antonio &c. Ry. Co. (U. S.)*, 41 Sup. Ct. 150.

⁶⁵ Amendment of June 29, 1906, § 1. See also § 6. And the commission is given power in that respect, especially under the amendment of 1910. See § 15; also *Transportation Act 1920*. *Interstate Com. Comm. v. Humboldt S. S. Co.*, 224 U. S. 474, 32 Sup. Ct. 556, 56 L. ed. 849; *Sunderland Bros. Co. v. St. Louis &c. R. Co.*, 23 I. C. C. 259, and see where shipment was held interstate in *Corcoran v. Louisville &c. R. Co.*, 125 Ky. 634, 101 S. W. 1185. See also *Through Routes*, In re, 12 Int. Com. 190. As to right of tap line to allowance see *United States v. Butler County R. Co.*, 234 U. S. 29, 34 Sup. Ct. 748, 58 L. ed. 1196; *United States v. Louisiana &c. R. Co.*, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. ed. 1185, Ann. Cas. 1913D, 880.

⁶⁶ *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671; *Kansas City So. R. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. ed. 683; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. ed. 703; *Atchison &c. R. Co. v. Robinson*, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. ed. 901; *East Hartford v.*

American &c. Bank, 49 Conn. 539; *Coupland v. Housatonic &c. R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; *Filing Copies &c. Re*, 1 Int. Com. 76; *Rate Sheets, Re*, 1 Int. Com. 316; *Passenger Tariff, Re*, 2 Int. Com. 445; *Grand Trunk &c. R. Co., In re*, 2 Int. Com. 496; *San Bernardino &c. v. Atchison &c. R. Co.*, 3 Int. Com. 138; *Lehmann v. Texas &c. R. Co.*, 3 Int. Com. 706; *Phelps v. Texas &c. R. Co.*, 4 Int. Com. 363. For English decisions upon subject of "Rate books," see *Cairns v. North Eastern R. Co.*, 4 R. & Canal Traf. Cas. 221; *Walkinson v. Wrexham &c. R. Co.*, 3 Nev. & Mac. 446; *Clonmel Traders v. Waterford &c. R. Co.*, 4 R. & Canal Traf. Cas. 92. See generally *Myrick v. Michigan &c. R. Co.*, 107 U. S. 102, 108, 1 Sup. Ct. 425, 27 L. ed. 325; *United States v. Miller*, 223 U. S. 599, 32 Sup. Ct. 323, 56 L. ed. 568 (publication is essential but posting is for convenience and not absolutely essential to make rate legally effective); *United States v. Union Stockyds. &c. Co.*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. ed. 226; *Texas &c. Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. ed. 562; *Stewart v. Terre Haute &c. R. Co.*, 3 Fed. 768; *United States v. Illinois Terminal R. Co.*, 168 Fed. 546; *Denver &c. R. Co. v. Interstate Com. Comm.*, 195 Fed. 968.

⁶⁷ See *McFarlane v. North British &c. R. Co.*, 4 R. & Canal Traf.

§ 2570 (1686a). **Transit privileges—Milling in transit.**—It has been customary to grant shippers certain privileges in transit, giving them the advantage of the through rate upon payment of a small additional sum. The most important of these privileges, perhaps, is that of milling in transit, but other privileges of a similar nature have also been granted, such as cleaning, bagging or compressing in transit. It has been held that shippers are not entitled as a matter of right to mill grain in transit and forward the milled product under the through rate from the point of origin to the place of ultimate destination;⁶⁸ but that it is not

Cas. 269; *In re Advances in Rates*, 23 I. C. C. 518; *Ohio Milk Products Co. v. Erie R. Co.*, 21 I. C. C. 323; *Gulf &c R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910; *Atchison &c. R. Co. v. United States*, 232 U. S. 199, 34 Sup. Ct. 291, 58 L. ed. 568; *Kansas City So. R. Co. v. C. H. Albers Com. Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. ed. 556; *Director General v. Viscose Co. (U. S.)*, 41 Sup. Ct. 151; *Interstate Com. Act*, § 6, as amended June 29, 1906, June 18, 1910, and August 24, 1912. But it has been held that there is no presumption of wrong from a change of rates by a carrier. *Interstate Com. Comm. v. Chicago &c. R. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705; *Louisville &c. R. Co. v. Interstate Com. Comm.*, 195 Fed. 541. But by § 15 of the act as amended the burden of showing to the Commission that an increased rate is just and reasonable, is placed upon the carrier. *Citizens of Somerset v. Wash. Ry. &c. Co.*, 22 I. C. C. 187, 188; *In re Advances on Iron &c.*, 22 I. C. C. 486. Special contracts for special privileges not provided for in the published tariffs or schedules are held invalid. *Engemoen*

v. Chicago &c. Ry. Co., 210 Fed. 896; *Chicago &c. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033. Ann. Cas. 1914A, 501n; *Mollohan v. Atchison &c. Ry. Co.*, 97 Kans. 51, 154 Pac. 248, L. R. A. 1918A, 175n (so holding under state law).

⁶⁸ *Diamond Mills v. Railroad*, 9 I. C. C. 311; *Koch v. Pennsylvania R.*, 10 I. C. C. 675; *Plano Mill Co. v. St. Louis &c. R. Co.*, 22 I. C. C. 360; *Priebe v. Southern R. Co.*, 189 Ala. 427, 66 So. 573; *State ex rel. R. R. Comrs. v. Atlantic Coast Line R. Co.*, 59 Fla. 612, 52 So. 4; *Alleged Unlawful Rates, Re*, 9 I. C. C. 121. In the case last cited, however, it is held that the privilege enters into and becomes part of the service covered by the rate, and should be specified in the published schedule or tariffs. See also *Shiel &c. Co. v. Illinois Cent. R. Co.*, 12 I. C. C. 210, 215; *Unlawful Rates on Trans.*, 8 I. C. C. 121, 135. And a special contract enlarging the privilege beyond that specified in the tariff has been held invalid. *Mollohan v. Atchison &c. Ry. Co.*, 97 Kans. 51, 154 Pac. 248, L. R. A. 1918A, 175n.

necessarily unlawful to grant such privileges provided there is no wrongful prejudice to the rights of other shippers.⁶⁹ It has also been said that a through rate may be made by charging the separate rate to the junction point, and then, upon reconsignment and reshipment over a second road, paying a rebate on the charges of one of the roads.⁷⁰ But, as held in the case last cited, this practice must not be so indulged as to result in unlawful discrimination, and the shipment must be intended from the first as a through shipment.⁷¹ In a recent case the complainant at Knoxville, Tennessee, manufactured a saccharine feed, half of which consisted of corn and oats, the other half of molasses, cotton seed meal and salt. "The corn and oats were shipped from points north of the Ohio river through Cincinnati and Louisville, and the other ingredients, except the salt, from points in the South. The feed was shipped from Knoxville to points East and South, and by an agreement with defendant complainant was allowed a milling in transit privilege, by which the feed was shipped out on the through rates applying to the corn and oats. Since these grains composed only half of the feed, complainant at first was compelled to sell locally one-half of the corn and oats shipped in, but, this being inconvenient, it was later arranged that complainant should be permitted to ship out double the quantity of feed as compared with the corn and oats shipped

⁶⁹ Koch v. Pennsylvania R., 10 I. C. C. 675; Central Yellow Pine Assn. v. U. S. & C. R. Co., 1 I. C. C. R. 703; Cowan v. Bond, 39 Fed. 55; Laurel Cotton Mills v. Gulf & C. R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453. Compare also Southern Ry. Co. v. St. Louis Hay Co., 214 U. S. 297, 29 Sup. Ct. 678, 53 L. ed. 1004; Alabama & C. R. Co. v. Mississippi, 203 U. S. 496, 27 Sup. Ct. 163, 51 L. ed. 289; Listman Mill Co. v. Chicago & C. R., 8 I. C. C. 47.

⁷⁰ St. Louis & C. Co. v. Illinois Cent. R., 11 I. C. C. 486, 494. See

also Alleged Unlawful Rates, Re, 7 I. C. C. 240.

⁷¹ Alleged Unlawful Rates, Re, 7 I. C. C. 240. See also Commercial Club v. Chicago & C. R., 6 I. C. C. 647; Grand Rapids & C. Ry. Co. v. United States, 212 Fed. 577; Armour Pack. Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 48, 52 L. ed. 681. If such a privilege is given to one it must be open to all. Southern R. Co. v. St. Louis Hay & C. Co., 214 U. S. 297, 29 Sup. Ct. 678, 53 L. ed. 1004; Bergin v. Missouri & C. R. Co., (Tex. Civ. App.), 150 S. W. 1184.

in. Complainant paid the inbound local rates on the articles entering into the product and the outbound proportional rates on the feed and, under arbitrary calculations, was afterwards reimbursed in the form of refunds on the hypothesis that the ingredients were all transit articles like the corn and oats, and so entitled, when milled, to the transit rate." It was held, that such agreement violated interstate commerce act prohibiting rebates and forbidding the collection or receipt of less compensation for transportation of property than is specified in published schedules of rates, and that the contract as to the milling and transit privilege thus being illegal and sufficient to vitiate the whole contract, the complainant could not recover damages for breach thereof.⁷² It has not been determined just what effect, if any, the recent amendments have on the granting of such privileges, but there seems to be no material change in the law in this respect, except that it is now clear that they are now within the jurisdiction of the interstate commerce commission.⁷⁸

§ 2571. Reconsignment.—The privilege of reconsignment is generally looked upon with favor.⁷⁴ But it has been held not demandable as a matter of right.⁷⁵ And there must be no

⁷² *Lewis, Leonhardt & Co. v. Southern Ry. Co.*, 217 Fed. 321.

⁷³ *Grand Rapids &c. R. Co. v. United States*, 212 Fed. 577; *Lewis, Leonhardt & Co. v. Southern R. Co.*, 217 Fed. 321; *Wichita Board of Trade v. Abilene &c. Ry. Co.*, 29 I. C. C. 376. Compare as to grain elevation, *Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 32 Sup. Ct. 39, 56 L. ed. 171; *Interstate Com. Com. v. Dittenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. ed. 83. Railroad Commission may impose on railroads obligation of permitting milling in transit if the rates are compensatory for the additional burden. *Empire Rice Milling Co. v. Railroad Com.*, 143

La. 1036, 79 So. 833. See also *State ex rel. Northern Pac. R. Co. v. Public Service Com.*, 95 Wash. 376, 163 Pac. 1143, 166 Pac. 793.

⁷⁴ *Detroit Traffic Assn. v. Lake Shore &c. Ry. Co.*, 21 I. C. C. 257; *Louisville &c. R. Co. v. United States*, 197 Fed. 58. Change of destination does not affect the interstate character of the shipment. *Atchison &c. R. Co. v. Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. ed. 1050; *Kirby v. Union Pac. R. Co.*, 94 Kans. 485, 146 Pac. 1183, L. R. A. 1916E, 528.

⁷⁵ *Dietz Lumber Co. v. Atchison &c. Ry. Co.*, 22 I. C. C. 75; *Cedar Hill Coal &c. Co. v. Colorado &c. Ry. Co.*, 16 I. C. C. 387. And the

undue discrimination.⁷⁶ It is frequently granted at the through rate without extra charge, but reasonable compensation may be charged in a proper case.⁷⁷ The combination of locals, and not the joint through rate has been held properly collected, where the shipment was ordered reshipped before it had reached its original billed destination, in the absence of a reconsignment privilege.⁷⁸ The Interstate Commerce Commission has refused to grant reparation where the privilege or tariff therefor was not duly filed.⁷⁹ And it has been held that the right of reconsignment in transit does not include the right to remove a part of a carload at the reconsigning point.⁸⁰

§ 2572. **Icing and refrigeration.**—Icing and refrigeration are included in the term “transportation” as used in the Interstate Commerce Act.⁸¹ It has been held that it is the duty of the carrier to furnish refrigeration in a proper case and to make a reasonable charge therefor.⁸² The carrier’s tariff should

carrier can limit the number of free reconsignments permitted on any car. *Crescent Coal &c. Co. v. Baltimore &c. R. Co.*, 20 I. C. C. 559.

⁷⁶ *Southern R. Co. v. St. Louis &c. Grain Co.*, 153 Fed. 728; *American Hay Co. v. L. V. R. Co.*, 21 I. C. C. 166. See also *United States v. Louisville &c. R. Co.*, 235 U. S. 314, 35 Sup. Ct. 113, 59 L. ed. 245. But compare *Sinclair & Co. v. Chicago &c. Ry. Co.*, 21 I. C. C. 490 (where complainant was not injured).

⁷⁷ *Investigation of Alleged Unreasonable Rates on Meats*, 22 I. C. C. 160; *St. Louis Hay &c. Co. v. M. & O. R. Co.*, 19 I. C. C. 533. The cost of the extra service should be considered and the charge must not be excessive and unreasonable. *Southern R. Co. v. St. Louis &c. Grain Co.*, 153 Fed.

728; *Detroit Traffic Assn. v. Lake Shore &c. Ry. Co.*, 21 I. C. C. 257; *Beekman Lumber Co. v. Kansas City &c. Ry. Co.*, 17 I. C. C. 86.

⁷⁸ *Floridini Co. v. S. A. L. Ry.*, 21 I. C. C. 610. See also *Townley Metal &c. Co. v. Chicago &c. R. Co.*, 15 I. C. C. 235.

⁷⁹ *Kile &c. Co. v. Deepwater Ry. Co.*, 15 I. C. C. 235.

⁸⁰ *Acme Cement Plaster Co. v. Chicago &c. R. Co.*, 17 I. C. C. 220.

⁸¹ Interstate Commerce Act, as amended in 1906, and 1910, § 1; *In re Pre-Cooling and Pre-Icing*, 23 I. C. C. 267 (but not pre-cooling); *Atchison &c. R. Co. v. United States*, 232 U. S. 199, 34 Sup. Ct. 291, 58 L. ed. 568; *Cudahy Packing Co. v. Grand Trunk &c. R. Co.*, 215 Fed. 93.

⁸² *Albree v. B. & M. R.*, 22 I. C. C. 303; *In re Advances &c.*, 23 I. C. C. 656. See also *Atchison*

make provision for it,⁸³ and the charge should be reasonable and not unlawfully discriminatory.⁸⁴

§ 2573 (1687). Party rates, mileage and commutation tickets—Interchange of passes.—The rule that discrimination may be made where the circumstances are substantially dissimilar is recognized by many express provisions of the act. Thus, "party rates" may be made and commutation tickets issued.⁸⁵ While mileage tickets may be issued, unjust discrimination is forbidden and such tickets must be issued to all persons alike when

&c. R. Co. v. United States, 232 U. S. 199, 34 Sup. Ct. 291, 58 L. ed. 568 (and it has a right to do so and cannot be compelled to accept refrigerator cars tendered by the shipper on condition that a lower freight rate be charged, but shippers may pre-ice their shipments under some circumstances).

⁸³ *Bannon v. Southern Exp. Co.*, 13 I. C. C. 516; *Memphis Freight Bureau v. Kansas City &c. Ry. Co.*, 17 I. C. C. 90; *Sulzberger v. Minneapolis &c. R. Co.*, 40 I. C. C. 173.

⁸⁴ *Arlington Heights Fruit Exch. v. Southern Pac. Co.*, 22 I. C. C. 149. As to methods of fixing charges for icing see *Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co.*, 148 Fed. 968. See also *Crutchfield &c. v. Southern Pac. Co.*, 24 I. C. C. 651.

⁸⁵ Act to regulate commerce, § 22, as amended March 2, 1889, and Feb. 8, 1895, and June 6, 1906, and June 18, 1910, also providing for joint interchangeable mileage tickets; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699; *United States v. Chicago &c. Ry. Co.*, 127 Fed. 785, 791 (citing text);

Jones & Eastern R. Co., In re, 3 C. B. (N. S.) 718; *Oxlake v. Northeastern R. Co.*, 1 C. B. (N. S.) 454. Compare *United States v. Chicago &c. R. Co.*, 127 Fed. 785, with *Party Rate Tickets, In re*, 12 Int. Com. 110. And see *Sprigg v. Baltimore &c. R. Co.*, 8 Int. Com. 443; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 43 Fed. 45. Where a system of commutation rates has been voluntarily established by the carrier such intrastate rates may be fixed by a public service commission under legislative authority, at less than the legally established normal one way passenger fare without being subject to the objection that this is a taking without due process of law or denies equal protection of the laws. *Pennsylvania R. Co. v. Towers*, 245 U. S. 6, 38 Sup. Ct. 2, 62 L. ed. 117, L. R. A. 1918C, 475 (by a divided court), overruling *Lake Shore &c. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858, so far as inconsistent. See also *Pennsylvania R. Co. v. Public Utilities Com.*, 83 N. J. L. 67, 83 Atl. 945; *Delaware &c. R. Co. v. Public Utilities Com.*, 84 N. J. L.

properly requested and the conditions and circumstances are substantially similar.⁸⁶ And definite and specific provision should be made in the tariff schedules.⁸⁷ The act likewise places the seal of its condemnation on gratuitous transportation generally, and prohibits the issuance of free passes except⁸⁸ in

619, 87 Atl. 801; *People v. Public Serv. Com.*, 159 App. Div. 531, 145 N. Y. 503, *affd.* in 215 N. Y. 689, 109 N. E. 1089. Rate for through transportation of party when carrier has no through party rate on file is the individual rate for each person and not the combination of a party rate which had been filed for part of the way and the individual rate for the rest of the way. *Atchison &c. Ry. Co. v. United States (U. S.)*, 41 Sup. Ct. 456.

⁸⁶*Associated &c. Grocers' &c. v. Missouri Pac. R. Co.*, 1 Int. Com. Com. 156; *Larrison v. Chicago &c. R. Co.*, 1 Int. Com. Com. 147; *In re Mileage Excursion and Commutation Tickets*, 23 I. C. C. 95; *Koch Secret Service v. Louisville &c. R. Co.*, 13 I. C. C. 523. But see *United States v. Chicago &c. R. Co.*, 127 Fed. 785, and compare *Troy Board &c. v. Alabama &c. R. Co.*, 6 I. C. C. 1; *Freight Bureau v. Cincinnati &c. R. Co.*, 6 I. C. C. 195; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699. For a definition of commutation and mileage tickets, see *Harper's Interstate Commerce Act*, 188-192; and *Commutation Rate Case*, 21 I. C. C. 438. As to the power of the Interstate Commerce Commission respecting the exceptions, see *Thatcher v. Fitchburg R. Co.*, 1 Int. Com. 356;

Theatrical Rates, Re, 1 Int. Com. 18. As to when carriers may be authorized to make special rates, see *Philadelphia &c. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200; *Indian Supplies, Re*, 1 Int. Com. 22; *Religious Teachers, In re*, 1 Int. Com. 21; *Smith v. Northern Pac. R. Co.*, 1 Int. Com. 611; *Savery v. New York &c. R. Co.*, 2 Int. Com. 210; *Sanger v. Southern &c. R. Co.*, 2 Int. Com. 548.

⁸⁷*In re Mileage Excursion &c. Tickets*, 23 I. C. C. 95, 97.

⁸⁸*Interstate Com. Act*, § 1, as amended June 29, 1906, April 13, 1908, and June 18, 1910, and also § 22. See *Exchange of Free Transportation, In re*, 12 Int. Com. 46; *Railroad-Telegraph Co.'s, In re*, 12 Int. Com. 10; *Illinois Cent. R. Co., complaint of*, 12 Int. Com. 8; *Free Transportation of Newspaper Employes, In re*, 12 Int. Com. 16; *Louisville &c. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671; *St. Louis &c. R. Co. v. State*, 26 Okla. 62, 107 Pac. 929, 30 L. R. A. (N. S.) 137n; *Atchison &c. R. Co. v. State*, 31 Okla. 767, 123 Pac. 1065. And one using a free ticket or pass contrary to the law is liable to the penalty prescribed. *United States v. Martin*, 176 Fed. 110; *United States v. Williams*, 159 Fed. 310.

certain specified instances. But interchange of passes is allowed to the extent specified in that act.⁸⁹

§ 2574 (1688). Violations of the interstate commerce act—Indictments.—It will aid us in securing a clear view of the construction given the interstate commerce act to consider some of the decisions rendered in cases where violators of the act were prosecuted by indictment, and at the same time will assist us in reaching a correct conclusion upon the question of what facts an indictment must contain in order to make it good. In one of the cases an indictment professing to charge the defendant with unlawfully receiving less compensation from one shipper than from another which alleged that a rebate was given a designated shipper, but did not allege any instance in which a rebate was denied to another shipper, was held bad.⁹⁰ A conspiracy to obstruct or impede interstate commerce is an indictable offense, and subjects the offender to punishment.⁹¹ It is held that signing a "line voucher" in the third federal circuit payable at a place in the eighth circuit even if a violation of the interstate com-

⁸⁹ *United States v. Erie R. Co.*, 236 U. S. 259, 35 Sup. Ct. 396, 59 L. ed. 567. As to who are and who are not within the exception allowing free passes, see *American Exp. Co. v. United States*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. ed. 635; *Schuyler v. Southern Pac. Co.*, 37 Utah 581, 109 Pac. 458; *Transportation Act 1920*, ch. 91, §§ 400, 403; *Barnes' Fed. Code 1921 Supp.*, § 7884 (7).

⁹⁰ *United States v. Hanley*, 71 Fed. 672. In the case referred to the court said: "The language of the statute recognizes that a uniform rate between different shippers is not always possible or proper; that the time of service, the kind of traffic, and the circumstances and conditions under which it is transported may materially change

the just obligations and duties of the carrier to his patrons. Equality and uniformity of rate dissociated from considerations of the time, kind and circumstances of the transaction is, therefore, not the object aimed at. The object of the statute is to prevent one shipper from getting the advantage over his competitor in the matter of rates only when they both make substantially a like offering to the carrier." But see amendments of the act since this decision, and see *Grand Rapids &c. Ry. Co. v. United States*, 212 Fed. 577.

⁹¹ *Thomas v. Cincinnati &c. R. Co.*, 62 Fed. 803; *Phelan, In re*, 62 Fed. 803; *Grand Jury, In re*, 62 Fed. 834; *United States v. Elliott*, 62 Fed. 801. See generally To-

merce act is not cognizable in the courts of the former circuit.⁹² It is held that it is not necessary in a prosecution for conspiring to violate the act regulating commerce to prove that schedules of rates were posted for the reasons that schedules are required to be posted for the information of the public and an established rate may be proved in other modes than by showing that schedules were posted.⁹³ So, it has been held that an agent who simply collects freight charges, and has nothing to do with fixing rates, is not indictable under the long and short haul clause

Iledo &c. R. Co. v. Pennsylvania &c. R. Co., 54 Fed. 730, 738; Debs, In re, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092. The case last cited contains an exhaustive review of the authorities and affirms the power of the federal courts to prevent the obstruction of interstate commerce. The following cases were cited: Lane County v. Oregon, 7 Wall. (U. S.) 71, 76; Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1010, 37 L. ed. 905, and see Act of Aug. 10, 1917. See also upon the question of conspiracy State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. 23; Angle v. Chicago &c. R. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. ed. 55; Old &c. Steamship Co. v. McKenna, 30 Fed. 48; Casey v. Cincinnati Typographical Union, 45 Fed. 135; United States v. Workmen's &c. Assn., 54 Fed. 994; Carew v. Rutherford, 106 Mass. 1; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710n; Bowen v. Hall, 6 Q. B. Div. 333; Temperton v. Russell, L. R. (1893) 1 Q. B. 715. As to the remedy by injunction, see Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. 689; Coeur D'Alene Co. v. Miners'

Union, 51 Fed. 260; Blindell v. Hagan, 54 Fed. 40; Farmers' &c. Co. v. Northern &c. R. Co., 60 Fed. 803.

⁹² United States v. Fowkes, 53 Fed. 13, distinguishing Palliser, In re, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. ed. 514; Horner v. United States, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. ed. 126. But see amendments of the act, and compare as to false billing, Davis v. United States, 104 Fed. 136. See also Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681. Fixing the amount at less than actual value for the purpose of limiting the carrier's liability is not false billing. Pierce Co. v. Wells-Fargo & Co., 189 Fed. 561.

⁹³ United States v. Howell, 56 Fed. 21. See also United States v. Miller, 223 U. S. 599, 32 Sup. Ct. 323, 56 L. ed. 568. In Tozer v. United States, 52 Fed. 917, it is held that there can be no conviction under the provisions of the act prohibiting "undue preferences," in a case where the jury are required to determine whether the preference was reasonable or unreasonable, but this doctrine seems to be opposed to that asserted in other cases.

of the interstate commerce act.⁹⁴ But the corporation may be held liable and subjected to the penalty prescribed for purposely violating the law through its agent.⁹⁵ In a comparatively recent case it is held that a railroad company is not subject to indictment under section 10 for failure to furnish switch connections to a shipper, although such connections are furnished to other shippers, at least where it is not charged that they are reasonably practicable and would justify the expense, nor that any offer was made to pay such portion of the cost as is usual and reasonable.⁹⁶

§ 2575 (1688a). **Remedies and practice.**—Various acts have been passed in regard to remedies of shippers and of carriers in the courts under or for violation of the interstate commerce law. Some of these have already been considered.⁹⁷ It was held that a suit to enjoin a common carrier from discriminating between localities in violation of the interstate commerce act could not be brought on behalf of the United States at the request of the commission prior to the Act of February 19, 1903, known as the Elkin's Act, but that such a remedy was given by said act.⁹⁸

⁹⁴ United States v. Mellen, 53 Fed. 229. See generally for other cases involving the construction of the interstate commerce act, United States v. Mellen, 4 Int. Com. 247, 53 Fed. 229; United States v. Morsman, 42 Fed. 448; United States v. Michigan &c. R. Co., 43 Fed. 26; Junod v. Chicago &c. R. Co., 47 Fed. 290; United States v. Hanley, 71 Fed. 672; United States v. De Coursey, 82 Fed. 302; United States v. Egan, 47 Fed. 112, 3 Int. Com. 582; United States v. Knight, 3 Int. Com. 801; United States v. Cleveland &c. R. Co., 3 Int. Com. 290; Regina v. Bradford &c. Co., 6 Best & L. 631.

⁹⁵ New York &c. R. Co. v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. ed. 613. See also Grand Rapids &c. R. Co. v. United States,

212 Fed. 577; Nichols &c. Lumber Co. v. United States, 212 Fed. 588.

⁹⁶ United States v. Baltimore &c. R. Co., 153 Fed. 997. See this case also, as to other things that indictment must show. See also United States v. Hanley, 71 Fed. 672. But see later amendments. For indictments held sufficient as showing discrimination departure from published rates and the like, see United States v. Sunday Creek Co., 194 Fed. 252; Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681; United States v. Vacuum Oil Co., 153 Fed. 598.

⁹⁷ See especially ante, § 2552, also District Court Jurisdiction Act of Oct. 22, 1913.

⁹⁸ Missouri Pac. R. Co. v. United States, 189 U. S. 274, 23 Sup. Ct. 507, 47 L. ed. 811. See also as to

So, it has been held that "the rule that an action at law to recover excessive interstate freight charges can not be maintained in advance of action by the Interstate Commerce Commission will not prevent a Federal court which has suspended proceedings on a bill seeking relief from an advance in freight rates, pending action by the Commission, from granting relief in the exercise of its powers, under the act of February 4, 1887, as a court of equity, on a petition filed after the commission has acted, stating the substance of the findings of the commission, and containing a copy of its report and opinion, where defendants have stipulated in open court that, in case complainants prevailed, decree of restitution might be made."⁹⁹ But it has also been held that admissions claimed to be made in a complaint filed by soap manufacturers with the Interstate Commerce Commission as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory do not deprive a federal court, in a proceeding to enforce an order of the commission directing the carriers to cease from enforcing this classification as to soap in less than car-load lots, of the power to test the validity of such order by the scope of the act to regulate commerce.¹ The remedies given

Elkins Act, *United States v. Atchison &c. R. Co.*, 142 Fed. 176; *United States v. Milwaukee &c. R. Co.*, 142 Fed. 247; *Interstate Com. Com. v. Chicago &c. R. Co.*, 141 Fed. 1003; *United States v. Mich. Cent. R. Co.*, 122 Fed. 544; *Interstate Com. Com. v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. ed. 860.

⁹⁹ *Southern R. Co. v. Tift*, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. ed. 1124. See also *Pennsylvania R. Co. v. International Coal &c. Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. ed. 1446, Ann. Cas. 1915A, 315n; *Louisville &c. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. ed. 355. Relief against discrimination and rebates must,

however, usually be first sought by applying to the commission. *United States v. Pacific &c. Co.*, 228 U. S. 87, 33 Sup. Ct. 228, 57 L. ed. 742; *Morrisdale Coal Co. v. Penna. R. Co.*, 230 U. S. 304, 33 Sup. Ct. 938, 57 L. ed. 1494. See also *Robinson v. Baltimore &c. R. Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. ed. 288; *Baltimore &c. R. Co. v. United States*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. ed. 280. But compare authorities last cited in note 9 *infra*.

¹ *Cincinnati &c. R. Co. v. Interstate Com. Com.*, 206 U. S. 142, 27 Sup. Ct. 648, 51 L. ed. 995. Compare *Director General v. Viscose Co. (U. S.)*, 41 Sup. Ct. 151.

by the act are intended to supplement rather than to supplant existing remedies.² Mandamus or injunction will lie, in a proper case, especially under the amendment of June 29, 1906.³ But it has been held that a mandatory injunction compelling the carrier to carry at a certain rate can not be issued, as the court has no greater power than the commission to fix rates.⁴ The remedy by indictment⁵ has already been considered, and so has the remedy by action for damages.⁶ It is held that the common law right, if any there was, to recover damages for discrimina-

² *Tift v. Southern R. Co.*, 123 Fed. 789; *Little Rock &c. R. Co. v. East Tenn. &c. R. Co.*, 47 Fed. 771; *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 730. See also *Texas &c. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553, 9 Ann. Cas. 1075. See as to venue of action to enforce reparation order, *Vicksburg &c. Ry. Co. v. Anderson-Tully Co. (U. S.)*, 41 Sup. Ct. 524.

³ See Act of June 29, 1906, § 16; *Interstate Com. Com. v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047; *Interstate Com. Com. v. Baltimore &c. R. Co.*, 225 U. S. 326, 32 Sup. Ct. 742, 56 L. ed. 1107, Ann. Cas. 1914A, 504n; *Florida East Coast R. Co. v. United States*, 234 U. S. 167, 34 Sup. Ct. 867, 58 L. ed. 1267 (enforcement of order of commission reducing rate enjoined where no evidence to support the order); *United States v. Union Pac. R. Co.*, 234 U. S. 495, 34 Sup. Ct. 995, 58 L. ed. 1426; *United States v. Delaware &c. R. Co.*, 40 Fed. 101; *Interstate Com. Com. v. Texas &c. R. Co.*, 52 Fed. 187; *United States v. Norfolk &c. R. Co.*, 109 Fed. 831. See also Act of Feb. 19, 1903, and Act of March 2, 1889. The courts may enjoin increase of

rates where the commission has exceeded its authority. *Skinner &c. Corp. v. United States*, 249 U. S. 557, 39 Sup. Ct. 375, 63 L. ed. 772. But see as to when refused, *Knapp v. Lake Shore &c. R. Co.*, 197 U. S. 536, 25 Sup. Ct. 538, 49 L. ed. 870; *United States v. Norfolk &c. R. Co.*, 138 Fed. 849. And see District Court Jurisdiction Act of Oct. 22, 1913. Compare also *Baltimore &c. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. ed. 292; *Columbus Iron &c. Co. v. Kanawha &c. R. Co.*, 171 Fed. 713. Injunction must be against specific acts rather than general. *New York &c. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 515.

⁴ *Southern Pac. Co. v. Colorado &c. Co.*, 101 Fed. 779. But as elsewhere shown, the commission is now given power to fix maximum rates.

⁵ See ante, § 2574; also Act of June 29, 1906, § 15. *United States v. Standard Oil Co.*, 155 Fed. 305 (shipper fined \$29,240,000.00 for violation of law as to rebates and concessions, reversed in 164 Fed. 376).

⁶ See *Parsons v. Chicago &c. R. Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. ed. 231; *Kinnavey v. Terminal*

tion has, in some respects at least, been abrogated, and an action for damages for unreasonable rates or discrimination in interstate shipments can not be maintained without first applying to the Interstate Commerce Commission, at least where the discrimination is not a rebate in the nature of a gift not involving a question as to the value of the services.⁷ But it is held that the right to recover damages in a state court for unlawful discrimination in an intrastate shipment is not taken away by a state statute prohibiting such discrimination but providing no civil remedy, nor affected by the interstate commerce act.⁸ And when a carrier charges more than the published rate, or otherwise departs from it, the injured party may sue without previous action by the commission, because the court can determine whether there has been a departure therefrom and apply to the facts of the particular case the law prohibiting such a departure.⁹ But

R. Assn., 81 Fed. 802; *Junod v. Chicago &c. R. Co.*, 47 Fed. 290; *McGrew v. Missouri &c. R. Co.*, 8 I. C. C. 630; *Independent &c. Assn. v. Western R. Co.*, 6 I. C. C. 378; Act of June 29, 1906, §§ 9, 16, and §§ 8 and 9 of original act. And see also generally as to reparation and damages, *Lehigh Val. R. Co. v. Meeker*, 211 Fed. 785; *Robinson v. Baltimore &c. R. Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. ed. 288; *Phillips Co. v. Grand Trunk &c. Ry. Co.*, 195 Fed. 12; *Fidelity Lumber Co. v. Great Northern Ry. Co.*, 193 Fed. 924; *G. B. Merkle Co. v. Lehigh Val. R. Co.*, 271 Fed. 989. Claim for reparation for overpayment is assignable and assignee may recover. *Spiller v. Atchison &c. Ry. Co.* (U. S.), 40 Sup. Ct. 466 (also considering question of review by writ of error or certiorari).

⁷ *Mitchell Coal &c. Co. v. Penna. R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. ed. 1472; *Robinson v.*

Baltimore &c. R. Co., 222 U. S. 506, 32 Sup. Ct. 114, 56 L. ed. 288; *Texas &c. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553, 9 Ann. Cas. 1075; *Western &c. R. Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644. Finding of Commission as to discrimination in service can be disturbed by courts only when it is arbitrary or transcends limits of its authority. *Seaboard Air Line Ry. v. United States* (U. S.), 41 Sup. Ct. 24.

⁸ *Sullivan v. Minneapolis &c. Ry. Co.*, 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612, and note.

⁹ *Mitchell Coal &c. Co. v. Penna. R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. ed. 1472; *Pennsylvania R. Co. v. International Coal &c. Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. ed. 1446, Ann. Cas. 1915A, 315n; *Geraty v. Atlantic Coast Line R. Co.*, 211 Fed. 227; *National Pole Co. v. Chicago &c. R. Co.*, 211 Fed.

such an action, under section 8 of the interstate commerce law can only be brought in the federal court of competent jurisdiction and not in a state court.¹⁰ Numerous provisions in regard to witnesses, evidence, expediting causes, and other matters of procedure in the courts are found in the different acts of congress, but a mere reference to the acts in which those that are most important may be found will be sufficient in this connection.¹¹

§ 2576 (1688b). Recent decisions under latest acts of congress.
—It is believed that most of the important decisions under the

65. Administrative questions must be first presented to the Commission and courts are without jurisdiction to afford relief to the shipper unless so submitted, but this is not so when the discrimination is caused by breach of a proper rule. *Dusenberry v. Lehigh Val. R. Co.*, 268 Fed. 1009; *Anderson v. Chicago &c. Ry. Co.*, 208 Mich. 424, 175 N. W. 246.

¹⁰ *Pennsylvania R. Co. v. Puritan Coal &c. Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. ed. 867; *Union Pac. R. Co. v. Oregon &c. Lumber &c. Co.*, 165 Fed. 13; *Olcovich v. Grand Trunk R. Co.*, 20 Cal. App. 349, 129 Pac. 290; *Gulf &c. R. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770; *Robinson v. Baltimore &c. R. Co.*, 64 W. Va. 406, 63 S. E. 323. That is, the injured party can only make complaint before the commission or sue in a federal court. But it is held that state courts have jurisdiction to construe the tariff filed with the Interstate Commerce Commission, though it has not officially been construed by the Commission. *Merchants' Elevator Co. v. Great Northern Ry. Co. (Minn.)*, 180 N.

W. 105. Claim of railroad company for breach of contract of bailment is held not within the jurisdiction of the Commission, but of the courts. *Empire Refining Co. v. Guaranty Trust Co.*, 271 Fed. 668. See generally as to grounds on which orders of Interstate Commission other than award of damages, may be set aside, 2 *Watkins on Shippers and Carriers*, § 309, and as to awards of damages on procedure, see 2 *Watkins on Shippers and Carriers*, § 317.

¹¹ See Act of June 29, 1906, § 16; section 12 of the Interstate Commerce Act as amended March 2, 1889, and Feb. 10, 1889; Section 23 as added March 2, 1889; Acts of Feb. 11, 1893; Acts of Feb. 10 and 11, 1903; Act of Feb. 19, 1903, and amendments thereto June 29, 1906, and June 8, 1910; District Court Jurisdiction Act of Oct. 22, 1913. See also Transportation Act 1920 in subsequent chapter. See as to remedies in state courts, etc., *Banner v. Wabash R. Co.*, 131 Iowa 405, 108 N. W. 759; *Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607; *Cheney v. Chicago &c. R. Co.*,

recent acts of congress, so far as they come within the scope of this chapter, have already been cited. But several decisions relative to some of the acts, or in regard to other topics or incidental matters, have been rendered, or at least reported, since the earlier part of this chapter was written, and, in closing this chapter advantage is taken of the opportunity to call attention to them and to some other relevant cases of a miscellaneous nature. The Interstate Commerce Commission may increase intrastate rates to remove discrimination arising out of a disparity in interstate and intrastate rates.¹² In another recent case the question as to the statute of limitations applicable to a reparation action is considered together with the form and effect of the report of the commission and it is also held that the damages sustained by the shipper may be measured respectively by the rebate to a favored competitor and by the charge in excess of what would have been a reasonable rate, if the evidence shows that such amounts represent the claimant's actual pecuniary loss, and that the services for which an attorney's fee is to be taxed are those incident to the action in which recovery is had and not those before the commission.¹³ But in a still more recent case the court held that there was no abuse of discretion in the attorney's fees allowed and that interest was properly added where the claim had been contested for years and the company had never offered any payment of the award of the commission.¹⁴ Waiver of a carrier's right or defenses in favor of a par-

191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. 830; *Halliday Milling Co. v. Louisiana & C. R. Co.*, 80 Ark. 536, 98 S. W. 374.

¹² *Illinois Cent. R. Co. v. Public Utilities Com. of Illinois*, 245 U. S. 493, 38 Sup. Ct. 170, 62 L. ed. 425. See also *Houston & C. R. Co. v. United States*, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. 833; *American Exp. Co. v. State*, 244 U. S. 617, 61 L. ed. 1352, 37 Sup. Ct. 656; *Lehigh Valley R. Co. v. Public Service Com.*, 272 Fed. 758; *Public Service Com. v.*

New York Cent. R. Co., 230 N. Y. 149, 129 N. E. 455.

¹³ *Meeker v. Lehigh Valley R. R.*, 236 U. S. 412, 35 Sup. Ct. 328, 59 L. ed. 644, Ann. Cas. 1916B, 691n.

¹⁴ *Pennsylvania R. Co. v. Minds*, 250 U. S. 368, 39 Sup. Ct. 531, 63 L. ed. 1039. In this case it was also claimed that the Commission had apparently awarded reparation under a rule violating its own determination of the correct rule which if true might have been cause for reversal under *Pennsylvania R.*

ticular shipper is an undue preference or discrimination forbidden by the Interstate Commerce Act.¹⁵ Assisting one shipper to collect his private charges against a consignee and refusing to perform the same services for others, under similar conditions, has also been held to amount to unlawful discrimination,¹⁶ and an agreement to notify a particular shipper of the refusal of the consignee to accept and pay the freight has been held invalid where no tariff or rule to that effect is filed or published and other shippers are not given such notice.¹⁷ The provision in the

Co. v. Jacoby, 242 U. S. 89, 37 Sup. Ct. 49, 61 L. ed. 165. But the Supreme Court held that instructions to that effect had been waived in the lower court by not calling the court's attention to the point and not making any specific objections.

¹⁵ Phillips v. Grand Trunk &c. R. Co., 236 U. S. 662, 35 Sup. Ct. 444, 59 L. ed. 774 (waiver of statute of limitations); Georgia &c. R. Co. v. Blish Mill Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. ed. 948; Olson v. Chicago &c. R. Co., 250 Fed. 372; Denver &c. R. Co. v. Caddo Realty Co., 66 Colo. 403, 182 Pac. 877; Fay v. Chicago &c. R. Co., 186 Iowa 573, 173 N. W. 69; Abell v. Atchison &c. R. Co., 100 Kans. 238, 164 Pac. 269 (waiver of time of notice of claim); Burke v. Union Pac. Ry. Co., 226 N. Y. 534, 124 N. E. 119; St. Louis &c. Ry. Co. v. Patterson, 75 Okla. 204, 182 Pac. 701; Dean v. Southern R. Co., 107 S. Car. 25, 91 S. E. 1043 (same); Houston &c. R. Co. v. Reichardt (Tex. Civ. App.), 212 S. W. 208. So as to waiver of written notice. Carbic Mfg. Co. v. Western Exp. Co. (Minn.), 184 N. W. 35.

¹⁶ Emery v. Boston &c. R. Co.,

38 I. C. C. 636. Some courts also hold that a carrier has no right under the Interstate Commerce Act to require prepayment of freight from one shipper and give credit to another under similar circumstances. Hocking Valley R. Co. v. United States, 210 Fed. 735. But the Commission and other courts hold that this may be done in a proper case. Boise Commercial Club v. Adams Exp. Co., 7 I. C. C. 115; Gamble-Robinson Com. Co. v. Chicago &c. R. Co., 168 Fed. 161, 21 L. R. A. (N. S.) 982n, 16 Ann. Cas. 613; Gulf &c. Ry. Co. v. Miami &c Co., 86 Fed. 407.

¹⁷ Atchison &c. R. Co. v. Standard, 99 Kans. 720, 162 Pac. 1176, L. R. A. 917C, 1124n. An agreement in a lease by an interstate railroad company for a smelter to do intraplant switching of cars, wholly disconnected from their transportation over the road, free of charge, in consideration of the rental, is held not to be invalid as a rebate or device to cover it in. American Smelting &c. Co. v. Union Pac. R. Co., 256 Fed. 737. A shipper may assemble or disassem-

amendment of June 18, 1910, authorizing suits against railroad companies to enforce orders of the commission in the district in which the complainant resides, is held not to authorize service of process beyond such district.¹⁸ Carriers may ordinarily make their own agreement as to the division of joint rates, but if the division is such as to cause or result in a rebate or discrimination and undue preference as among interstate shippers the Interstate Commerce Commission has jurisdiction and may correct the same.¹⁹ On the question as to what is interstate or foreign commerce the supreme court of the United States laid down the following rule in a recent case: "It is the essential character of the commerce, not the accident of local or through bills of lading, which determines federal or state control over it, and it takes character as interstate or foreign commerce where it is actually started in the course of transportation to another state or to a foreign country."²⁰ A shipment of rough material from forest to milling point, however, both being within the same state, is not interstate commerce, although it is followed by forwarding the finished products to points outside the state but was not known where it would eventually be sold until after the

ble its ultimate product for shipment in order to make the shipment take a lower rate than it would in its final form. In *re Suspension of Western Classification &c.*, 25 I. C. C. 444, 487, cited with approval in *Lakewood Engineering Co. v. New York Cent. R. Co.*, 259 Fed. 61, 62.

¹⁸ *Graustein v. Rutland R. Co.*, 256 Fed. 409.

¹⁹ *Tap Line Case*, 31 I. C. C. 490; *Tap Line Case*, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. ed. 1185; *United States v. Butler County R. Co.*, 234 U. S. 29, 34 Sup. Ct. 748, 58 L. ed. 1196. See *Transportation Act 1920* in subsequent chapter. This was held by the Supreme Court as well as the Commission in the cases cited, al-

though the court overruled the order of the Commission on the ground that the logging roads involved were common carriers, and not merely mill facilities, and as such were entitled to participate in the joint rates. A state statute requiring an interstate railroad to pay its employees semi-monthly has been held, in the absence of action by Congress, not to be an unlawful burden on interstate commerce. *Erie R. Co. v. Williams*, 233 U. S. 685, 34 Sup. Ct. 761, 58 L. ed. 1155, 51 L. R. A. (N. S.) 1097n, affirming 199 N. Y. 525, 92 N. E. 1084.

²⁰ *Railroad Com. v. Texas &c. R. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. ed. 1215.

material was manufactured and stored.²¹ By an act of May 29, 1917, and by the Transportation Act 1920, the Interstate Commerce Commission is given jurisdiction over "car service," and authorized to direct that the rules and regulations of carriers shall be filed with the commission and incorporated in their schedules. This includes the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the interstate commerce act; but the matter was largely placed under the control of the Director General of Railroads during the war, and he made a number of general orders upon the subject, including demurrage regulations and charges.

§ 2577. Recent war acts and decisions.—By act of August 10, 1917, it is made a misdemeanor to obstruct or retard, or aid in obstructing or retarding interstate or foreign commerce or cars or other vehicles engaged therein in the United States, during the war, and the President is authorized to employ armed forces of the United States to prevent it, and also to direct that such traffic or shipments of commodities as, in his judgment may be essential to the national defense and security shall have preference in transportation, by his direct orders or through the Interstate Commerce Commission or through such person or persons as he may designate; and carriers in obeying such order or direction are exempted from penalties, liabilities and obligations imposed by existing law by reason of giving such preference. The President was also empowered by an act of August 29, 1916, to take over the railroads, and by proclamation on December 28, 1917, he did so through the Secretary of War and appointed a Director General of Railroads. This was followed by the act approved March 21, 1918, known as the Federal Control Act, the leading purpose of which was to provide means of

²¹ *Arkadelphia Milling Co. v. Southwestern Ry. Co.*, 249 U. S. 134, 39 Sup. Ct. 237, 63 L. ed. 517. But where the initial shipment is the beginning of an interstate journey, a shipment intended for another state will not be deprived of its interstate character by being billed to an intermediate point in the state of origin. *Bracht v. San Antonio &c. Ry. Co.*, 200 Mo. App. 655, 209 S. W. 579.

compensating the carriers for the use of their property during the time of federal control, which is therein limited to the period of the war and a reasonable time thereafter, not to exceed a year and nine months after the ratification of the treaty of peace. This act, among other things, gives the President power to agree with the carriers as to their annual compensation, not exceeding as near as may be the average annual railway operating income for the three years ending June 30, 1917, and provides for determining the compensation in case of failure to agree. It also gives the President power to initiate reasonable and just rates, fares, charges, regulations and practices by filing the same with the Interstate Commerce Commission, but provides that the commission shall, upon complaint, hear and determine the justness and reasonableness thereof and make such findings and orders as are authorized by the interstate commerce act as amended, and they shall be enforced as provided in said act. It is further provided that while under federal control the carriers shall still be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the Federal Control Act or any other act applicable to such federal control "or with any order of the President."²² Many "general

²² In *State ex rel. Langer v. Northern Pac. Ry. Co.* (N. Dak.), 172 N. W. 324, it is held that the termination of hostilities under the armistice does not justify judicial interference to restrain exercise of the extraordinary executive powers rendered necessary by the existence of the war, but the act does not confer original authority to initiate intrastate rates which will supersede pre-existing lawful rates prescribed by the legislature or other competent state authority; that rates initiated by the President or Director General are subject to review by the Interstate

Commerce Commission, but even it can modify valid intrastate rates only when such modification is necessary to the complete exercise of its jurisdiction over interstate commerce, and that mandamus would lie to prevent the collecting of rates, fares and charges wholly intrastate under an order of the Director General increasing freight rates horizontally and prescribing a uniform passenger rate of three cents a mile for intrastate as well as interstate traffic contrary to the state statute and tariffs on file with the State Railroad Commission. But this decision

orders" have been made by the Director General under the authority given to the President to act through him, one of which is to the effect that all suits against carriers must be brought in the county or district in which the plaintiff resided when the cause of action occurred, or in the county or district where it arose.²³ The act also provides that actions at law, and suits in equity may be brought by and against carriers subject thereto, and judgments rendered as now provided by law, and that no defense shall be made upon the ground that the carrier is an instrumentality or agency of the federal government; nor shall any such carrier be entitled to have any action transferred to a federal court when not so transferable prior to Federal control; but no process shall be levied against any property under such federal control.²⁴ It has been held, however, that

was reversed by the Supreme Court of the United States in *Northern Pac. Ry. Co. v. N. Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. ed. 897, where it is held that the rate making power given to the President during the war is not limited to interstate rates as such a limitation and construction would tend to make it ineffective, and the President has power under the acts in question to prescribe intrastate rates for railroads under federal control, even though such rates conflict with rates previously fixed by state authority. See also *Burlison v. Illinois*, 250 U. S. 191, 39 Sup. Ct. 392, 63 L. ed. 926. Order of Railroad and Warehouse Commission directing a railroad company to erect a new depot in a city was held not to come within the operation of the Act of March 21, 1918, in *Commercial Club v. Chicago &c. Ry. Co.*, 142 Minn. 169, 171 N. W. 312. But control of operation of railroad by

restraining order or injunction so as to interfere with Director General is prohibited by the act. *Nueces Valley Town Site Co. v. McAdoo*, 257 Fed. 143. See also *Chicago &c. Ry. Co. v. State (Okla.)*, 180 Pac. 250.

²³ This has been held within the authority conferred and is a valid order. *Wainwright v. Pennsylvania R. Co.*, 253 Fed. 459; *Rhodes v. Tatum (Tex. Civ. App.)*, 206 S. W. 114. But see *Friesen v. Chicago &c. Ry. Co.*, 254 Fed. 875; *Cocker v. New York &c. Ry. Co.*, 253 Fed. 676; *Harnick v. Pennsylvania R. Co.*, 254 Fed. 748; *Haubert v. Baltimore &c. R. Co.*, 259 Fed. 361, 363; *West v. New York &c. R. Co.*, 233 Mass. 162, 123 N. E. 621; *Illinois Cent. R. Co. v. Ryan (Tex. Civ. App.)*, 214 S. W. 642; *El Paso &c. R. Co. v. Lovick (Tex. Civ. App.)*, 210 S. W. 283; and subsequent chapters on Transportation Act 1920, and Federal Control.

²⁴ See *Louisville &c. R. Co. v.*

an action on liabilities due to the operation of the railroad under the Director General should be brought against him and the plaintiff is limited to such sources of payment as are provided by the Federal Control Act or may be provided for by the United States, and that an action can not be brought against the carrier and prosecuted to judgment against it for such liabilities.²⁵ But some of the other courts, both federal and state have taken a different view.²⁶

§ 2578 (1688c). Recent controversy in regard to two-cent fares and other rate regulations.—During the last ten or twelve years controversies have arisen in several states, notably in Alabama, Illinois, Iowa, Minnesota, Missouri and North Carolina, in regard to the validity and enforcement of comparatively recent acts of the state legislatures providing for two-cent

Steel, 180 Ky. 290, 202 S. W. 878; *Schumacher v. Pennsylvania R. Co.*, 175 N. Y. S. 84. The general order of the Director General that, except with his written consent, no attachment or mesne process or execution shall be levied against the property used in the business of a common carrier as such has been held valid. *Dooley v. Pennsylvania R. Co.*, 250 Fed. 142. Compare *Salant v. Pennsylvania R. Co.*, 177 N. Y. S. 475.

²⁵ *Haubert v. Baltimore &c. R. Co.*, 259 Fed. 361; *Rutherford v. Union Pac. R. Co.*, 254 Fed. 880; *Sagona v. Pullman Co.*, 174 N. R. S. 536; *Oyler v. Cleveland &c. R. Co.*, 17 Ohio L. R. 356; *Castle v. Southern Ry. Co.*, 112 S. Car. 407, 99 S. E. 846. General order 50 provides that such actions shall be brought against the Director General. But see *Franke v. Chicago &c. Ry Co.*, 170 Wis. 71, 173 N. W. 701, and case

cited in next following note, holding that the statute gives or recognizes a right to sue the railroad company and such right cannot be taken away by a general order.

²⁶ *Johnson v. McAdoo*, 257 Fed. 757 (holding that railroad company may be sued, but Director General should defend the road and make payment of any recovery out of his receipts, leaving question of adjustment between government and railroad to be settled when roads are returned to owners); *LaValle v. Northern Pac. Ry. Co.*, 143 Minn. 74, 172 N. W. 918. See also *Jensen v. Lehigh Valley R. Co.*, 255 Fed. 795; *Gowan v. McAdoo*, 143 Minn. 227, 481, 173 N. W. 440, 443; *Bryant v. Pullman Co.*, 177 N. Y. S. 488; *Mcgregor v. Great Northern Ry. Co.* (N. Dak.), 172 N. W. 841. This whole subject, however, is considered with the latest authorities in a subsequent chapter.

fares, or the like. In some of these states, particularly in Alabama and North Carolina, a sharp conflict ensued, or was threatened, between the state authorities and the federal courts. In Alabama, Georgia and North Carolina suits were instituted by railroad companies for the purpose of obtaining the protection of the fourteenth amendment against such acts, and the federal courts granted injunctions pendente lite.²⁷ In North Carolina the state authorities nevertheless continued to prosecute railroad officials under the act, and on application of one of such officials to the federal court to be discharged on writ of habeas corpus from the custody of the sheriff of the county in which he had been indicted, tried, convicted and sentenced under such act, it was held that the court had jurisdiction to discharge him, and that section 4 of the North Carolina Act, prescribing a ruinous penalty if a company contested the validity of the law in court, was unconstitutional.²⁸ It was also held, in a case involving the Iowa statute, that a federal court is not without jurisdiction of a suit to enjoin the enforcement of a state statute providing for two-cent fares, although the officers of the state are or must be made parties, on the ground that it is in reality a suit against the state.²⁹ And, in a case involving the Missouri statute, the same court held that a federal court of equity has jurisdiction of suits to determine the constitutionality of such statutes when they are attacked on the ground that the rates fixed are unremunerative and in violation of the fourteenth amendment; but the court, instead of granting a preliminary injunction left the matter open and allowed the statute to be enforced, ordering that this be done for some months to show by actual trial

²⁷ Wood, Ex parte, 155 Fed. 190, 191. See also Bellamy v. Missouri &c. R. Co., 215 Fed. 18 (within discretion of court). And such acts were held confiscatory and unconstitutional as to certain carriers in a number of instances. *Western Ry. v. Railroad Com. of Ala.*, 197 Fed. 954; *Trust Co. v. Chicago &c. R. Co.*, 199 Fed. 593.

²⁸ Wood, Ex parte, 155 Fed. Rep. 190.

²⁹ *Poor v. Iowa Cent. R. Co.*, 155 Fed. 226; also holding, however, that, under equity rule 94, a stockholder cannot maintain a suit to enjoin the company from obeying the statute where his petition shows that he has done no more than make a demand on the directors,

whether the rate was reasonable or unreasonable, retaining jurisdiction, however, with the right of the railroad companies later on to renew their motion to enjoin the enforcement of the statute.³⁰ Several valuable suggestions as to questions arising in passing on the validity of the two-cent fare statutes are made in the two cases last above cited. The federal court in Minnesota also took jurisdiction of such a case,³¹ and the supreme court of Pennsylvania has held the statute of that state, at least as applied to the company and circumstances there involved, to be unconstitutional and void.³² The views of the different courts in these and other cases involving the validity of two-cent fare statutes or similar statutes or orders of state commissions claimed to be confiscatory, varied considerably in some instances, but the question, aside from the question of interference with interstate commerce and the basis of calculation for determining whether the law is confiscatory, seems to be largely a question of fact in the particular instance, and the law has been

and neither the manner nor reason for their refusal.

³⁰ *St. Louis &c. R. Co. v. Hadley*, 155 Fed. 220, 225. The court in this case also held that the question could be raised and determined in pending suits on supplemental bills, and that when bills were tendered in such court for filing pursuant to notice previously given, and, while leave was not then granted because of the absence of defendants, restraining orders were issued by the court based thereon, jurisdiction over the subject matter was then obtained by such court, and this was not ousted by subsequent institution of suits in a state court, even though the bills were not yet formally filed.

³¹ *Perkins v. Northern Pac. R. Co.*, 155 Fed. 445. See also *Southern R. Co. v. McNeill*, 155 Fed. 756;

Seaboard &c. R. Co. v. Railroad Com., 155 Fed. 792; *Missouri &c. R. Co. v. Love*, 177 Fed. 493; *Northern Pac. R. Co. v. Lee*, 199 Fed. 621; *Seaboard &c. Ry. v. Ellis*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175.

³² *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108n, (but this case contains some statements that are questionable). In some other courts it has been held to be confiscatory and in some not. *South & N. Ala. R. Co. v. Railroad Com.*, 210 Fed. 465; *Chicago &c. Ry. Co. v. Smith*, 210 Fed. 632; *Central of Ga. R. Co. v. Railroad Com.*, 209 Fed. 75; *Norfolk &c. Ry. Co. v. Conley*, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. ed. 745 (two cent fare held confiscatory).

pretty well settled by recent decisions of the Supreme Court of the United States.⁸⁸

⁸⁸ See *Minnesota Rate Cases*, *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n (holding that a state has power to enact such laws as to intrastate transportation so far as the question of interference with interstate commerce is concerned and stating the rules for determining whether the law is unconstitutional as confiscatory or not); *Norfolk &c. R. Co. v. Conley*, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. ed. 745; *Missouri Rate Cases*, 230 U. S. 474, 30 Sup. Ct. 975, 57 L. ed. 1571; *Allen v. St. Louis &c. R. Co.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. ed.

1625; *Wood v. Vandalia R. Co.*, 231 U. S. 1, 32 Sup. Ct. 7, 58 L. ed. 97; *Knott v. Chicago &c. R. Co.*, 230 U. S. 474, 33 Sup. Ct. 976, 57 L. ed. 1571; *Chesapeake &c. R. Co. v. Conley*, 230 U. S. 513, 33 Sup. Ct. 985, 57 L. ed. 1597. See also *Arkansas Rate Cases*, 187 Fed. 290; *Joplin &c. Ry. Co. v. Public Service Com.*, 267 Fed. 584; *St. Louis &c. R. Co. v. Hadley*, 168 Fed. 317; *Louisville &c. R. Co. v. Siler*, 186 Fed. 176; *Rowland v. Boyle*, 244 U. S. 106, 37 Sup. Ct. 577, 61 L. ed. 1022; *Southern Pac. Co. v. Campbell*, 230 U. S. 537, 33 Sup. Ct. 1027, 7 L. ed. 1610.

CHAPTER LXXXI.

RATES AND RATE REGULATIONS.

Sec.		Sec.	
2585.	Scope of chapter.	2593.	Apportionment of values and expenses between intra-state and interstate business.
2586.	Reasonable charges.	2594.	Minnesota Rate Cases.
2587.	Reasonable charges—Schedule as a whole—Matters to be considered.	2595.	Reasonableness of separate rate—Generally—Rights of shipper.
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2589.	Reasonableness of rates—Cost of reproduction.	2597.	Reasonableness of rate—What the traffic will bear.
2590.	Reasonableness of rates—Expenses.	2598.	Schedules—When presumption of law as to reasonableness of rate.
2591.	Reasonableness of rates—Rate of return or profit.	2599.	Changes in rates.
2592.	Reasonableness of rates—System and schedule as entirety—Losses on part of system.	2600.	Remedy of carrier where rate regulation is confiscatory.

§ 2585 (1683). **Scope of chapter.**—In the last preceding chapter some phases of rate regulation were considered, incidentally, and the right of the government to regulate, within constitutional limits, was shown, as well as the relative spheres of state and federal jurisdiction and the general nature and effect of the interstate commerce act and the provisions against unlawful combinations, discriminations and preferences. In this chapter we shall consider rate regulation and the proper basis for fixing rates and determining their validity, especially under the interstate commerce act.

§ 2586 (1684). **Reasonable charges.**—Generally speaking the provision of the interstate commerce act requiring charges to be

"reasonable and just" does nothing more than give expression to the rule of the common law, for that rule, as we have seen, prohibited common carriers from making unjust and unreasonable charges. We suppose that whether charges are or are not reasonable must be determined, in particular cases, from the facts, circumstances and conditions, since many elements must be considered in order to justly determine whether rates are reasonable or unreasonable.¹ It is now well settled that railroad companies can not be required to render service as carriers without just compensation, so that it must necessarily follow that the cost of the service is always an important matter for consideration, and so are many other matters. We can not here give in detail the facts, circumstances or conditions that should be taken into consideration and must content ourselves with a reference to some of the decided cases,² and to illustrations

¹ Interstate Com. Com. v. Lehigh &c. R. Co., 74 Fed. 784; Boston &c. v. Lake Shore &c. Co., 1 Int. Com. Com. 436; Business Men's Assn. v. Chicago &c. R. Co., 2 Int. Com. Com. 52; Railroad Commissioners v. Savannah &c. R. Co., 5 Int. Com. 13, 136; Perry v. Florida &c. R. Co., 5 Int. Com. Com. 97; Rice v. Cincinnati &c. R. Co., 5 Int. Com. Com. 193; Rice v. Louisville &c. R. Co., 5 Int. Com. 193; Loud v. South Carolina R. Co., 5 Int. Com. Com. 529; Severn &c. R. Co. v. Great Western &c. R. Co., 5 R. & Canal Tr. Cas. 170.

² Evans v. Oregon &c. R. Co., 1 Int. Com. Com. 325; Lincoln &c. v. Missouri &c. R. Co., 2 Int. Com. 98; Detroit &c. Co. v. Grand Trunk &c. R. Co., 2 Int. Com. 199; Murphy v. Wabash &c. R. Co., 5 Int. Com. 122; Delaware State Grange v. New York &c. R. Co., 5 Int. Com. Com. 161; Board &c. v. East Tennessee &c. R. Co., 5 Int. Com.

546; Merchants' Union v. Northern &c. R. Co., 5 Int. Com. Com. 478; James v. Canadian &c. R. Co., 5 Int. Com. Com. 612; Severn v. Great Western &c. R. Co., 4 R. & C. T. Cas. 170; Int. Com. Com. v. Alabama &c. R. Co., 74 Fed. 715. In the case last cited the prevailing doctrine was thus stated: "We do not discuss the third and fourth contention of the counsel further than to say that, within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading propositions that their charges shall not be unjust or unreasonable and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at common law, free to make special rates looking to the increase of their business, to class-

given in the last preceding chapter. "Reasonable" and "just rates" have been held to be such as are just and reasonable on the particular railroad, and in view of the surrounding circumstances.³ But the public can not be subjected to unreasonable rates merely to enable the stockholders of the particular company to earn dividends.⁴ And, on the other hand it has been held that the mere fact that the rates are such as make the business of the carrier very profitable is not necessarily proof that the rates are unreasonable.⁵ It has been held that the fact that charges are not unreasonable per se does not prevent their being relatively unreasonable or constituting unjust discrimination by reason of being unequal,⁶ but we suppose that where the charges

ify their traffic, to apportion and adjust their rates so as to meet the necessities of commerce and of their own situation and relation to it and generally to manage their important interests upon the same principles which are regarded as sound and adapted to other trades and pursuits." Cited also to same effect in *Delaware &c. R. Co. v. Kutter*, 147 Fed. 51, 51 L. ed. 705. And see *Interstate Com. Com. v. Alabama &c. R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; *Interstate Com. Com. v. Chicago &c. R. Co.*, 209 U. S. 108, 28 Sup. Ct. 493.

³ *New Orleans &c. Exchange v. Illinois Central R. Co.*, 3 Int. Com. Com. 534. Imposition of distance tariffs for switching cars from a siding serving an elevator to tracks of another company is held unreasonable in *State Pub. Utilities Com. v. Chicago &c. R. Co.*, 282 Ill. 158, 118 N. E. 427.

⁴ *Covington &c. R. Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; *Interstate Com. Com. v. Union Pac. R. Co.*, 222 U. S.

541, 32 Sup. Ct. 108, 56 L. ed. 308; *Interstate Com. Com. v. Louisville &c. R. Co.*, 118 Fed. 613; *Missouri &c. R. Co. v. Interstate Com. Com.*, 164 Fed. 645; *Hooker v. Interstate Com. Com.*, 188 Fed. 242. The convenience and necessities of the public, especially the shipping public, are said to be the chief considerations in fixing the rates before the Public Utilities Commission in *State v. Cleveland &c. R. Co.*, 288 Ill. 502, 123 N. E. 547.

⁵ *Howell v. New York &c. R. Co.*, 2 Int. Com. Com. 272. See also *Louisville &c. R. v. Interstate Com. Com.*, 195 Fed. 541; *Interstate Com. Com. v. Union Pac. R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308. See as to what is prima facie evidence of reasonableness, *Tariffs &c. In re*, 2 Int. Com. Com. 324; *Detroit &c. R. Co. v. Interstate Com. Com.* 74 Fed. 803; *Ottinger v. Southern &c. R. Co.*, 1 Int. Com. Com. 144.

⁶ *Trammell v. Clyde &c. Co.*, 5 Int. Com. 324, 376, citing and distinguishing *Hozier v. Caledonian*

are not unreasonable per se it would ordinarily devolve upon the complainant in the particular case to give evidence of circumstances and conditions clearly showing the charges to be unreasonable. This branch of the subject has, however, been sufficiently considered in the last preceding chapter and the question to be considered here is not so much the making of rates by the carrier or a commission and their reasonableness from the shipper's point of view as it is the regulation of rate making and the reasonableness and lawfulness of rates as against the carrier.

§ 2587 (1684a). Reasonable charges—Schedule as a whole—Matters to be considered.—As already suggested, the question of the reasonableness of a rate is a complex and difficult one, and the courts have not attempted to lay down any definite comprehensive and invariable rule or test for determining it. The rights or interests of both the shippers and the carrier are to be considered. The reasonableness of the schedule as a whole is most important to the carrier and that of the particular separate rate is most important to the shipper. The schedule should, therefore, be fair as a whole to the carrier and in detail to each shipper. The schedule as a whole should be such as to yield the carrier a fair return.⁷ The cost of maintenance and operation and certain annual or fixed charges should be considered and, in addition, the carrier is entitled to a fair profit, such, in

&c. R. Co., 1 Nev. & Mac. 27; Jones v. Eastern Counties &c. R. Co., 1 Nev. & Mac. 45; Painter v. London &c. R. Co., 2 C. B. (N. S.) 702. In *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699, the English statutes and cases were reviewed and it was said: "These traffic acts do not appear to be as comprehensive as our own and may justify contracts which with us would be obnoxious to the long and short-haul clause of the act or would be open to the charge of unjust discrimination." See generally Budd

v. London &c. R., 4 R. & Canal Traf. Cas. 393n; Hays v. Pennsylvania Co., 12 Fed. 309; Kinavey v. Terminal R. R. Assn., 81 Fed. 803; Murray v. Glasgow &c. R. Co., 4 R. & Canal Traf. Cas. 456; Strick v. Swasea &c. Co., 16 C. B. N. S. 245; Liverpool &c. Assn. v. London &c. Co., L. R. (1891) 1 Q. B. 120, 45 Am. & Eng. R. Cas. 216; Attorney-General v. Birmingham &c. R. Co., 2 Eng. R. & Canal Cas. 124.

⁷ Reagan v. Farmers &c. Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714,

general, as that realized from business generally where the capital and risk are the same.⁸ The basis of the calculation, it is said, is the fair value of the property—not necessarily its cost nor the amount of money expended—as a producing factor, taking into consideration, among other things, its location, the character of the country through which it passes, and the reasonable expectation of business coming to it.⁹ The amount of the investment or the interest of the carrier is not alone to be considered. The rights of the public are also to be considered, and the rate must be reasonable as to the shipper.¹⁰

§ 2588 (1684b). Reasonableness of rates—Basis on which capital or investment is to be determined.—Different theories

13 L. R. A. (N. S.) 932n, 14 Ann. Cas. 764; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Cotting v. Kansas City &c. Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92; *Metropolitan Trust Co. v. Houston &c. R.*, 90 Fed. 683; *Louisville &c. R. Co. v. Brown*, 123 Fed. 946; *Pensacola &c. R. Co. v. Florida*, 27 Fla. 403, 9 So. 89. But see *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151. This does not mean that where a particular commodity or class of traffic is segregated the carrier may be compelled to carry it at a loss after taking into account the entire traffic to which the rate applies even though the return from its entire business may be sufficient. *Northern Pac. R. Co. v. State of North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735, L. R. A. 1917F, 1148n, Ann. Cas. 1916A, 1n.

⁸ *Brymer v. Butler &c. Co.*, 179 Pa. St. 331, 36 Atl. 249, 36 L. R. A. 260. See also *Louisville &c. R. Co. v. Brown*, 123 Fed. 946; *Spring*

Valley &c. Works v. San Francisco, 124 Fed. 574; *Stanislaus Co. v. San Joaquin &c. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406; *Interstate Com. Com. v. Louisville &c. R. Co.*, 118 Fed. 613. Cost of permanent improvement and equipment should not, however, be charged to operating expenses and wholly against the revenue of a single year, *Illinois Cent. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. ed. 1128.

⁹ *Matthews v. Board*, 106 Fed. 7; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819. See also *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134n, 15 Ann. Cas. 1034. Goodwill, it is held, should not be included. *In re Lincoln Trac. Co. (Nebr.)*, 171 N. W. 192. But see *Missouri &c. R. Co. v. Love*, 177 Fed. 493; *Montana &c. R. Co. v. Morley*, 198 Fed. 991.

¹⁰ *Covington &c. Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; *Smyth v. Ames*, 169

have been suggested for determining the capital or investment upon which the "fair return" to which the carrier is entitled is to be computed. They may be reduced to two, or perhaps three, general heads. 1. The "fair value" of the concern. 2. The actual cost to the corporation or its stockholders. 3. The cost to reproduce. The latter, however, seems to be merely a way of determining the fair value rather than an independent basis. In a few cases, the second theory, namely, the original cost or amount actually invested or put into the concern, seems to have been adopted as the basis for the calculation;¹¹ but, while it may be an important factor in determining the question, it can hardly be regarded as the true basis and is not sustained by the weight of authority. Certainly it can not be the true basis where there has been fraud, waste and extravagance, or the like. So, of course where there is watered stock, over-capitalization or the like, the carrier is not entitled to make the public pay for such matters by demanding a "fair return" thereon.¹² It is said that

U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; *San Diego &c. Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. ed. 892; *Stanislaus Co. v. San Joaquin*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406; *Brunswick &c. Dist. v. Maine Water Co.*, 99 Maine 371, 59 Atl. 537. See also § 2595. *Interstate Com. Com. v. Chicago &c. R. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705; *Interstate Com. Com. v. Chicago &c. R. Co.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946.

¹¹ *Brymer v. Butler &c. Co.*, 179 Pa. St. 231, 36 Atl. 249, 36 L. R. A. 260; *Wilkes-Barre v. Spring Brook &c. Co.*, 4 Lack. Leg. News (Pa.), 367. See also *Milwaukee &c. Co. v. Milwaukee*, 87 Fed. 577. The great weight of authority as well as

reason to the contrary, as shown in the cases cited in note 15 *infra*.

¹² See *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 353, 33 Sup. Ct. 729, 762, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; *Capital City Gas &c. Co. v. Des Moines*, 72 Fed. 829; *Steenerson v. Great Northern R. Co.*, 69 Minn. 353, 72 N. W. 713; *Grain Shippers' Assn. v. Illinois Cent. R.*, 8 I. C. C. 158; *Danville v. Southern R.*, 8 I. C. C. 409; *Advance Freight Rates, R.*, 9 I. C. C. 391; *Advances in Rates*, 20 I. C. C. 243, 307. It is also said in some of the cases cited that the cost of reproducing the property is not an exclusive guide. See also to effect

justifying legislative rates is one thing and holding that unreasonable charges are not being made is quite another and that "in determining whether the return allowed a railroad is a fair return on their property the property is that actually in use, at its present value," but where "the question is whether the company is exacting too great a return on its investment by means of an unfair schedule, the question is as to the amount actually and bona fide invested."¹³ It is doubtless true that the standard of reasonableness, in one sense, is not the same in both classes of cases, as, in determining whether the legislative act is constitutional, the question is usually as to what limit can be imposed without violating the constitutional provision against taking property without compensation or due process of law, and not merely as to what is reasonable as between the carrier and a particular shipper or the like. At all events, the great weight of authority, at least where the question is as to the validity of statutes regulating the rates, is to the effect that the fair value of the property being used for the public at the time in question is to be taken as the basis for the calculation.¹⁴ But the original cost or amount of the investment may be some evidence of actual

that outstanding capitalization is not conclusive: *Chicago &c. R. Co. v. Smith*, 110 Fed. 473; *Gloucester Water Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977; *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 6 L. R. A. 756, 16 Am. St. 116; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *San Diego &c. Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. ed. 892. Whitten on Valuation of Public Serv. Corp., 84 et seq. and § 101.

¹³ See *In re Ronopath &c. R. Co.*, Cal. R. C. R. Dec. 836 (1913).

¹⁴ *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *San Diego &c. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. ed.

1154; *Chicago &c. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *State v. Minneapolis &c. R. Co.*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151, affirming 80 Minn. 191, 83 N. W. 60, 89 Am. St. 514n; *Stanislaus Co. v. San Joaquin &c. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406; *Redlands &c. Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843; *Cedar Rapids Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081; *Reeder's Validity of Rate Regulation*, §§ 155, 158. Most of the decisions state that it is such value "at the present time," and the meaning of this phrase is discussed by Mr. Reeder in the last section above referred to.

value, and has often been taken into consideration along with other matters.¹⁵ It is said in a leading case that in order to ascertain the fair value of the property, "the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."¹⁶ But it seems that there is a better and more direct way of finding the present value than by attempting to find the original cost and amount expended in permanent improvements.¹⁷

¹⁵ *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *San Diego &c. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. ed. 1154; *Ames v. Union Pac. R.* 64 Fed. 165, affirmed in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. St. 413, 888, 42 L. ed. 819; *State v. Seaboard Air Line R. Co.*, 48 Fla. 152, 37 So. 658; *Kennebec Water Dist. v. Waterville*, 97 Maine 185, 54 Alt. 6, 60 L. R. A. 856; *State v. Sioux City &c. R. Co.* 46 Nebr. 682, 65 N. W. 766, 31 L. R. A. 47; *Brooklyn City, In re*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

¹⁶ *Smith v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 434, 42 L. ed. 819. But see *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup.

Ct. 900, 46 L. ed. 1151. Return for taxation may be evidence of present value, but is not conclusive. *Southern Pac. R. Co. v. Railroad Comrs.* 87 Fed. 22; *Louisville &c. R. Co. v. Brown*, 123 Fed. 946. See also *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134n, 15 Ann. Cas. 1034.

¹⁷ See *Whittens Valuation of Public Service Corp.* 39; *Reeder's Validity of Rate Reg.* § 168; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, 1189, Ann. Cas. 1916A, 18n. The valuation is not a matter of formulas and there may be relevant facts and elements of value

§ 2589. Reasonableness of rates—Cost of reproduction.— There has been much difference of opinion as to whether the cost of reproduction is a proper basis or means of determining the present value,¹⁸ but the tendency now seems to be in its favor and apparently with good reason. Other methods have already been shown to be inexact and impracticable or unfair, and, as market value in addition to other objections, is determined largely by the rates themselves it cannot well be the basis of determining the reasonableness of the rates. On the other hand the cost of reproducing the property or a concern of the same efficiency at the present time usually furnishes a proper basis or means of getting at its present value. This is certainly true as to the tangible property and physical valuation. Even if other things should have to be considered, in the final and complete solution of the problem, it is at least a proper and important factor in the process. But this theory must be rightly understood and applied. Much of the criticism directed against it is due to a misapprehension or misapplication of the doctrine. Deduction must be made from the cost of a new plant for depreciation that has taken place.¹⁹ So,

in one case that are not present in another, and sometimes one method may be used to test another.

¹⁸ Mr. Whitten and Mr. Reeder favor it. 1 Whitten Valuation of Pub. Serv. Corp. § 84; Reeder Validity of Rate Regulation, §§ 157, 170. The doctrine has also been criticised or denied application as a complete test in *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 27 L. R. A. 827; *Metropolitan Trust Co. v. Houston &c. R.*, 90 Fed. 683; *Spring Val. Waterworks v. San Francisco*, 124 Fed. 574. But it has been approved in a large number of cases as shown in the last note to this section.

¹⁹ *Minnesota Rate Case*, (Simpson v. Shepard) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151A, Ann. Cas. 1916A 18; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371. Both of these decisions seem to approve the cost of reproduction rule, but hold that it was not properly applied and that there was no proper finding and the deduction of the amount of depreciation. See also *Southern Pac. R. Co. v. Bartine*, 170 Fed. 725. A further sum may, perhaps, have to be allowed for difference of value between the existing plant and a plant of modern description. See *Brunswick &c.*

to the cost of reproducing the tangible property, with such deduction, it may be necessary to add the cost of producing at the "present time" a corporation or like concern of equal efficiency with such an organization and clientage or business as the one in question so far as the same is not the result of monopoly or security from competition.²⁰ The cost of reproduction rule or method has often been approved when properly understood and applied.²¹

§ 2590 (1684c). Reasonableness of rates—Expenses.—Gross receipts do not, of course, of themselves determine whether a

Dist. v. Maine W. Co., 99 Maine 371, 386, 59 Atl. 537; article in 15 Harv. L. Rev. 249, 267; *Reeders Validity of Rate Reg.* § 157. It seems also that property not used or needed for the business of the company and greatly in excess of the requirements should not be included, to that extent at least as a basis upon which revenue from transportation should be allowed in determining the rate and its reasonableness. *San Diego L. & T. Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. ed. 892; *Minnesota Rate Cases*, (*Simpson v. Shepard*) 230 U. S. 352, 33 Sup. Ct. 728, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 1184, Ann. Cas. 1916A, 18n, citing 15 I. C. C. 376, 397, 407; *Spring Val. W. Co. v. San Francisco*, 165 Fed. 667, 697; *Southern Pac. R. Co. v. Bastine*, 170 Fed. 725, 767; *Cedar R. &c. Co. v. Cedar Rapids*, 144 Iowa 426, 120 N. W. 966; *Brunswick &c. Dist. v. Maine W. Co.*, 99 Maine 371, 59 Atl. 537.

²⁰ *Reeder's Validity of Rate Regulation*, § 170.

²¹ See *Shepard v. Northern Pac. Ry. Co.*, 184 Fed. 765, 802; *Western*

Ry. of Ala. v. Railroad Com., 197 Fed. 954; *Montana &c. R. Co. v. Morley*, 198 Fed. 991; *Louisville &c. R. Co. v. R. R. Com.* 196 Fed. 800; *San Diego W. Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. 261n; *Redlands &c. W. Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843; *Cedar R. &c. Co. v. Cedar Rapids*, 144 Iowa 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025n, 138 Am. St. 299; *Stevenson v. Great Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713; *Pioneer T. & T. Co. v. Westenhaver*, 29 Okla. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209n. In the *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 33 Sup. Ct. 728, 48 L. R. A. (N. S.) 1151n, 1188, Ann. Cas. 1916A, 18n, it is said: "The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

business is profitable, and rates prescribed by legislature can not be said to be reasonable if the necessary expenses of carrying on the business are greater than the receipts.²² "Compensation," it is said, "implies three things: Payment of cost of service, interest on bonds, and then some dividend."²³ The cost of service, including proper maintenance, and certain annual or fixed charges, must be met before there can be any net earnings or income upon the capital or value of the property, and rates which do not enable the company to do this can not be said, under ordinary circumstances at least, to be reasonable. So, in determining the "fair return" to which the company is usually held entitled, such expenses ordinarily have to be deducted from the gross receipts.²⁴ It is not always easy to determine, however, just what should be deducted as coming within the class of expenses indicated. Taxes,²⁵ reasonable salaries of officials,²⁶

²² *Chicago &c. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417. See also *Minnesota Rate Cases*, (*Simpson v. Shepard*) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n; *Wood v. Vandalia R. Co.*, 231 U. S. 1, 34 Sup. Ct. 7, 58 L. ed. 97; *Long Branch Comm. v. Fintern M. W. Co.*, 70 N. J. Eq. 71, 61 Atl. 474.

²³ *Chicago &c. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744.

²⁴ See generally *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. ed. 274; *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. 400; *Lake Shore &c. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 585; *Cotting v. Kansas City &c. Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; *Chicago &c. R. Co. v. Becker*, 35 Fed. 883; *Tift v. Southern R.*, 138 Fed. 753; *Arkansas Rate*

Cases, 187 Fed. 290; *St. Louis &c. R. Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; *Troutman v. Smith*, 105 Ky. 231, 48 S. W. 1084; *Cedar Rapids Co. v. Cedar Rapids*, 144 Iowa 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025n, 138 Am. St. 299 (overruling *Cedar Rapids Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081), and authorities cited in following notes. See also *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735, L. R. A. 1917F, 1148n, Ann. Cas. 1916A, and note.

²⁵ *Advance in Freight Rates*, Re, 9 I. C. C. 382; *Cumberland Tel. &c. Co. v. Memphis*, 183 Fed. 875, 877; *Contra Costa W. Co. v. Oakland*, 165 Fed. 518; *Southern Pac. R. Co. v. Railroad Comrs.*, 78 Fed. 236, 272 (but not, it seems, overdue taxes for past years).

²⁶ *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. ed. 176.

reasonable (but not unreasonable) expenditures to get business;²⁷ repairs and improvements,²⁸ necessary to keep the property unimpaired, and even certain losses caused by accident, or, perhaps, by negligence of employes,²⁹ have been held proper annual charges or expenses chargeable to operation. But unnecessary permanent improvements³⁰ and entirely new con-

²⁷ *Pannell v. Louisville &c. Co.*, 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141; *Milk &c. Assn. v. Delaware &c. Co.*, 7 I. C. C. 92; *Underbilling, Re*, 1 Int. Com. 813; *Shamberg v. Delaware &c. R. Co.*, 3 Int. Com. 502. See also *Arkansas Rate Cases*, 187 Fed. 290.

²⁸ *Reagan v. Farmers' &c. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Southern Pac. Co. v. Railroad Comrs.*, 78 Fed. 236; *Milwaukee Elec. R. &c. Co. v. Milwaukee*, 87 Fed. 577; *Metropolitan Trust Co. v. Houston &c. R. Co.*, 90 Fed. 683; *Northern Pac. R. Co. v. Keyes*, 91 Fed. 47; *Arkansas Rate Cases*, 187 Fed. 290. See also as to allowance for depreciation, *Davison v. Gillies*, 16 Ch. Div. (1879) 347n. But compare *Redlands &c. Co. v. Redlands*, 121 Cal. 365, 53 Pac. 843; *Cedar Rapids Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081, 144 Iowa 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025n, 138 Am. St. 399; *Puget Sound &c. Ry. Co. v. Railroad Com.*, 65 Wash. 75, 82, 117 Pac. 739, 743.

²⁹ *New Orleans &c. Exch. v. Texas &c. R.*, 10 I. C. C. 331; *Arkansas Rate Cases*, 187 Fed. 290, 306. It also seems that money necessarily expended in fees to the state and other organization expenses should be considered and

something allowed for the fact that the company is a going concern. *Pioneer T. & T. Co. v. Westenhaver*, 29 Okla. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209n, and authorities cited. *Metropolitan Trust Co. v. Houston &c. R. Co.*, 90 Fed. 683. *Reeder's Validity of Rate Regulations* §§ 160, 161. But compare *Spring Val. Water Co. v. San Francisco*, 165 Fed. 667; *Montana W. &c. R. Co. v. Morley*, 198 Fed. 991. No allowance should be made for good will at least as an independent item or where the company has a monopoly and is secure from competition. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134, and note; *Des Moines Gas. Co. v. Des Moines*, 199 Fed. 204; *Re Metropolitan St. R. Co. Reorganization*, 3 P. S. C. R. (pt. D. N. Y.) 113.

³⁰ *Tift v. Southern R.* 10 I. C. C. 543; *Illinois Cent. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. ed. 1128 (should be distributed over the years of their duration). See also *Erie v. Erie &c. Co.* 78 Kans. 348, 97 Pac. 468; *Coal &c. Ry. v. Couley*, 67 W. Va. 193, 67 S. E. 613. But compare *Railroad Com. of La. v. Cumberland &c. T. & T. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577;

struction,⁸¹ should not be charged to annual expense of operation. It has also been held that a loan made by the company can not be charged as an annual expense of the year.⁸²

§ 2591 (1684d). Reasonableness of rates—Rate of return or profit.—As to the rate of return or profit to which the carrier is entitled, it is difficult to lay down any precise and exact rule. And it may depend to some extent upon the particular circumstances and the way in which the question is presented. It is clear that, ordinarily at least, some return must be permitted, and, under the later decisions, it must be a fair or reasonable return. The interest upon legitimate outstanding bonds must be protected,⁸³ and, in addition to this and the payment of operating expenses and charges such as those referred to in the last preceding section, the general rule now is that reasonable dividends should also be allowed.⁸⁴ Further than this, no well settled general

Southern Pac. R. Co. v. Board of R. Comrs., 78 Fed. 236; *Metropolitan Trust Co. v. Houston &c. R. Co.*, 90 Fed. 683.

⁸¹ *Illinois Cent. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. ed. 1128; *Advance in Freight Rates*, Re, 9 I. C. C. 382.

⁸² *Southern Pac. Co. v. Railroad Comrs.* 78 Fed. 236. And dishonest or unreasonable and extravagant expenditures should not be deducted. *Chicago &c. Ry. Co. v. Wellman*, 143 U. S. 345, 12 Sup. Ct. 200, 36 L. ed. 176; *Brooklyn H. R. Co. v. Brooklyn &c. R. Co.*, 109 N. Y. S. 31, 35.

⁸³ *Chicago &c. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Milwaukee Elec. R. &c. Co. v. Milwaukee*, 87 Fed. 577; *San Diego &c. Co. v. Jasper*,

189 U. S. 439, 23 Sup. Ct. 571, 47 L. ed. 892, and authorities cited in following note. But compare some of the observations in *Minnesota &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713.

⁸⁴ *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Cotting v. Kansas City &c. Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92; *Stanislaus Co. v. San Joaquin*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406; *New Memphis &c. Co. v. New Memphis*, 72 Fed. 952; *Louisville &c. R. Co. v. Brown*, 123 Fed. 946; *St. Louis &c. R. Co. v. Hadley*, 168 Fed. 317; *Chicago v. Rogers &c. Co.*, 214 Ill. 212, 73 N. E. 375. Compare *Steenerson v. Great Northern R. Co.*, 69 Minn. 353, 72 N. W. 713.

rule can be stated, and, for its application to particular cases, reference is made to the decisions cited in the last preceding note. As we have already suggested, much may depend upon the particular facts of the case, a rate may be unreasonable or even confiscatory as to one railroad and not to another, the risk involved and the rate of return may vary in different parts of the country from time to time, and a change in economic conditions may make a certain regulation reasonable at one time and unreasonable at another or vice versa.⁸⁵ So, no very helpful rule applicable to all cases can be stated more specifically than we have already attempted to state it, and the supreme court of the United States has said in more than one case that no precise or given per cent can be fixed as the exact return to which all companies are entitled; but it seems that, as a general rule, a governmental regulation not allowing a properly managed carrier to receive from all its transportation subject to such government such a rate of return, just both to the carrier and public, as clearly shown to be received at the present time in question in other enterprises in the same locality involving the same risks and the like would be unreasonable and probably unconstitutional.⁸⁶

⁸⁵ See *Knott v. Chicago &c. R. Co.*, 230 U. S. 474, 33 Sup. Ct. 976, 57 L. ed. 1571; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 1192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134n, 15 Ann. Cas. 1034; *In re Arkansas Rate Cases*, 168 Fed. 732; *Southern Ind. R. Co. v. Railroad Com.*, 172 Ind. 113, 87 N. E. 966; *Puget Sound Elec. Ry. v. Railroad Com.*, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763n.

⁸⁶ See *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134n, 15 Ann. Cas. 1034; *Central of Ga. Ry. Co. v. Railroad Com. of Ala.*, 161 Fed. 925; *Louisville &c. R. Co. v. Brown*, 123 Fed. 946, 951;

Milwaukee Elec. Ry. &c. Co. v. Milwaukee, 87 Fed. 577; *Pioneer T. & T. Co. v. Westenhaver*, 29 Okla. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209n; *Puget Sound Elec. Ry. v. Railroad Comm.*, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763n. See generally as to what rate of return is or is not sufficient. *Donham v. Pub. Service Com. (Mass.)*, 112 N. E. 397; *In re Lincoln Trac. Co.*, 103 Nebr. 229, 171 N. W. 192; *Milwaukee Ry. &c. Co. v. Railroad Com.*, 169 Wis. 421, 172 N. W. 746 (7½% on value above expense and depreciation is fair return on street railway); *Westinghouse Elec. &c. Co. v. Binghamton Ry. Co.*, 255 Fed. 378

§ 2592 (1684e). **Reasonableness of rates—System and schedule as entirety—Losses on part of system.**—As a general rule a railroad system must be taken as a unit or an entirety;³⁷ and if, under a state statute or regulation the revenue from the entire schedule and business within the state is sufficient and thus presents a fair return such state statute or regulation applying only to intrastate business can not, ordinarily at least, be justly said to be confiscatory even though on some kinds or parts of the business or some branches of the road there is no profit.³⁸ But while a state, in making a reasonable adjustment of the carrier's charges, is under no obligation to assure a net profit from every part of the road nor to secure the same rate of return from each of the two principal departments of its business, passenger and freight, the state may not select either of these departments for arbitrary control; and where the passenger rate fixed by a state

(five cent street railway fare held confiscatory under present condition).

³⁷ *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. ed. 274; *St. Louis &c. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567; *Chicago &c. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Atlantic &c. R. Co. v. United States*, 76 Fed. 186; *Intrastate Com. Com. v. Louisville &c. R. Co.*, 118 Fed. 613; *Pensacola &c. R. Co. v. Florida*, 27 Fla. 403, 9 So. 89; *Delaware State Grange v. New York &c. R.* 3 Int. Com. 554. But compare *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. ed. 176, affirming 83 Mich. 592, 47 N. W. 489; *Louisville &c. R. Co. v. Brown*, 123 Fed. 946; *Steenerson v. Great Northern Ry.*, 69 Minn. 353, 72 N. W. 713.

³⁸ *St. Louis &c. Ry. Co. v. Gill*, 156 U. S. 644, 15 Sup. Ct. 484, 39 L. ed. 567; *Minneapolis &c. R. Co.*

v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; *Willcox v. Consolidated Gas. Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 200, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134n, 15 Ann. Cas. 1034; *Mathews v. Board of Corp. Comrs.*, 106 Fed. 7, 10; *Interstate Commerce Commission v. Louisville &c. R. Co.*, 118 Fed. 613; *Pensacola &c. R. Co. v. State*, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661, 669, 672; *Alexandria &c. Ry. Co. v. Railroad Com.*, 143 La. 1067, 79 So. 863. See also *Atlantic &c. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 933, 11 Ann. Cas. 398; *Lincoln G. &c. Co. v. Lincoln*, 182 Fed. 926; *Interstate Consolidated St. Ry. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. ed. 111, 12 Ann. Cas. 555; *Vandalia R. Co. v. Schnull*, 188 Ind. 87, 122 N. E. 225. But compare *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108n.

statute, as applied to a carrier's entire intrastate passenger business, separately considered, yielded at most a very narrow margin of profit over the cost of the traffic, it was held confiscatory.³⁹ So, it is likewise held by the supreme court of the United States in another recent case that the state may not select a commodity or class of traffic for such arbitrary control and, instead of fixing what might be deemed a reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a mere nominal compensation in addition to cost, and the fact that the carrier may get an adequate return from its entire intrastate business does not prevent this from being confiscatory where taking into account the entire traffic to which the rate is applied, it has the effect indicated.⁴⁰ And it has been held in Minnesota that "a portion of a line that is not self-supporting is not a feeder, but an incumbrance; and in determining what are reasonable rates on the rest of the line or system, any state has a right to reject such portion from the line or system."⁴¹ So, in other particular cases, rates have been apportioned to constituent companies and to different parts of the same system.⁴² It has also been held by the Supreme Court of the United States that the reasonableness or unreasonableness of rates prescribed by a state for transportation wholly within its limits must be determined without reference to its interstate business.⁴³ Thus,

³⁹ *Norfolk &c. R. Co. v. Conley*, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. ed. 745.

⁴⁰ *Northern Pac. R. Co. v. State of North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735, L. R. A. 1917F, 1148n, Ann. Cas. 1916A, 1n. See also *Union Pac. R. Co. v. Public Utilities Com.*, 95 Kans. 604, 148 Pac. 667; *Morgan's La. &c. R. Co. v. Railroad Com.*, 127 La. 636, 53 So. 890.

⁴¹ *Steenerson v. Great Northern R.*, 69 Minn. 353, 72 N. W. 713. See also *Wellman v. Chicago &c. R. Co.*, 83 Mich. 592, 47 N. W. 489;

Florida &c. Ry. Co. v. United States, 200 Fla. 797.

⁴² *Louisville &c. R. Co. v. Brown*, 123 Fed. 946; *San Diego &c. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. ed. 1154, affirming on this point 74 Fed. 29.

⁴³ *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, where it is said: "The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state, can have no applica-

a railroad company can not be compelled to carry state traffic at inadequate and confiscatory rates even though its interstate business may be such as to enable it to make a profit on its business taken as a whole.⁴⁴ So, on the other hand, the state regulation can not be considered unreasonable and confiscatory merely because it does not allow for sufficient profit to make up for loss on interstate business.⁴⁵ Where a legitimate bona fide lease is made, it seems that the operating road is entitled to include the rent in its operating expenses.⁴⁶

§ 2593. Apportionment of values and expenses between intrastate and interstate business.—It is often very difficult to separate and apportion intrastate and interstate values and expenses. The supreme court of the United States has disapproved apportionment according to the proportion of gross earnings or revenue formerly made or followed by a number of the lower federal courts, but has not very definitely specified just how the ap-

tion where the state is without authority over rates on the entire line and can only deal with local rates and make such regulations as are necessary to give just compensation on local business." See also *Chicago &c. R. Co. v. Dey*, 35 Fed. 866; *Louisville &c. R. Co. v. Railroad Com.*, 196 Fed. 800; *Chicago &c. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417, and compare *State v. Atlantic Coast Line*, 48 Fla. 146, 37 So. 657; *State v. Seaboard &c. Ry.*, 48 Fla. 129, 37 So. 314, aff'd in 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175.

⁴⁴ *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47; *Seaboard &c. Ry. Co. v. Railroad Comrs.*, 155 Fed. 792; *State v. Seaboard &c. Ry.*, 48 Fla. 129, 37 So. 314; *Morgan's L. & T.*

R. Co. v. Railroad Com. of La., 127 La. Ann. 636, 53 So. 890.

⁴⁵ See *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Northern Pac. Ry. Co. v. Lee*, 199 Fed. 621. But as elsewhere shown, intrastate rates can not be made so as to discriminate injuriously and interfere with the interstate rate. See also *Houston &c. R. Co. v. United States*, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. 833; *Illinois Cent. R. Co. v. Public Utilities Com.*, 245 U. S. 493, 62 L. ed. 425, 38 Sup. Ct. 70; *Public Service Com. v. New York Cent. R. Co.*, 230 N. Y. 149, 129 N. E. 455.

⁴⁶ *Southern Pac. Co. v. Railroad Comrs.*, 78 Fed. 236.

portionment should be made in order to determine the effect and validity of state regulations as to rates, particularly where part of the carrier's property within the state is used in both local and interstate transportation, part in neither directly and part in one alone. The inconsistencies and defects of the gross revenue rule of apportionment are clearly shown in the well considered opinion of Justice Hughes in the Minnesota rate cases to which we have so often referred, and the doctrine is there announced that when rates are in controversy it seems necessary to find some basis for a division of the total value of the property independently of revenue, and such basis is found "in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business." Other important suggestions are made in the opinion, which will be considered in the next section, but, as already stated, no exact or precise method of determining the question and making the calculation is specifically stated. A recent writer, who seems to have given the subject careful consideration is a little more definite.⁴⁷ He says that "in order to ascertain the total value within a state upon which a railroad is entitled to earn a revenue we must add to the value of the tangible property within the state a share of the total intangible value of the corporation." And that the fairest method would seem to be "to take all of the elements of value which can be definitely localized (which may include more than merely tangible property), find the proportion of such elements of value which are within the state to those in all states within which the company operates, and assign in similar proportion those elements of value which can not be localized." He also says that "where an attack is made upon the validity of a schedule of intrastate rates as an entirety, it is necessary to recognize the fact that to a large extent the same property within the state is used in both interstate and intrastate traffic, and it is necessary to apportion the value of such property and declare what portion, plus the property which is used exclusively for local traffic, is

⁴⁷ Reeder Validity of Rate Reg. § 165.

entitled to earn a revenue from intrastate business," and as cars usually carry at the same time both interstate and intrastate freight or passengers, "it seems that the apportionment should be based not upon car mileage but upon ton mileage and passenger mileage."⁴⁸ This subject will be further considered in the next section.

§ 2594 (1684e). Minnesota rate cases.—As already shown it is held by the supreme court of the United States in the Minnesota rate cases, and in other recent cases that a state, in the absence of congressional legislation, may establish maximum reasonable intrastate rates although the existing relation between intrastate and interstate rates is thereby disturbed within zones of competition crossed by the state boundary line. The decision in the Minnesota rate cases is also important in its statement and application of the rules for determining the question as to whether the state statute or orders thereunder are confiscatory. Three general rules are stated by the court.⁴⁹ "(1) The basis of cal-

⁴⁸ The writer referred to then proceeds to explain how this is worked out in detail as follows: "Having found the total value within the state upon which the company is entitled to earn a revenue from both interstate and intrastate traffic, this total value may be apportioned between freight and passenger traffic by finding the extent to which the facilities can be said to be used exclusively for freight traffic and extent to which they can be said to be used exclusively for passenger traffic and then assigning the residuum of value in the same proportion. Having found the value upon which the company is entitled to earn a revenue from both interstate and intrastate freight traffic within the limits of the state, that value can

be apportioned between interstate and intrastate traffic according to the extent to which the facilities are used in each of those two classes of traffic, as shown by the ton mileage. So also we can find the value assignable to intrastate passenger traffic when we have found the relation of the intrastate passenger mileage to the total passenger mileage within the state. By adding the result found as to intrastate freight traffic to the result found as to intrastate passenger traffic we will have the total value within the state upon which the railroad should be entitled to earn a revenue upon intrastate traffic of all kinds."

⁴⁹ Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L.

culatation is the 'fair value of the property' used for the convenience of the public.⁵⁰ (2) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. (3) Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the interstate business and the compensation allowed in that business under the rates prescribed." And upon the last point the court said, in substance, that the total value of the property of the carrier within the state, independently of revenue, should be divided as between its interstate and intrastate business in such state, according to the use that is made of the property, assigning to each business that proportion of the total value of the property corresponding to the extent of its employment in that business. The court admitted that this might be difficult, particularly because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles, but said, "it does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common." The court also held that market value of stocks and bonds representing the entire property, including assets not forming part of the operating

R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n.

⁵⁰ Smyth v. Ames, 169 U. S. 546, 18 Sup. Ct. 418, 42 L. ed. 849. Or, as it was put in San Diego Land & Town Co. v. National City, 174 U. S. 757, 19 Sup. Ct. 804, 43 L. ed. 1161. "What the company is entitled to demand, in order that

it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. See also San Diego Land & Town Co. v. Jasper, supra; Willcox v. Consolidated Gas. Co., 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. ed. 382, 395, ante, 1134, 15 Ann. Cas. 1034."

property or that devoted to public service, furnished no criterion for determining the value of the property on which a fair return was essential in testing the validity of the state regulation and that a division of the value of the property of the carrier within a state according to gross earnings derived respectively from its interstate and intrastate business in such state does not give a sufficiently accurate measure of the value of the use of its property in intrastate business to justify the court in holding in a close case that the intrastate rates fixed by the state are confiscatory. The evidence was likewise regarded as insufficient because items of depreciation were not stated and because neither the share of the expenses properly attributable to the intrastate business, nor the value of the property employed in such business, was satisfactorily shown.⁵¹ The decision in the Minnesota

⁵¹ It was also held that general estimates as to the extra cost of the intrastate business over the interstate business, made without the aid of accurate data for at least test periods, which however difficult, to prepare, was not beyond the power of the carrier to furnish, should not be accepted as sufficient to sustain a finding that the intrastate rates, as fixed by the state, were confiscatory, that, as stated in the syllabus in 48 L. R. A. (N. S.) 1151, "the cost to a railway company of acquiring the land necessary for its terminals, yards and right of way if the railway were not there, and the company should be called upon to reproduce its road, including the estimated excess over the market value of contiguous or similarly situated property which it is conjectured that the railway company would be obliged to pay, and an allowance for consequential and sever-

ance damages, and for possible improvements that might be found on the property taken, is not the proper basis for valuing such property for the purpose of testing the reasonableness of state regulation of rates; and estimates of the value of the right of way, yards, and terminals of a railway company cannot be properly based, when testing the reasonableness of state regulation of its rates, upon their supposed value for railway purposes in excess of the fair market value of contiguous or similarly situated property;" and that the fair present value of the right of way, yards, and terminals cannot be increased in such a case, by adding further sums calculated on that value for engineering, superintendence, legal expenses, contingencies, and interest during construction. But enough was found as to one of the companies to justify the court in holding, as it did that the

rate cases upon most, if not all, of these points has been followed and applied in a number of recent cases.⁵²

§ 2595 (1684f). Reasonableness of separate rate—Generally—Rights of shipper.—As already suggested, the shipper is interested in the particular rate upon goods such as he is shipping rather than in the entire schedule, and there should be a proper distribution of the burden of the schedule upon the different articles. In a general way it may be said that the sum of the particular rates should equal the amount of the entire schedule and is determined by adding the rates for the known traffic at each station. "As an abstract matter," says Mr. Wyman, "the fairest way to all concerned to determine the price for any particular service would seem to be to apportion ratably the total disbursements of every sort to the various items of business so as to arrive at proportionate rates."⁵³ But there are difficulties in the practical application of this theory and, while there is some conflict among the authorities, the supreme court of the United States, as we have already shown, has upheld disproportionate rates in a number of cases.⁵⁴ So the "fair return" which

rate was confiscatory as to that company and deciding in effect that a state may not fix the intrastate rates of an interstate carrier so low that the carrier's entire revenue from all its business in the state, after paying only operating expenses and taxes, amounts at the most to only about 4 per cent on the value of its property within the state.

⁵² *Knott v. Chicago &c. R. Co.*, 230 U. S. 474, 33 Sup. Ct. 976, 57 L. ed. 1571; *Southern Pac. Co. v. Campbell*, 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. ed. 1610; *Allen v. St. Louis &c. R. Co.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. ed. 1625; *Oregon R. &c. Co. v. Campbell*,

230 U. S. 525, 33 Sup. Ct. 1026, 57 L. ed. 1604.

⁵³ *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. St. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108n; *Seaboard &c. Ry. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175; *Interstate Com. Com. v. Western Ala. R. Co.*, 88 Fed. 186.

⁵⁴ See ante § 2592, n. 58; also *Interstate Consolidated Ry. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. ed. 111, 12 Ann. Cas. 555; *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 901, 46 L. ed. 1151; *Southern R. Co. v. McNeill*, 155 Fed. 756; *Missouri Pac. R. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752; *State v. Northern Pac.*

a railroad company may, ordinarily, arrange for in making its schedule is usually made from both freight and passenger traffic.⁵⁵ The question as to the reasonableness of particular rates, however, most frequently arises in regard to freight. The rate must be reasonable as to the shipper and should not be more than the value of the services.⁵⁶ Indeed, we think it should not always be as high as the value of the services to the particular shipper at the particular time for undue advantage might thus be taken of his necessities. But it may ordinarily be a reasonable amount under all the circumstances.

§ 2596 (1684g). Reasonableness of separate rate—How tested—Elements to be considered.—Many elements are to be considered in fixing rates. The cost of service to the carrier is an im-

Ry. Co., 19 N. Dak. 45, 120 N. W. 869, 25 L. R. A. (N. S.) 1001n. But regulations relating only to particular rates, classes of rates, have been held unreasonable and confiscatory in themselves in some cases. *Chicago &c. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970 (revenue from intrastate traffic as a whole apparently not considered); *Southern Pac. Co. v. Campbell*, 189 Fed. 182; *Gulf &c. Ry. Co. v. Railroad Com.*, 102 Tex. 338, 116 S. W. 795. See generally *Atlantic &c. R. Co. v. Florida*, 203 U. S. 256, 27 Sup. Ct. 108, 51 L. ed. 174; *Northern Pac. Ry. Co. v. Lee*, 199 Fed. 621.

⁵⁵ But as held in the Minnesota rate case and others already cited one can not be segregated and made to bear the burden of the other and they may have to be examined apart. See also *Missouri &c. R. Co. v. Love*, 177 Fed. 493; *Western R. of Alabama v. Railroad Com.*, 197 Fed. 954.

⁵⁶ See Proposed Advances in Freight Rates, Re, 9 I. C. C. 382; *Kennebec &c. Dist. v. Waterville*, 97 Maine 185, 54 Atl. 6, 60 L. R. A. 856; *Covington &c. R. Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; *Tift v. Southern R.*, 138 Fed. 753; *Interstate Com. Com. v. Chicago &c. R. Co.*, 141 Fed. 1003. In the last case it is said that in determining the value to the shipper, the value of the goods, and the profits which he can make by having them transported should be considered. See also *Interstate Com. Com. v. Baltimore &c. R. Co.*, 43 Fed. 37, 53. Rates unreasonable in themselves are not permitted. *Cary v. Eureka Springs R.*, 7 I. C. C. 286; *Union Pac. R. Co. v. Goodrich*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. ed. 896; *Wells v. Oregon R. &c. Co.*, 15 Fed. 561; *Interstate Com. Com. v. Louisville &c. R. Co.*, 118 Fed. 613; *Harrison Granite Co. v. Pennsylvania R. Co.*, 145 Mich. 712, 108 N. W. 1081.

portant factor, but it is not controlling in or of itself.⁵⁷ If conditions were always the same and the cost of service the same throughout a ton-mile rate would be ideal on freight, and the length of transportation is usually very important,⁵⁸ although conditions and circumstances are usually so different, that it is not a controlling factor.⁵⁹ But passenger fares may usually be

⁵⁷ *Thurber v. New York Cent. R. Co.*, 2 Int. Com. 742; *Memphis News Pub. Co. v. Southern R.*, 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150; *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. ed. 176; *Tift v. Southern R. Co.*, 138 Fed. 753; *Minneapolis &c. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151. See also *In re Advances on Coal*, 22 I. C. C. 604; *Bolieau v. P. & E. R. Co.*, 22 I. C. C. 640. Cost of service, because of grades or other reasons, may be different on different roads and justify a different rate. *New Orleans Cotton Exch. v. Illinois Cent. R. Co.*, 2 Int. Com. 777. See also *Interstate Com. Com. v. Union Pac. R. Co.* 222 U. S. 549, 32 Sup. Ct. 108, 56 L. ed. 313. The investment of the carrier is also frequently considered. *Meeker & Co. v. L. V. R. Co.*, 21 I. C. C. 129; *Advances in Rates, Eastern Case*, 20 I. C. C. 243; *Advances in Rates, Western Case*, 20 I. C. C. 307, (but capitalization does not always represent either the real investment or the value).

⁵⁸ *Texas &c. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; *East Tenn. &c. R. Co. v. Interstate Com. Com.*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 719; *Interstate Com. Com. v.*

Louisville &c. R. Co., 118 Fed. 613; *State v. Seaboard Air Line*, 48 Fla. 152, 37 So. 658, aff'd in 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175; *Louisville &c. R. Co. v. Commonwealth*, 106 Ky. 633, 21 Ky. L. 232, 51 S. W. 164, 1012; *State v. Minneapolis &c. R. Co.*, '80 Minn. 191, 85 N. W. 60, 89 Am. St. 514n; *Alabama &c. R. Co. v. Railroad Com.*, 86 Miss. 667, 38 So. 356; *Freight Bureau v. Cincinnati &c. R. Co.*, 7 I. C. C. 180; *Eau Claire Board v. Chicago &c. R. Co.*, 4 Int. Com. 65.

⁵⁹ *Gustin v. Atchison &c. R. Co.*, 8 I. C. C. 277; *Hilton Lumber Co. v. Wilmington &c. R. Co.*, 9 I. C. C. 17; *Butte Milling Co. v. Chicago &c. R. Co.*, 15 I. C. C. 351; *Muskogee Traffic Bureau v. Atchison &c. R. Co.*, 17 I. C. C. 169; *Danville Brick Co. v. Chicago &c. R. Co.*, 20 I. C. C. 239; *Ashgrove Cement Co. v. Atchison &c. R. Co.*, 23 I. C. C. 519; *Rice v. Western &c. R. Co.*, 2 Int. Com. 319 (part of the haul over heavy grade). Indeed, terminal expenses are usually the same whether the haul is short or long, and for this, and other reasons, the rate of cost per ton mile is usually less the longer the distance. See *New Orleans &c. Exch. v. Cincinnati &c. R. Co.*, 2 Int. Com. 289; *McMorran v. Grand Trunk R. Co.*, 2 Int. Com. 604; *Imperial Coal*

made on a mileage basis.⁶⁰ Competition also frequently exerts an important influence. In a comparatively recent case⁶¹ the court enumerates the following as among the most important matters to be considered in making rates: "(1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation.⁶² (2) The cost of service to the carrier would be an ideal theory, but is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration however.⁶³ (3) Weight, bulk and convenience of transportation.⁶⁴ (4) The amount of the product or the commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail.⁶⁵ (5) General

Co. v. Pittsburgh &c. R. Co., 2 Int. Com. 436. See also *Interstate Com. v. Union Pac. R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308; note to *Ransome v. Eastern Counties R.*, 1 Eng. R. Can. Traf. Cas. 63. As to revenue train mileage basis, see *Trust Co. v. Chicago &c. R. Co.*, 199 Fed. 593. Car revenue or earnings per car mile or train mile is often regarded as a fairer basis or more important factor. In *re Advances in Coal*, 22 I. C. C. 604, 620; *Merchants &c. Assn. v. A. C. L. R. Co.*, 22 I. C. C. 467; *National Hay Assn. v. Michigan Cent. R. Co.*, 19 I. C. C. 34; *Farrar v. East Tenn. &c. R. Co.*, 1 Int. Com. 764

⁶⁰ *Savannah Bureau v. Charleston &c. R. Co.*, 7 I. C. C. 601.

⁶¹ *Interstate Com. Com. v. Chicago &c. R. Co.*, 141 Fed. 1003, 1015.

⁶² *Interstate Com. Com. v. Baltimore &c. R. Co.*, 43 Fed. 37, 53.

⁶³ *Interstate Com. Com. v. Baltimore &c. R. Co.*, 43 Fed. 37, 53; *Ransome v. Eastern R. Co.*, (1857) 1 C. B. (N. S.) 437, 26 L. J. C. P. 91; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765. *Interstate Com. Com. v. Detroit &c. R. Co.*, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. ed. 306.

⁶⁴ See ante, § 2561.

⁶⁵ *Interstate Com. Com. v. Baltimore &c. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699. But see and compare *Proposed Advance in Freight Rates, Re*, 9 I. C. C. 382; *Lake Shore &c. R. Co. v.*

public good, including good to the shipper, the railroad company and the different localities.⁶⁶ (6) Competition, which the authorities, as well as the experts, in their testimony in these cases, recognize as a very important factor.⁶⁷ None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling."⁶⁸ It should also be observed that the rule and considerations which govern the legislature or commission in determining a rate and a court in determining whether it is confiscatory are not precisely the same, for the legislature or commission has some discretion in the matter and is usually interested to a great extent in determining what is a reasonable rate under the circumstances as a legislative or administrative problem and looks at it more frequently for the purpose of determining the reasonableness of the separate rate and the maximum rate allowable while a court in determining whether it is confiscatory is dealing with a judicial problem and has more to do with the schedule or return as a whole and the question as to what minimum return is sufficient to satisfy the constitution under the circumstances of the case.⁶⁹

Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; Minneapolis &c. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 901, 46 L. ed. 1151; Tift v. Southern R., 138 Fed. 753.

⁶⁶ Interstate Com. Com. v. Baltimore &c. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699.

⁶⁷ Interstate Com. Com. v. Baltimore &c. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699; Cincinnati &c. R. Co. v. Interstate Com. Com., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935; Texas &c. R. Co. v. Interstate Com. Com. 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; Interstate Com. Com. v. Alabama &c. R. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; Louis-

ville &c. R. Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309; East Tenn. &c. R. Co. v. Interstate Com. Com. 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 719; Interstate Com. Com. v. Louisville &c. R. Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. ed. 1047; Phipps v. London &c. R. Co., 2 Q. B. D. (1892) 229 (this case construes section 2 of the English Act of 1854, which is almost like section 3 of our interstate commerce act.

⁶⁸ See also Spring Val. Water Works v. San Francisco, 192 Fed. 137.

⁶⁹ Louisville &c. R. Co. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 54, 58 L. ed. 229; Louisville &c. R.

§ 2597 (1684h). **Reasonableness of rate—What the traffic will bear.**—It has often been insisted that rates may be made according to what the traffic will bear, and that no rate that the traffic will bear, and under which it will move freely, can be unreasonable. But, while in some instances this may be justified, the principle is too broadly stated. What the traffic will bear may be a proper consideration in a proper case, but it is the duty of the carrier to carry at a reasonable rate, and it certainly is not conclusive that a rate is reasonable merely because the company, by taking advantage of necessities or peculiar conditions, may be able to exact it. As said in one case, "it is not a question of what the traffic will bear, but rather of what the public should bear."⁷⁰ Yet, when rightly understood, the principle in question is a very important one and is not without its proper application, especially in classification. It is necessary that rates should move the freight and they ought, in general, to move it in increasing quantities. Low class traffic can not always pay a proportionate share of the fixed charges, and if each and every article had to do so, some articles would not move at all in many instances. Able economists have pointed this out, and have used very strong language upon the subject. Thus, in regard to the

Co. v. Siler, 186 L. ed. 176, 189. Compare also *Prentiss v. Atlantic &c. R. Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

⁷⁰ *Tift v. Southern R. Co.*, 138 Fed. 753 (affirmed in 206 U. S. 428, 27 Sup. Ct. 709, 51 L. ed. 1124, 11 Ann. Cas. 846, not discussing this point). See also *Brunswick v. Maine Water Co.*, 99 Maine 371, 59 Atl. 537; *Proposed Advances in Freight Rates*, Re, 9, I. C. C. 382, 434; *Railroad Com. v. Atchison &c. Ry. Co.*, 22 I. C. C. 407; *Advances in Rates, Western Case*, 20 I. C. C. 307; *Commercial Club of Omaha v. Atchison &c. R. Co.*, 19 I. C. C. 419. It is sometimes argued that

railroad rate makers are in touch with the situation will not charge too much, because to do so would cause shipments to cease, and that competition is also a safeguard; but this is clearly not a sufficient answer to the objection. The matter should not be left wholly to the railroads. Much injustice and extortion might result. For instance, it might well be that a large majority of farmers in the locality served by the carrier would pay much more than a reasonable rate to get their wheat or corn to market in order to prevent its being almost entirely lost to them.

phrase, "charging what the traffic will bear," one of them says: "The real meaning of the phrase is that, within the limits already described—the superior limit of what any particular traffic can afford to pay and the inferior limit of what the railway can afford to carry it for—railway charges for different categories of traffic are fixed, not according to an estimated cost of service, but roughly on the principle of equality of sacrifice by the payer. Translated into railway language, the principle means this: the total railway revenue is made up of rates which, in the case of traffic unable to bear a high rate, are so low as to cover hardly more than actual out-of-pocket expenses; which, in the case of medium class traffic, cover both out-of-pocket expenses and a proportionate part of the unapportioned cost; and which finally, in the case of high-class traffic, after covering that traffic's own out-of-pocket expenses, leaves a large and disproportionate surplus available as a contribution towards the unapportioned expenses of the low-class traffic, which such traffic itself could not afford to bear. This, in principle and in outline, is the system of charging what the traffic can bear. It is the system which—the point must be reiterated—is, always has been, and, as far as we can see, always must be adopted on all railways, whether they be State enterprises or private undertakings. It is a system in the interest of the public, because traffic is hereby made possible which could not come into existence at all if each item of traffic was required to bear not only its own direct expenses but its full share of all the standing charges."⁷¹ Another uses language almost equally strong, saying: "The system of making rates to develop business, or of 'charging what the traffic will bear,' rightly applied, has been the means—and we shall find it to be the only possible means—of securing efficient service and low rates. Charging what the traffic will bear is a very different thing from charging what the traffic will not bear. It is a hard principle to apply intelligently, but when it is thus applied it adjusts the burdens where they can be best borne, and develops a vast amount of business which could not otherwise exist. The principle of charging what the traffic will bear is unquestionably

⁷¹ Acworth's *Elements of Railway Economics*, 75-78.

the principle which enables railroads to render most efficient service to the community."⁷²

§ 2598 (1684i). Schedules—When presumption of law as to reasonableness of rate.—The Act of Congress, especially as amended by section 2 of the Act of June 29, 1906, and by the amendments of June 18, 1910, and August 24, 1912, is both comprehensive and definite in requiring schedules and publication of rates.⁷³ Terminal and refrigerating charges must be stated,⁷⁴ and so must rules and regulations which in any wise change, affect or determine any part or the aggregate of the rates, fares or charges.⁷⁵ But it was held under the act before the later

⁷² Hadley's Railroad Transportation, 17, 76, 123, 124, 246, 248.

See also *Colorado Fuel &c. Co. v. Southern Pac. R. Co.*, 6 I. C. C. 489; *Interstate Com. Com. v. Chicago &c. Ry. Co.*, 141 Fed. 1003; *In re Transportation of Wool &c.*, 23 I. C. C. 151; *Judson Interstate Commerce*, § 206; *Newcomb's Facts About Railroad Rates*, 19 et seq.

⁷³ See *Unlawful Charges*, Re., 8 Int. Com. 585; *New York &c. R. Co. v. Interstate Com. Com.*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 515; *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681; *Louisville &c. R. Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. ed. 853, L. R. A. 1915E, 665; *Dayton Coal &c. Co. v. Cincinnati &c. R. Co.*, 239 U. S. 446, 36 Sup. Ct. 137, 60 L. ed. 375; *Pittsburgh &c. R. Co. v. Baltimore &c. R. Co.*, 2 Int. Com., 729; *New Orleans Cotton Exch. v. Louisville &c. R.*, 3 Int. Com. 523; *Phelps v. Texas &c. R.*, 4 Int. Com. 363; *Publication &c. Re.*, 10 Int. Com. 55; *Suffern v. Indiana &c. R.*, 7 I. C. C. 255; *Black-*

man v. Southern R. 10 I. C. C. 352. So in *Transportation Act 1920*.

⁷⁴ *Swift & Co. v. Hocking Valley R. Co.*, 243 U. S. 281, 37 Sup. Ct. 287, 61 L. ed. 722; *Interstate Com. Com. v. Atchison &c. R. Co.*, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. ed. 1319; *Phelps v. Texas &c. R.*, 4 Int. Com. 363; *American &c. Assn. v. Illinois Cent. R.*, 7 Int. Com. 556; *Pennsylvania Millers' Assn. v. Philadelphia &c. R. Co.*, 8 I. C. C. 531; *Transportation of Fruit*, Re., 10 I. C. C. Rep. 360; *Charges for Transportation and Refrigeration*, In re, 11 I. C. C. 129. See also *Knudsen &c. Co. v. Michigan Cent. R. Co.*, 148 Fed. 968.

⁷⁵ *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43, 36 Sup. Ct. 228, 60 L. ed. 517; *Boston &c. R. Co. v. Hoker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. ed. 368 L. R. A. 1915B, 450, Ann. Cas. 1915D, 593n (baggage); *Mitchell Coal &c. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. ed. 1472; *Chicago &c. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed.

amendments that, at least in the absence of any order by the commission, a carrier is not necessarily obliged to post such regulations as have long existed and are open and notorious,⁷⁶ and that a carrier publishing a through tariff may reserve the right to route goods as it pleases beyond its own terminal.⁷⁷ The statement should be clear and plain and sufficiently full,⁷⁸ and the schedules must be filed and published and should be printed and properly posted and kept open for inspection.⁷⁹ The rate duly published and filed with the commission must

1033, Ann. Cas. 1914A, 501n; *Suffern v. Indiana &c. R.*, 7 I. C. C. 255; *Alleged Unlawful Rates*, Re, 8 I. C. C. 121; *Mobile &c. R.* In re, 9 I. C. C. 373; *Spillers v. Louisville &c. R. Co.*, 8 Int. Com. 364; *Central &c. Assn. v. Vicksburg &c. R.*, 10 Int. Com. 193.

⁷⁶ *Interstate Com. Com. v. Detroit &c. R.*, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. ed. 306.

⁷⁷ *Southern Pac. Co. v. Interstate Com. Com.*, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. ed. 585. But see § 15 as amended June 29, 1906, and June 18, 1910, and act of August 24, 1912. It has also been held that a combination rate, not being a joint rate, need not be posted. *Gulf &c. R. v. Nelson*, 4 Tex. Civ. App. 345, 23 S. W. 732. But compare *Export Rates*, Re, 8 I. C. C. 185; *Consolidated &c. Co. v. Southern &c. Co.*, 9 Int. Com. 182; *New York &c. R. v. Platt*, 7 Int. Com. 323. And see generally under amendments *Kansas City So. R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. ed. 556; *Interstate Com. Com. v. United States*, 224 U. S. 474, 32 Sup. Ct. 556, 56 L. ed. 849; *Cincinnati &c. Ry. Co. v. Rankin*, 241 U. S. 319, 36 Sup. Ct.

555, 60 L. ed. 1022, L. R. A. 1917A, 265.

⁷⁸ *Johnston-Larimer &c. Co. v. Atchison &c. R. Co.*, 6 Int. Com. 568; *Rate Schedules*, Re, 6 Int. Com. 267; *H. B. Pitts &c. v. St. Louis &c. R.*, 10 Int. Com. 684; *Colorado Fuel &c. Co. v. Southern &c. Co.*, 6 Int. Com. 488; *Alleged Unlawful Charges*, Re, 8 Int. Com. 585. But see *Mannheim Ins. Co. v. Erie &c. Co.*, 72 Minn. 357, 75 N. W. 602.

⁷⁹ *Johnson v. Chicago &c. R. Co.*, 9 Int. Com. 221; *Paxton Co. v. Detroit &c. R.*, 10 Int. Com. 422; *Rea v. Mobile &c. R.*, 7 Int. Com. 43; *New York Board &c. v. Pennsylvania R.*, 3 Int. Com. 417; *Wabash R. Co. v. Sloop*, 200 Mo. 198, 98 S. W. 607. But see as to establishment of rate without posting, *Texas &c. R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. ed. 562. As to changes in schedule rates and notice now required, see Act of June 29, 1906, § 6. Posting is held not to be essential to making the tariff legally operative, *United States v. Miller*, 223 U. S. 599, 32 Sup. Ct. 323, 56 L. ed. 568; *Texas &c. Ry. Co. v. Cisco Oil Mills*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. ed. 562.

be taken as a reasonable rate,⁸⁰ except in proceedings before the commission to have it altered or the like; but there is no such presumption in such proceedings before the commission,⁸¹ and it has lately been held by the Supreme Court of the United States that there is no presumption of law that the freight rate upon a particular commodity is reasonably low merely because such rate has been published and filed with the commission.⁸² It has also been held that a carrier may exact the regular rate for an interstate shipment as shown by its printed and published schedules on file with the Interstate Commerce

⁸⁰ *Van Patten v. Chicago &c. R. Co.*, 81 Fed. 545; *Kinnavey v. Terminal &c. Assn.*, 81 Fed. 802; *Pennsylvania R. Co. v. Steinman Coal Co.*, 242 U. S. 298, 37 Sup. Ct. 118, 61 L. ed. 316; *Pennsylvania R. Co. v. Clark Brös. Coal Min. Co.*, 238 U. S. 456, 35 Sup. Ct. 896, 59 L. ed. 1406; *Texas &c. R. Co. v. American Tie &c. Co.*, 234 U. S. 138, 34 Sup. Ct. 885, 58 L. ed. 1255. See also *St. Louis &c. R. Co. v. J. S. Patterson Constr. Co.*, 181 Ind. 304, 104 N. E. 512; *McGrew v. Missouri Pac. R. Co.*, 114 Mo. 210, 21 S. W. 463; *Burlington &c. R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. 477. Most of these cases merely hold, however, that it is presumed reasonable as against the carrier and thus throws the burden upon the carrier in attacking it. See also *State v. Northern Pac. Ry. Co.*, 19 N. Dak. 45, 120 N. W. 869, 25 L. R. A. (N. S.) 1001, and note. The fact that the carrier fixed the rate or performed services under it may raise the presumption that it is reasonable. *Louisville &c. R. Co. v. Kentucky Railroad Com.*, 214 Fed.

465, affirmed in 35 Sup. Ct. 146. But a commission can not substitute a new rate for a just and reasonable rate on the ground that the carrier had so conducted itself that it is estopped from being entitled to receive a just and reasonable compensation. *Southern Pac. Co. v. Interstate Com. Com.*, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283. See also *Allen v. St. Louis &c. R. Co.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. ed. 1625; *Detroit &c. R. Co. v. Michigan R. Com.*, 171 Mich. 335, 137 N. W. 329.

⁸¹ *San Bernardino Board &c. v. Atchison &c. R. Co.*, 3 Int. Com. 138.

⁸² *Illinois Cent. R. Co. v. Interstate Com. Com.*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. ed. 1128. It has also been held that a carrier's rates on through business do not prove that its local rate is unreasonable and that the local rate does not throw light on the justice or injustice of discriminations between nonlocal shipments of the same origin and destination. *Southern R. Co. v. St. Louis &c. Co.*, 153 Fed. 728.

Commission and duly posted in its stations, and is not liable in damages therefor, notwithstanding the shipment was made under a lower rate quoted by the carrier to the shipper.⁸³

§ 2599. Changes in rates.—The subject of changes in rates of an interstate carrier has already been considered in treating of the jurisdiction of the Interstate Commerce Commission over the matter, and the right of a state or municipality to regulate fare or charges of a railroad or street railway company in regard to intrastate commerce has likewise been considered;⁸⁴ but there are certain phases of the latter subject, involving constitutional questions, relating to changes in rates, especially in the case of street railways, that have arisen in a number of recent cases and have not been fully treated in other connections. The most important of these is the question of the right to increase or reduce rates or charges fixed by charter or so-called franchise granted by a municipality. On the one hand, the state, or a public service or railroad commission authorized by the state has power to change an intrastate rate when, such change will conflict with no paramount law or constitutional inhibition,⁸⁵ and on the other hand, the great weight of authority is to the effect that in the absence of constitutional prohibition, a contract may be made under legislative authority as to rates or charges so that it cannot be changed without violating the constitutional provision

⁸³ *Texas &c. R. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. ed. 1011; *Gulf &c. R. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910; *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. 936. See also *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176, 47 L. ed. 290; *Macon Grocery Co. v. Atlantic &c. R. Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. ed. 300. But compare section 6 of amendment of 1910.

⁸⁴ Ante §§ 811, 1483 et seq.

⁸⁵ *Ft. Smith Light & Trac. Co. v. Ft. Smith*, 202 Fed. 581; *Home Tel. & Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176; *Board of Survey v. Bay St. R. Co.*, 224 Mass. 463, 113 N. E. 273; *City of Benwood v. Pub. Service Com.*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261 and note; *Milwaukee Elec. R. &c. Co. v. Railroad Com.*, 153 Wis. 592, 142 N. W. 491, L. R. A. 1915F, 744, Ann. Cas. 1915A, 911n.

against impairment of the obligation of contracts.⁸⁶ But the rate or charge may properly be regulated where there is a reserved power to amend or alter the charter.⁸⁷ It has been held in Georgia that the Railroad Commission has no power to alter rates fixed by a valid contract with a municipality, although it may do so where there is no such contract.⁸⁸ But, on the other hand, it has also been held that where a city grants a franchise it is in effect a grant by the state through the city as its agent and the state therefore has the right to change the rate of fare provided in the franchise granted to a street railway.⁸⁹ The

⁸⁶ *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592; *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; *Detroit United Ry. Co. v. State of Michigan*, 242 U. S. 238, 37 Sup. Ct. 87, 61 L. ed. 268; *Southern Iowa Elec. Co. v. City of Chareton* (U. S.), 41 Sup. Ct. 400; *Georgia Ry. & Co. v. Town of Decatur* (Ga.), 108 S. E. 615; *Pingree v. Michigan Cent. R. Co.*, 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274. In *Ottumwa Ry. & Co. v. Ottumwa* (Iowa), 173 N. W. 270, it is said that a city has no right to fix an unalterable fare for a certain period unless authorized by the legislature but it may be so authorized.

⁸⁷ *Parker v. Metropolitan R. Co.*, 109 Mass. 506; *Pawhuska v. Pawhuska Oil & Co.*, 64 Okla. 214, 166 Pac. 1058; *Manitowoc v. Manitowoc & Trac. Co.*, 145 Wis. 13, 129 N. W. 925, 140 Am. St. 1056. See also *United R. Co. v. Pub. Serv. Com.*, 270 Mo. 429, 192 S. W. 958. Many

cases, indeed, hold that this reserved power is implied, at least where no right is clearly given to a city to irrevocably fix the rate to the exclusion of such reserved power. See notes in L. R. A. 1915C, 261, 282, and *City of Woodburn v. Pub. Service Com.* 82 Ore. 114, 161 Pac. 391, L. R. A. 1917C, 98, 98 Ann. Cas. 1917E, 996, and cases cited. See also *Milwaukee Elec. Ry. & L. Co. v. Wisconsin*, 252 U. S. 100, 40 Sup. Ct. 306; *Groesbeck v. Detroit United Ry. (Mich.)*, 177 N. W. 726, 178 N. W. 1023.

⁸⁸ *Georgia Ry. & Co. v. Railroad Com.*, 149 Ga. 1, 98 S. E. 696.

⁸⁹ *City of Portland v. Public Service Com.*, 89 Ore. 325, 173 Pac. 1178. See also *Chicago & Co. R. Co. v. Nebraska*, 170 U. S. 67, 18 Sup. Ct. 513, 42 L. ed. 951; *Worcester v. Worcester Ry. Co.*, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. ed. 591; *Portland R. & Co. v. Portland*, 210 Fed. 667; *International Ry. Co. v. Rann*, 224 N. Y. 83, 120 N. E. 153. Increasing rates by Public Service or Railroad Commission has been held authorized in the following cases: *State v. Lewis*, 187 Ind. 564,

question as to whether a change in the rate by a public service commission would seem, in general, to depend on whether the state has power to make the change and whether it has delegated that power to the commission; and the power of the state in the particular instance, may depend upon whether the municipality has been granted the power to make an irrevocable contract as to the matter and whether it has done so, the prevailing rule being that, unless it impairs the obligation of a contract and thus violates the constitution, the state or its authorized commission may make such a change in the exercise of the police power.^{89a}

120 N. E. 129; *Mercer County Trac. Co. v. Board of Public Utility Comrs.*, 91 N. J. L. 719, 103 Atl. 1054; *Northampton &c. Co. v. Board of Pub. Utility Co.* (N. J.), 102 Atl. 930; *State v. Public Service Com.*, 103 Wash. 72, 173 Pac. 737. See also *Black v. New Orleans &c. Ry. Co.*, 145 La. 180, 82 So. 81; *Donham v. Pub. Service Com.*, 232 Mass. 309, 122 N. E. 397; *Omaha &c. St. Ry. Co. v. Nebraska &c. Com.*, 103 Nebr. 695, 173 N. W. 690. But compare *State v. Pub. Serv. Com.*, 101 Wash. 601, 172 Pac. 890, and see generally *International Ry. Co. v. Public Serv. Com.*, 226 N. Y. 474, 124 N. E. 123; *Westinghouse &c. Co. v. Binghamton Ry. Co.*, 255 Fed. 378. In several of the cases above cited it appeared that war conditions made the old rate insufficient, but in most of them the Commission or other state agency was expressly given power to increase rates in an "emergency" or the like. In *Columbus Ry. &c. Co. v. Columbus*, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. ed. 669, however, it is held that the franchise ordinance con-

stituted a binding contract and the company could not enjoin the enforcement of the contract rate on the ground that war conditions had rendered it unprofitable to operate the railway at such rate.

^{89a} The authorities are reviewed in the opinion and notes in A. L. R. in the following cases: *Quinby v. Public Service Com.*, 223 N. Y. 244, 119 N. E. 433, 3 A. L. R. 685; *Salt Lake City v. Utah Light & Trac. Co.*, 52 Utah 210, 173 Pac. 556, 3A. L. R. 715, 730-748. See also *City of San Antonio v. Pub. Service Co.* (U. S.), 41 Sup. Ct. 428; *Puget Sound Trac. &c. Co. v. Reynolds*, 244 U. S. 574, 61 L. ed. 1325, 37 Sup. Ct. 13; *Dubuque Elec. Co. v. Dubuque*, 260 Fed. 353, 10 A. L. R. 495; *Chicago v. O'Connell*, 278 Ill. 191, 116 N. E. 210, 8 A. L. R. 916; *Atlantic Coast &c. R. Co. v. Board*, 92 N. J. L. 168, 104 Atl. 218, 12 A. L. R. 737. In Ohio and some other states the right to make such an irrevocable contract seems to be given. *Columbus R. &c. Co. v. Columbus*, 249 U. S. 399, 63 L. ed. 669, 39 Sup. Ct. 349, 6 A. L. R. 1648; *Interurban Ry. &c. Co. v. Public Utility Com.*, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R.

§ 2600. **Remedy of carrier where rate regulation is confiscatory.**—At one time there appeared to be some doubt as to whether a suit for an injunction could be maintained in a Federal court against a state railroad commission, attorney general, or other state official to prevent the enforcement of a state rate regulation, but the question is now settled in the affirmative, and a state statute which provides for the establishment of rates without giving the carrier an opportunity to be heard and fixes penalties by fines so enormous and imprisonment so severe as to intimidate corporations and their officers from resorting to the courts to test the validity of the rates is unconstitutional as denying the equal protection of the laws.⁹⁰ The objection that the suit is in effect one against the state is untenable and where the regulation is properly claimed to be confiscatory a Federal question is presented although its determination may incidentally involve a question of fact.⁹¹ Injunctions have been granted or held proper in such cases in a number of instances,⁹² and in the Minnesota rate cases where the companies were proceeding to obey the regulation the suits were brought by the stockholders and the companies were made party defendants

696; *Water, Light &c. Co. v. City of Hot Springs*, 274 Fed. 827.

⁹⁰ *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, distinguished in *Chesapeake &c. R. Co. v. Conley*, 230 U. S. 513, 33 Sup. Ct. 985, 987, 57 L. ed. 1597. Compare also *Louisville &c. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 53, 58 L. ed. 229, where it was held that a penal provision was separable and did not impair the remaining portion of the statute. And see *Prentiss v. Atlantic &c. R. Co.* 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

⁹¹ *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714,

13 L. R. A. (N. S.) 932n, 14 Ann. Cas. 764; *Minnesota Rate Cases*, (*Simpson v. Shepard*), 230 U. S. 352, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n, 57 L. ed. 1511. See also *Willcox v. Consolidated Gas. Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134n. 15 Ann. Cas. 1034; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; *Herndon v. Chicago &c. Ry. Co.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. ed. 970.

⁹² In addition to the cases cited in the last preceding note, see also *Knott v. Chicago &c. R. Co.*, 230 U. S. 474, 33 Sup. Ct. 976, 57 L. ed. 1571.

together with the attorney general of the state and the railroad commission.⁹³ So, it may now be taken as well settled, as said in a still more recent case, that, "if the commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order."⁹⁴ Other phases of the subject as to

⁹³ Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151n, Ann. Cas. 1916A, 18n. In two of the cases representative shippers were also made party defendants.

⁹⁴ Louisville &c. R. Co. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 53, 58 L. ed. 229, where the court also says: "Presumably, the courts of the state as well as the Federal courts, would be open to the carrier for this purpose, without express statutory provision to that effect." Citing Home Tel. &c. Co. v. Los Angeles, 211 U. S. 265, 278, 29 Sup. Ct. 50, 53 L. ed. 176. In the case from which we have quoted the writer of the opinion also states what the court regards as the question for it to pass upon, and the difference between the scope of its power or duty and that of the state legislature or commission, as follows: "The right of the carrier to make its own intrastate rates is subject to the law of the state, constitutionally enacted. In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between shippers and carriers to pass upon the reasonableness of the compensation which the carrier has demanded for its services. In so do-

ing, the courts apply the common law. But it is the province of the legislature to make the law; and when the legislature or the body acting under its authority, establishes the rate to be thereafter charged by the carrier, it is the duty of the courts to enforce the rule of law so made unless the constitutional limits of the rate-making power have been transgressed. The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportations to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power. The questions of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be re-examined by the courts. The appropriate questions for the courts would be whether the commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permit-

what amounts to confiscation and the right and remedy of the company are considered in the authorities cited below.⁹⁵

ted by the prescribed rates is concerned, whether the commission went beyond the domain of the state's legislative power and violated the constitutional rights of property by imposing confiscatory requirements." See also *Columbus Ry. &c. Co. v. Columbus*, 249 U. S. 399, 63 L. ed. 669, 39 Sup. Ct. 349, 6 A. L. R. 1649. Ordinance reducing fares may be enjoined if unreasonable and insufficient to maintain a fair return value, though not strictly confiscatory. *Houston Elec. Co. v. City of Houston* (Tex. Civ. App.), 212 S. W. 198.

⁹⁵ *Puget Sound Trac. &c. Co. v. Reynolds*, 244 U. S. 574, 61 L. ed. 1325, 37 Sup. Ct. 705, 5 A. L. R. 14. Earnings of all lines of street railway to be considered, when operated as a single system and company may be compelled to establish through service for a single fare; *Fall River v. Public Service Com.*, 228 Mass. 575, 117 N. E. 915; note in 6 A. L. R. 1659. Compare also *St. Louis &c. Ry. Co. v. Pub. Service Com.* (U. S.), 41 Sup. Ct. 192; *Wisconsin &c. L. & P. Co. v. Railroad Com.*, 267 Fed. 711.

CHAPTER LXXXII.

INTERSTATE COMMERCE AND RATE REGULATION UNDER ACT OF 1920.

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§ 2605. **Scope of chapter.**—The Federal “Transportation Act, 1920,” also known as the Esch-Cummins Act, has four titles or divisions, relating respectively to definitions, termination of Federal control, disputes between carriers and their employes and subordinate officials, and amendments to the Interstate Commerce Act.¹ It is the purpose in this chapter to note all the im-

¹ Act Feb. 28, 1920, c. 91, secs. 200-211, 300-316, 400-441; Barnes’ Fed. Code, 1921 Supplement, §§ 7884-7897, 7902-7976, 10169a-10691; 262 Fed. Rep. (April 1, 1920), §§ 8563-8596c, 10071¼-10071¼ kk;

Public Pamphlet 152-66th Congress; Conference Report No. 650. Title III of the Act (sections 300-316) relates to disputes between carriers and employes, establishes a Railroad Labor Board to con-

portant changes thereby made in the Interstate Commerce Act, so far as they apply to railroads, and to consider their construction and effect.

§ 2606. Changes in first paragraph of section 1 of Interstate Commerce Act.—The chief change made in the first paragraph of section 1 of the Interstate Commerce Act in regard to the railroad transportation covered by the Act is found in the provision that it shall apply, among other things, to transportation “from or to any place in the United States to or from a foreign country, but only so far as such transportation or transmission takes place within the United States.” This does not expressly limit it to an “adjacent” foreign country as in the Act as it stood before this amendment, but does limit it so as to cover such transportation only so far as it takes place within the United States.^{1a} In defining the term “railroad,” the words

sider and determine such disputes certified to it by an Adjustment Board (for which provision is also made to be established by agreement between any carrier or group of carriers or carriers as a whole, and any employer or organization or group of organizations thereof) or otherwise brought before it as provided by the act. And it is made the duty of all carriers and their employes and agents to exert every reasonable effort and adopt every reasonable means to avoid any interruption to the operation of any carrier growing out of dispute between the carrier and employes or subordinate officials, and to settle it by conference if possible, and, if not, then to refer them to the board authorized by the act to hear and decide it.

Section 501 of Transportation Act 1920 also provides that the date of

taking effect of the provisions of section 10 of the “Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,” approved October 15, 1914, is deferred and extended to January 1, 1921, but such extension shall not apply to any corporation organized after January 1, 1918.

^{1a} The Act formerly used the expression “from any place in the United States to an adjacent foreign country” but it was recently held that it is the nature of the transportation as determined by the field of the carrier’s operation and not the direction of the movement that controls, and that the transportation of a passenger’s trunk from Canada to the United States is subject to the Act and under the Carmack Amendment the carrier may limit its liability for loss of such baggage by

“car floats” and “lighters” and “terminals” are added; and in defining “transportation” the words “locomotives” and “vessels” are added in the second paragraph.

§ 2607. Duty to furnish transportation—Through routes and just and reasonable rates.—The words “fares and charges” are added to the provision in the second paragraph relating to the duty to establish through routes and reasonable rates, and the provision in regard to making reasonable regulations with respect to exchange, interchange and return of cars is omitted, the subject being treated elsewhere, and the following provision is added: “And in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.”

§ 2608. Classification of property—Regulations and practices affecting transportation.—The fourth paragraph remains the same, except that the words “with reference to commerce between the states and with foreign countries” are omitted.

§ 2609. Car service.—The Act of May 29, 1917, added to the original act a number of provisions relating to car service. As amended by the present act, “car service” is defined to include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to the Act; it is made the duty of every railroad carrier subject to the Act to furnish safe and adequate car service and to establish and enforce just and reasonable rules and practices with respect to such service and any unjust and unreasonable rule or practice with respect thereto is prohibited and declared unlawful; particular provision is also made for distribution of cars for transportation of coal, and the carrier is subject to a

provision in its published tariff fixing the same unless a greater value is declared and excess charge paid.

Galveston &c. Ry. Co. v. Woodbury (U. S.), 41 Sup. Ct. 114.

penalty of \$100 for each violation thereof by it. The Interstate Commerce Commission is authorized by general or special order to require the rules and regulations of the carrier with respect to car service to be filed and, in the discretion of the Commission, to be incorporated in the carrier's schedules of rates, fares and charges, and to establish rules, regulations and practices for such car service. The Commission is also authorized to suspend the operation of such established rules, regulations and practices, in case of emergency or the like, for such time as it may determine, and make other just and reasonable directions for such service during such time, and give preference or priority in transportation; and in time of war or threatened war, the President may certify to the Commission that it is essential to national defense or security that certain traffic shall have preference or priority and the Commission shall direct that it be afforded. When the Commission is of the opinion that any railroad carrier subject to the Act is unable to transport the traffic offered it so as to properly serve the public, it may make just and reasonable directions as to handling, routing, and movement of the traffic of the carrier and its distribution over other lines of roads. The directions of the Commission as to such car service may be made by and through such agents or agencies as the Commission shall appoint, and the carriers are required to conform promptly thereto under penalty of not less than \$100 nor more than \$500 for each offense, and \$50 for each day's continuance thereof. It has been held that a suit to enjoin the practice of a railroad company, in time of shortage of coal cars, to deliver assigned cars, whether belonging to it or to others, to mines with which the car owners had contracts for coal, counting them against the quota of such mines under their respective ratings under this section, and distributing commercial cars only to fill such quotas, so that such mines are not given a share of cars available for ordinary commercial shipments unless and to the extent only that the assigned cars fail to equal the distributive share of such mines, was not within the jurisdiction of the Federal District Court, as only an administrative question for the determination of the Commission was presented.²

² *Corona Oil Co. v. Southern Ry. Co.*, 266 Fed. 726. It has also been

§ 2610. Extension and construction of new lines—Abandonment of line.—It is provided that no railroad carrier subject to the Act shall undertake the extension of its line, or construction of a new line, or acquire or operate any line or extension, or engage in transportation over or by means of it, unless it first obtains a certificate therefor from the Commission, obtained in the manner prescribed by the Act and the Commission as therein authorized; and that no such carrier shall abandon all or any portion of a line; or the operation thereof, unless a certificate is so obtained from the Commission to the effect that the present or future public convenience and necessity permit it. Any construction, operation, or abandonment contrary to these provisions may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of a State affected, or any party in interest, and any carrier, director, officer, receiver, operating trustee, les-

held that the "rules and regulations" referred to are those adopted by the Commission or railroad company, and the Commission cannot, even in a period of car shortage, suspend the rules prescribed by statute, but under the provision that when an emergency exists the Commission may give directions for priority in transportation, etc., it may suspend the rule for distribution of cars to coal mines prescribed by section 12. *Baltimore &c. R. Co. v. Lambert Run Coal Co.*, 267 Fed. 776 (certiorari denied in 41 Sup. Ct. 148). As to whether railroad company can appropriate shipper's coal on ground that it is necessary in order to operate its road, see *Mobile R. Co. v. Zimmern* (Ala.), 89 So. 475, and authorities there cited. Prior to this act it was held that, although it is the duty of a carrier to furnish safe and adequate cars for transportation of the kind of property usually carried,

it was not bound to furnish a special kind for the transportation of extraordinary articles and different from those usually furnished, such, for instance, as tank cars, and that the Interstate Commerce Commission could not require a carrier to accept such articles and furnish such cars. *United States v. Pennsylvania R. Co.*, 242 U. S. 209, 37 Sup. Ct. 95, 61 L. ed. 252; *Chicago &c. R. Co. v. Lawton Refining Co.*, 253 Fed. 705. See also *In re Private Cars*, 50 Inters. Com. Rep. 652; *St. Louis &c. Ry. Co. v. State* (Okla.), 184 Pac. 442, 7 A. L. R. 140 (citing §§ 2213, 2223). But compare *Atlantic Coast Line R. Co. v. Geraty*, 166 Fed. 10, 20 L. R. A. (N. S.) 310n; *Empire Refining Co. v. Pere Marquette R. Co.*, 10 Can. Ry. Cas. 158. See as to distribution of cars, *Pennsylvania R. Co. v. Weber* (U. S.), 42 Sup. Ct. 18.

see, agent, or person, acting for or employed by the carrier who knowingly authorizes, consents to, or permits any violation of such provisions, is liable to a fine of not more than \$5,000, or by imprisonment for not more than three years, or both.³

§ 2611. Car service and extension of line—Safe and adequate facilities.—The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any such carrier refusing or neglecting to comply with any such order of the Commission is liable to a penalty of \$100 for each day that such refusal or neglect continues, and this may be recovered in a civil action brought by the United States.⁴

³ It is held in a recent case, not involving this act, that increased street railway operating expenses and decreased revenue due to war conditions and an increased wage scale fixed by the National War Labor Board, though making the fares fixed by municipal franchise ordinance, do not justify the company in surrendering its franchise and abandoning service at such rates. *Columbus Ry. &c. Co. v. City of Columbus*, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. ed. 669, 6 A. L. R. 1648. See also as to the general rule against abandonment of a road. *State ex rel. Railroad Com.*

v. Bullock, 78 Fla. 321, 82 So. 866, 8 A. L. R. 232, 238, and cases cited in opinion and note.

⁴ See on the general subject of compelling extension of lines, etc., *Puget Sound Trac. &c. Co. v. Reynolds*, 244 U. S. 574, 37 Sup. Ct. 705, 61 L. ed. 1325, 5 A. L. R. 13 and note on page 36, et seq.; *Charleston Isle of Palms Trac. Co. v. Shealy*, 266 Fed. 406; *Atchison &c. R. Co. v. Railroad Com.*, 173 Cal. 577, 160 Pac. 828, 2 A. L. R. 975, and note on page 983, et seq. Compare also *Norfolk & Western Ry. Co. v. Public Service Com.*, 82 W. Va. 408, 96 S. E. 62, 8 A. L. R. 155. It has been

§ 2612. **Limitations of authority of commission as to extension or abandonment—Spur tracks, etc.—Street and interurban railways.**—It is expressly provided, however, that such authority of the Commission in regard to extension and abandonment shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

§ 2613. **Special rates and rebates prohibited—Unjust discrimination—Similar services.**—Section 2 of the Interstate Commerce Act remains unchanged except that it is made to cover the transmission of intelligence as well as the transportation of passengers or property. It is the aim of the statute to establish equality of rights among shippers, or those sending messages, for such services under substantially similar circumstances and conditions, and, the mere exigencies of competition do not justify discrimination in this regard for substantially like services. So, the findings of fact by the Commission in such a case can not be disturbed by judicial decree unless their action is arbitrary or transcends the legitimate bounds of their authority. Applying these principles, the Supreme Court of the United States, in a very recent decision, held that while switching charges are not required to be always the same, they must be alike where the service is under substantially similar circumstances and conditions, and that a practice of certain competing carriers of absorbing switching charges only when the line-haul carrier competes with the switching line, and refusing to absorb such charges

held under somewhat similar provisions of state statutes that the State Railroad Commission has no power to compel a street railroad company to extend its tracks and service beyond the termini and territory covered by its charter. *State ex rel. United R. Co. v. Public Service Com.*,

270 Mo. 429, 192 S. W. 958, 198 S. W. 872; *In re Union R. Co.* (N. Y.), P. U. R. 1916F, 773; *Scranton v. Scranton R. Co.* (Pa.), P. U. R. 1915C, 890. See also *Towers v. United R. &c. Co.*, 126 Md. 478, 95 Atl. 170.

when the switching line does not compete with the line-haul carrier is discrimination in violation of this section, and an injunction against the order of the Commission so finding and ruling, being limited to cases in which and the extent to which, the service was similar, was properly denied.⁵

§ 2614. Carrier must keep possession of freight until charges and rates paid.—An additional paragraph is added to section 3 of the Interstate Commerce Act, providing as follows: From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: Provided, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

§ 2615. Equal facilities and terms to connecting lines—Terminal facilities and compensation.—The second half of paragraph three is also amended by adding to the provision for equal facilities to connecting carriers without discrimination in their rates, fares, and charges between such connecting lines, the further provision that they shall not unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper. The following is also added: If the Commission finds it to be in the public interest and to be

⁵ *Seaboard Air Line Ry. Co. v. United States* (U. S.), 41 Sup. Ct. 24. For other recent decisions as to what is or is not an unlawful discrimination, rebate, or the like,

see *Underwood v. Hines* (Mo. App.), 222 S. W. 1037; *Baker v. J. W. McMurry Constr. Co.* (Mo.), 223 S. W. 45; *Shroyer v. Chicago &c. Ry. Co.* (Tex. Civ. App.), 222 S. W. 1095.

practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.⁶

§ 2616. Long and short hauls.—The provisions of section four in regard to charges for long and short hauls are retained, but a provision is added to the effect that if a circuitous rail line or route is, because of such circuitry, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not

⁶ Only undue or unreasonable discrimination, preference or prejudice is denounced by secs. 3 and 15, and whether it is unreasonable is for the commission. *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457, 38 Sup. Ct. 383, 62 L. ed. 831.

longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence; and rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon are not required to be changed until the further order or determination by the Commission.

§ 2617. Pooling—Division of traffic or earnings.—The provision of section 5 making pooling, of freight and division of earnings unlawful is retained, but an exception is made where it is upon specific approval by order of the Commission or as provided in paragraph 16 of section 1, and a new provision is added to the effect that, whenever the Commission is of opinion, after hearing upon application of the carrier or carriers or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable. Other changes and additions are also made as hereinafter shown.⁷

§ 2618. Acquisition of control of another carrier.—Whenever the Commission is of opinion, after hearing, such application that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers

⁷ This section seems to settle a vexed question as to the lawfulness of pooling contracts or arrangements.

into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises. And it may from time to time, for good cause shown, make such orders, supplemental to any order made under this or the last preceding paragraph, as it may deem necessary to appropriate.⁸

§ 2619. Consolidation—Systems.—Provisions are also added to section 5 to the effect that the Commission shall prepare and adopt a plan for the consolidation of railway properties into a limited number of systems, preserving competition, as fully as possible and maintaining wherever practicable the existing routes and channels of trade and commerce. Subject to these requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties. When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto, is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After such hearings, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be

⁸ This and the next following and materially different rule from section herein establish a new that which formerly existed.

in harmony with such plan. It is made lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties under the following conditions: (a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation above mentioned and must be approved by the Commission; (b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission in accordance with a subsequent section, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation; (c) Carriers proposing a consolidation under this section shall present their application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding. They are also relieved from the operation of anti-trust laws designated in the Act of October 15, 1914, and all other restraints or prohibition by State or Federal Law, so far as necessary to enable them to do anything authorized or required by such order.

§ 2620. Consolidation—Problems presented.—The preceding section in regard to consolidation seems to make a radical change

in the old law and theory requiring competition, and presents some difficult problems, although it will be observed that it requires competition to be preserved under the plan of consolidation as fully as possible. It does not, however, require the Commission to create new competition thereby. It also requires existing routes and channels of trade and commerce to be maintained wherever practicable. Uniform rates in the movement of competitive traffic will still have to be employed, it seems, for the Act requires the filing of schedules and publicity of rates and forbids rebates and discrimination. The requirement as to valuation of substantially the same rate of return on competitive systems presents practical difficulties, but this is only required so far as practicable. Due process of law seems to be provided for and the interest of the States is recognized, and consolidations by carriers are authorized in accordance with the plan finally adopted by the Commission, but they must be in harmony with that plan. Statutory impediments and even the common law in some States, and the federal anti-trust laws, would have prevented many consolidations contemplated by this section, in the absence of anything to the contrary, but the final provision of the section seems to remove all such impediments if it is constitutional and valid. There may be some question as to the power of Congress to do this, at least in times of peace, but it may possibly be held to exist under the power to establish post roads,⁹ or, more probably, under the commerce power.¹⁰ The Interstate Commerce Commission with the aid

⁹ See *Ex parte Rapier*, 143 U. S. 134, 12 Sup. Ct. 374, 36 L. ed. 102; *Dickey v. Turnpike Co.*, 7 Dana (Ky.) 113. Compare also *McCulloch v. Maryland*, 4 Wheat (U. S.) 316, 4 L. ed. 579; *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. ed. 295; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *Farmers Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *Casey v. Galli*, 94 U. S. 673, 678, 24 L. ed. 168.

¹⁰ *Pacific Railroad Removal Com.*, 115 U. S. 1, 16, 5 Sup. Ct. 1113, 29 L. ed. 319; *California v. Central Pacific R. Co.*, 127 U. S. 1, 35-40, 8 Sup. Ct. 1073, 32 L. ed. 150; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. ed. 808; *Northern Securities Co. v. United States*, 193 U. S. 197, 274, 24 Sup. Ct. 436, 48 L. ed. 679; *Houston &c. R. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341; *Federal Incor-*

of Professor Ripley, of Harvard, has already announced tentative places for voluntary consolidation, the general principle followed being that of hitching weaker and less profitable lines to more prosperous ones but at the same time preserving in the main the identity of existing great railroads.

§ 2621. Schedule of rates, etc., and traffic contracts—Maximum and minimum proportional rates to and from ports.—The first two paragraphs of section 6 relating to schedules and their filing remain the same in substance; and so does paragraph three except that a provision is added thereto authorizing the Commission to make rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering what is not changed if, in its judgment, not inconsistent with the public interest. Paragraphs 4 and 5 in regard to filing joint tariffs and copies of traffic contracts and the authority of the Commission to prescribe the form of schedules are unchanged in substance and so are paragraphs 7, 8, 9, 10, 11, and 12. Paragraph 13, however, is changed so as to give the Commission power to establish not only maximum proportional rates but also maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought or from which it is taken by the water carrier.¹¹

poration of Railroad Companies, 30 Harvard L. Rev. 589. See also *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905n; *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. But compare *Louisville &c. R. Co. v. Kentucky*, 161 U. S. 677, 702, 16 Sup. Ct. 714, 40 L. ed. 849.

¹¹ That both parties are charge-

able with notice of schedules duly filed and as to their binding effect, in addition to authorities cited in a preceding chapter on Interstate Commerce, see also the following very recent cases: *Hurt v. Atlanta &c. Ry. Co.*, 17 Ala. App. 241, 84 So. 631; *Pioneer Trust Co. v. Nashville &c. R. Co.*, 204 Mo. App. 328, 224 S. W. 109. Compare also *Lehigh Coal &c. Co. v. United States*, 266 Fed. 457; *Louisville &c. R. Co. v. Bishop*, 17 Ala. App. 320, 85 So. 859.

§ 2622. Investigation and authority of Commission over rates, etc., notwithstanding state laws.—New provisions are added to section 13 to the following effect: Whenever in any investigation under the Act, or instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act. And whenever, after full hearing, it finds that any such rate, fare charge classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged,

But see as to provisions for limitation of actions. *Mason v. Maine Cent. R. Co.* (Maine), 110 Atl. 425. As to reconsignment and extra charges for extra services see and

compare *Merchants Elevator Co. v. Great Northern Ry. Co.* (Minn.), 180 N. W. 105; *Boston &c. R. v. Great Falls Mfg. Co.* (N. H.), 111 Atl. 691.

and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

§ 2623. Intrastate rates—Effect on interstate rates—Controversy between Commission and States.—Before this amendment the Interstate Commerce Act did not prevent a State from regulating intrastate rates and prescribing reasonable rates for its exclusively internal traffic;¹² and this was true even though interstate commerce was incidentally affected thereby, so long as such interstate commerce was not directly or necessarily interfered with.¹³ But it was held that an intrastate rate could not be adopted to further commerce in the State as against that of other states and so as to discriminate against cities in other states.¹⁴ Conflict has already arisen between State Railroad or Public Utility Commissions and the Interstate Commerce Commission as to whether the state commission can fix a lower rate over an interstate line for alleged intrastate traffic than the proportionate through rate fixed by the Interstate Commerce Commission. The question has been presented in several freight cases and in a number of passenger cases where passengers have bought a local ticket to the state line and then a through ticket beyond. It has been held by the

¹² *Simpson v. Shepard* (Minnesota Rate Cases), 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511, Ann. Cas. 1916A, 18, 48 L. R. A. (N. S.) 1151n; Ann. Cas. 1916A, 18n; *Louisville &c. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229. Not bound to fix uniform rates for all commodities, but can not compel transportation of a particular commodity or class of traffic at a

loss. *Vandalia R. Co. v. Schnull* (U. S.), 41 Sup. Ct. 324.

¹³ *Southern Pac. Co. v. Railroad Com.*, 193 Fed. 699; *Chicago &c. R. Co. v. State Public Utilities Com.*, 268 Ill. 49, 108 N. E. 729.

¹⁴ *Texas &c. R. Co. v. United States*, 205 Fed. 380. See also *Houston &c. R. Co. v. United States*, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. 833.

Interstate Commerce Commission in strong opinions that the state cannot fix a lower proportionate local rate applicable to such cases, and the federal courts, so far as they have had the question before them, have generally taken this view, but the state commissions and several state courts have taken the opposite view. Injunctions, most, if not all, temporary, have been granted on both sides, but no final decisions of the courts upon the subject have yet been reported, so far as we have been able to discover, in any of the official reports.^{14a} The older decisions of the Supreme Court of the United States upholding intrastate rates although interstate commerce was to some extent affected proceeded mainly on the ground that Congress had not exercised its paramount authority rather than that it lacked the power, and a drift is noticeable in the later decisions towards considering the matter as an entirety, rather than separating the intrastate from the interstate business, and upholding the power of Congress over it. But whether Congress has the power and has given the interstate commerce commission authority to exercise it by this act so as to control the intrastate rate in such cases is still a vexed question that can finally be determined only by decision of the Supreme Court of the United States.

§ 2624. Commission may prescribe rates and classifications—Through routes—Extension of time of suspension of new rates.

^{14a} In *Lehigh Val. R. Co. v. Public Service Com.*, 272 Fed. 749, held that I. C. C. may change state rate. *Public Service Com. v. New York Cent. R. Co.*, 230 N. Y. 149, 129 N. E. 455, the court held that the Interstate Commerce Commission may prevent discrimination against interstate traffic by intrastate rates, although to do so it requires a state rate to be raised, but the commission had found that there was such discrimination, and in the state of the record the court declined to consider what the rule would otherwise be under this Act of 1920 and

whether the Commission had authority over intrastate rates on the theory of a fair return for the combined business of a carrier. In *People v. Long Island R. Co.*, 185 N. Y. S. 594, it was held that Congress had no power, either directly or through the Commission, to regulate intrastate rates on intrastate roads, but on appeal from the Special Term, the court held that the federal courts had exclusive jurisdiction of the suit, which was to enjoin the carrier from charging the rates fixed by the Interstate Commerce Commission. See also note in 14 A. L. R. 454.

—The first four paragraphs of section 15 are amended, and the principal changes are in authorizing the Commission to prescribe not only what will be the just and reasonable maximum rate or charge to be observed, but also what will be the just and reasonable rate, fare, or charge, or the maximum or minimum or maximum and minimum to be charged, (or in case of a through route where one of the carriers is a water line, the maximum rates, fares and charges); and in adding a provision to the fourth paragraph to the effect that in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest. The provision of paragraph 2 in regard to suspension of new rates, etc., pending a hearing is also changed by providing that if the hearing cannot be concluded within the 120 days originally allowed, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified.^{14b} Additional provisions are also added as shown in the next two sections herein.

^{14b} See *Director General v. Viscose Co.* (U. S.), 41 Sup. Ct. 151.

§ 2625. Commission may establish just division of joint rates, etc.—The Commission is also empowered where it is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), by order to prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, it may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission must give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

§ 2626. Live stock in carload lots—Transportation includes unloading, etc.—A new provision is also added to section 15, as part of the amendment of the first four paragraphs, to the effect that transportation wholly by railroad or ordinary live-stock in car-load lots destined to or received at public stockyards shall include necessary service of unloading and reloading en

route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations; and the Commission may prescribe or approve just and reasonable rules governing each of such excepted services. But this does not affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.¹⁵

§ 2627. Diversion contrary to routing instructions—Liability of carrier—Routing by Commission.—Two new paragraphs are inserted after the fifth paragraph of section 15, to the effect that whenever property is diverted or delivered by one carrier to another contrary to routing instructions in the bill of lading, unless such diversion or delivery is in compliance with a lawful order, rule, or regulation of the Commission, such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated. But the carrier to which the property is thus diverted is not liable in such suit or action if it can show, the burden of proof being upon it, that before carrying the property it had no notice, by bill of lading, waybill or otherwise, of the routing instructions. The successful plaintiff is entitled to recover against the defendant a reasonable attorney's fee to be taxed in the case. As to

¹⁵ It was held in a case arising before this amendment, where a carrier agreed to ship cattle within a reasonable time, that the contract was not made preferential in violation of the Interstate Commerce Act merely because the shipper re-

quested the carrier to extend the time of their confinement without unloading for feed, water and rest, to 36 hours as authorized by U. S. Comp. St., § 8651. *Baltimore &c. R. Co. v. Bower* (Ind. App.), 127 N. E. 458.

traffic not routed by the shipper, the Commission may, whenever the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another, and is to be there delivered to another.

§ 2628. Definitions of terms used in new section 15a.—A new section is added after section 15, to be known as section 15a. It consists of seventeen paragraphs. The first defines the terms used in such section. “Rates,” means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; “carrier” means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to the Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term “net railway operating income” means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

§ 2629. Rates and fair return under section 15a.—In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, that the Commission shall have reasonable latitude to modify or adjust

any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

§ 2630. What constitutes fair return—Commission to determine and make public—Basis for two years from March 1, 1920.—The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to $5\frac{1}{2}$ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

§ 2631. What constitutes aggregate value.—For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the

service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purposes of determining such aggregate value.

§ 2632. Amounts received in excess of fair return to be paid to United States.—The fifth paragraph provides that any carrier that receives a net railway operating income upon competitive traffic substantially and unreasonably in excess of a fair return upon the value of its railway property shall hold such part of the excess, as prescribed in the next paragraph, as trustee for, and shall pay it to, the United States.

§ 2633. Amount in excess of six per cent of value of properties—Disposition.—Paragraph six provides that if, under the provisions of the section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property is to be determined by the Commission in the manner provided in paragraph four.

§ 2634. Reserve fund—Rules for computation and recovery of excess income.—(7) For the purpose of paying dividends or interest on its stocks, bonds, or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

§ 2635. Contingent and revolving fund—Loans to carriers.—(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in

the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositories of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operations, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per

centum per annum, payable semi-annually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.¹⁶

§ 2636. Lease to carriers of equipment or facilities purchased from contingent fund.—(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall

¹⁶ See also section 210 of act in Return of Railroads.
chapter on Federal Control and

be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

§ 2637. Purchase of equipment by Commission—Rules and regulations.—(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

§ 2638. Reparation to shippers in case of overcharge—How far affected by section 15a.—(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

§ 2639. Retention of earnings from new lines.—(18) Any carrier, or any corporation organized to construct and operate

a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.

§ 2640. Limitation of actions—Action on order of reparation.—The second paragraph of section 16 is amended by striking out the last sentence thereof and substituting the provision that actions at law by carriers for recovery of charges shall be commenced within three years from the time the cause of action accrued; and all complaints for recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expirations, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment is deemed, for the purpose of the section, to accrue upon delivery or tender of delivery by the carrier. A petition for enforcement of an order for payment of money must be filed in the district court or state court within one year from the date of the order, and not afterwards. In an action on a reparation order made by Commission under sections 13 and 16 it has been held that it is the duty of the court, where the record before the Commission is offered in evidence against the order, to inquire whether there was any substantial evidence to justify it;¹⁷ but the findings and order are prima facie evidence

¹⁷ *Michigan Cent. R. Co. v. Fed.* 677, 587 (reversed, however, *Elliott*, 256 Fed. 18; *Atchison &c. R. Co. v. Spiller*, 246 Fed. 1, 249 on ground that there was such evidence).

of the facts therein stated, and the order cannot be rejected as unsupported when material documentary evidence before the Commission has not been introduced before the court because of its bulk.¹⁸ Such a claim for reparation may be assigned.¹⁹

§ 2641. Penalty for failure to obey orders of Commission.—The provision in the seventh paragraph of section 16 for the forfeiture of \$5,000 to the United States for failing or neglecting to obey an order made under section 15 is extended so as to apply also to orders made under sections 3 and 13.

§ 2642. Duty of Commission as to valuation of property of carriers—Mandamus.—Section 19a is changed only in the numbering of paragraphs. It has recently been held that Congress had authority to require the Interstate Commerce Commission, in ascertaining the value of the property of common carriers under section 19a, to ascertain the present cost of condemnation and damages, or of purchase in excess of the original cost or present value, and that it is the duty of the Commission to do so notwithstanding such ascertainment will open a wide range of proof and be very difficult.²⁰

§ 2643. Forms of accounts and documents—Commissioners may examine—Depreciation charges under operating expenses.—The fifth paragraph of section 20 is amended by adding provisions to the effect that the Commission shall prescribe, for carriers subject to the Act, the classes of property for which depreciation charges may properly be included under operating ex-

¹⁸ *Spiller v. Atchison &c. Ry. Co.* (U. S.), 40 Sup. Ct. 466. See also *Pennsylvania R. Co. v. Weber* (U. S.), 42 Sup. Ct. 18.

¹⁹ *Spiller v. Atchison &c. Ry. Co.* (U. S.), 40 Sup. Ct. 466 (also holding that a judgment of the Circuit Court of Appeals reversing a judgment of the District Court and

granting a new trial is not reviewable on writ of error but may be reviewed by the Supreme Court on Certiorari).

²⁰ *United States ex rel. Kansas City So. Ry. Co. v. Interstate Com. Com.* (U. S.), 40 Sup. Ct. 187 (awarding a writ of mandamus to compel the performance of such duty).

penses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose, and may, when it deems necessary, modify the classes and percentages so prescribed; that the carriers shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission; that no such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses; that the Commission shall at all times have access not only to all accounts, records, and memoranda, but also to all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to the Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and its agents or examiners shall have authority under the order of the Commission to inspect and examine the same. The provisions of this section are made to apply also to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this Act. It has been held that the provision in the original section, also included in this amendment, making it unlawful for carriers subject to the Act to keep any other accounts, records or memoranda than those prescribed or approved by the Commission refers only to interstate commerce, and that a state may compel a carrier to keep its books in a certain way, at least when they may also be kept, without conflict, as prescribed by the Commission, in order that the state may obtain information to be used in regulating intrastate rates. ²¹

²¹ *Texas R. Com. v. Texas &c. R. Co.* (Tex.), 140 S. W. 829.

§ 2644. **When liability of initial carrier is same as that of carrier by water.**—The eleventh paragraph of section 20 is amended by inserting immediately before the first proviso thereof, a proviso to the effect that if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same.

§ 2645. **Limitation of time for notice and filing of claims and bringing suit.**—Another proviso is also added making it unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period of institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or part thereof specified in the notice.²² A waiver by the carrier of such a stipulation for notice

²² Where a bill of lading in standard form did not contain a sufficient limitation or notice of limitation of time for bringing suit for damages for delay, it was held that the rights of the shipper were not affected thereby nor by the Interstate Commerce Act of 1887 or the Carmack Amendment, making it unlawful to stipulate for a shorter period for bringing suit than two years and requiring the carrier to issue a bill of lading in approved form. *Mason v. Maine Cent. R. Co. (Maine)*, 110 Atl. 425. A stipulation for notice in writing of claims for "loss or injury" to the property shipped does not apply where the claim is wholly for damages sustained by loss of a favor-

able market caused by delay in transportation. *Estes v. Denver &c. R. Co.*, 49 Colo. 378, 113 Pac. 1005; *McElwain v. Union Pac. R. Co.*, 101 Nebr. 484, 163 N. W. 845, 1 L. R. A. 533, and other authorities then cited in note on pages 538, 539. Compare also *Hunt v. Hines (Mo. App.)*, 223 S. W. 798. It is also held that stipulations limiting the time for giving notice from the delivery of the property at its destination do not apply where it is never delivered. *Morrell v. Northern Pac. Ry. Co. (N. Dak.)*, 179 N. W. 922, 924 (citing § 2295 and numerous cases). But compare *Georgia &c. R. Co. v. Blish Milling Co.*, 241 U. S. 196, 36 Sup. Ct. 546, 60 L. ed. 948. As to what is

would amount to discrimination among shippers and as such is prohibited.²⁸

§ 2646. Issuing of securities, assumption of obligations—Authority of Commission.—A new section designated as section 20a is added. It defines the term “carrier” as therein used and provides that from and after one hundred and twenty days after it takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed “securities”) or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purpose. The Commission may grant or deny the application or grant it in part or with modifications, and may, from time to time, for good cause shown, make supplemental orders and modifications as to the purposes, uses and

a sufficient compliance with a provision for notice, see *Snyder v. King*, 199 Mich. 345, 165 N. W. 840, 1 A. L. R. 893n.

²⁸ *Baltimore &c. Ry. Co. v. Leach*, 249 U. S. 217, 39 Sup. Ct.

254, 63 L. ed. 570; *Chicago &c. Ry. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033, Ann. Cas. 1914A, 501n; *Morrell v. Northern Pac. Ry. Co. (N. Dak.)*, 179 N. W. 922, 924.

extent or conditions to and under which any securities so therefor authorized or the proceeds thereof may be applied, subject to the above requirements. The form of the application and matters to be included must be such as the Commission prescribes, and, as well as the certificate of notification hereinafter provided for, must be verified. Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or by other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission. The Commission shall cause notice of the application to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority. The jurisdiction conferred upon the Commission is exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein; but no guaranty or obligation as to such securities by the United States is to be implied. The foregoing provisions of this section do not apply to notes to be issued by the carrier maturing not more than two years after the date thereof and aggregating (together with all other then outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding. In the case of securities having no par value, the par value for the purposes of this paragraph shall be the fair market value as of the date of issue. Within ten days after the making of such notes the car-

rier issuing the same shall file with the Commission a certificate of notification, in such form as may from time to time be determined and prescribed by the Commission, setting forth as nearly as may be the same matters as those required in respect of applications for authority to issue other securities: Provided, That in any subsequent funding of such notes the provisions of this section respecting other securities shall apply. The Commission shall require periodical or special reports from each carrier hereafter issuing any securities, including such notes, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds.

§ 2647. Securities issued in violation of section 20a are void—Penalty.—It is also provided in said section 20a that any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but none that is issued or assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, he may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security

so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, is guilty of a misdemeanor and punishable by a fine of not less than \$1,000 nor more than \$10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

§ 2648. Holding position of officer or director of more than one corporation, etc., forbidden—Penalty.—Said section 20a also provides that it shall be unlawful, after December 31, 1921, for any person to hold the position of officer or director of more than one carrier, unless authorized by order of the Commission, upon due showing, in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby; and after this section takes effect it shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account. Violation of these provisions is a misdemeanor, and on conviction in any United States court having jurisdiction is punishable by a fine of not less than \$1,000, nor more than \$10,000, or by imprisonment for not less than one

year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.²⁴

§ 2649. Schedules and distribution where carriage is partly by water—Through bills of lading.—Three new sections are added at the end of the Interstate Commerce Act, relating largely to carriers by water and the furnishing and publishing of schedules to be distributed to and by railroad companies for the information of export shippers. They also provide, however, that upon application of any shipper a carrier by railroad shall make request for, and the carrier by water shall upon receipt of such request name, a specific rate applying for such sailing, and upon such commodity as shall be embraced in the inquiry, and shall name in connection with such rate, port charges, if any, which accrue in addition to the vessel's rates and are not otherwise published by the railway as in addition to or absorbed in the railway rate; and that when any consignor delivers a shipment to any of the places specified by the Commission, to be delivered by a railway carrier to one of the vessels upon which space has been reserved at a specified rate previously ascertained, as provided herein, for the transportation by water from and for a port named in the aforesaid schedule, the railway carrier shall issue a through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge; but the carrier by railroad shall not be liable to the consignor, consignee, or other person interested in the shipment after its delivery to the vessel; and the issuance of such bill of lading shall not be held "an arrangement for continuous carriage or shipment" within the meaning of the Act. The Commission

²⁴ Sections 434-438 in regard to bills of lading amend paragraphs 11 and 12 of section 20 of the Interstate Commerce Act, as amended in the respects hereinbefore shown in our sections headed "when lia-

bility of carrier is same as that of carrier by water" and "Limitation of time for notice and filing claims and bringing suits." See also Barnes' Fed. Code, Supplement 1921, § 7976 and note.

shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. It is the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier.

§ 2650. Safety devices for railroads.—The last of the three new sections provides that the Commission may order any carrier by railroad subject to the Act, within a time specified in the order, to install automatic train-stop, or train-control devices or other safety devices, complying with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad, such order to be issued and published at least two years before the date specified for its fulfillment; and failure to comply with the order subjects the carrier to a penalty of \$100 for each day of such refusal or neglect, to be recovered in a civil action by the United States. But a carrier shall not be held to be negligent because of its failure to install such devices upon a portion of its railroad not included in the order; and any action arising because of an accident happening upon such portion of its railroad must be determined without consideration of the use of such devices upon another portion of its railroad. The violation of this section by the carrier may give rise to a right or cause of action for damages to one injured thereby as well as the penalty prescribed in favor of the United States. This, though not expressly provided, seems clearly to be contemplated by the statute, and the decision of the Supreme Court of the United States so holding as to the Safety Appliance Act seems conclusive to that effect.²⁵

²⁵ *Texas &c. R. Co. v. Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. ed. 874 But it may admit of some question as to just how far

or to what extent this section should be given the same construction and effect in other respects as that given to the Safety Appliance Act.

CHAPTER LXXXIII.

FEDERAL CONTROL AND RETURN OF RAILROADS UNDER TRANSPORTATION ACT.

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| Sec. | Sec. |
| 2655. Scope and purpose of chapter. | 2668. Funding indebtedness for additions and betterments—Where indebtedness for equipment is not refundable. |
| 2656. Effect of taking Federal control—Complete control. | 2669. Notes and other evidences of indebtedness. |
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| 2667. Refunding of carriers' indebtedness to United States—Set-off. | 2680. Advice or assistance from Federal Reserve Board—Appropriation. |
| | 2681. Evidences of indebtedness to United States by carriers. |

§ 2655. **Scope and purpose of chapter.**—It is proposed in this chapter to review the authorities upon questions arising under the Federal Control Act of March 21, 1918,¹ and other war statutes and conditions, so far as such questions are still likely to be involved in railroad litigation, pending or future, and to consider in such detail as may be advisable the provisions of the Transportation Act 1920,² relating to federal control, termination of federal control, and return of railroads.

§ 2656. **Effect of taking Federal control—Complete control.**—The President, in taking federal control of railroads took control of the entire organization, including officers, directors and employees, and not merely of the physical properties.³ The assumption of federal control was in effect a mobilization under one head of the persons and corporations engaged in the business of transportation, as a proper means of meeting the emergencies imposed by a state of war.⁴

¹ Barnes' Fed. Code 1919, sec. 1056, et seq. See also section 10154.

² Act Feb. 28, 1920, c. 91, Title II, sections 200-211; Barnes' Fed. Code, Supplement 1921, §§ 10169a-10169l; 262 Fed. Rep. ec. 1071¼, et seq.

³ Christian v. Great Northern Ry. Co., 171 Wis. 266, 177 N. W. 29, where it is also held that this power was not exerted directly upon the employer but through the existing organization and a railroad freight agent of the company was a proper person upon whom to serve summons against the company under St. 1917, § 2637, subd. 6. See also Clements v. Southern Ry. Co., 179 N. Car. 225, 102 S. E. 399; Lanier v. Pullman Co., 180 N. Car. 406, 105 S. E. 21. But compare Dooley v. Pennsylvania R. Co., 250 Fed. 142; Southern Cotton Oil Co. v. Atlantic

Coast Line R. Co., 257 Fed. 138. And see Vicksburg &c. Ry. Co. v. Anderson-Tully Co. (U. S.), 41 Sup. Ct. 524.

⁴ Vaughn v. State, 17 Ala. App. 35, 81 So. 417. See also Northern Pac. R. Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 505, 63 L. ed. 987; Wainwright v. Pennsylvania R. Co., 253 Fed. 459; Lavalley v. Northern Pac. Ry. Co. 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659, 1661. But see as to limitation of what is included in Federal control. United States R. Adm. v. Burch, 254 Fed. 140; Public Utilities Com. v. Springfield Terminal Ry. Co., 292 Ill. 505, 127 N. E. 128; Lincoln Commercial Club v. Missouri Pac. R. Co., 103 Nebr. 504, 172 N. W. 687, and note in 4 A. L. R. 1703 et seq. It is held that the taking control for war pur-

§ 2657. Effect of Federal control—Extent to which it affects action of states or courts.—The fact that a railroad company was under federal control did not prevent a court from granting an injunction restraining the arbitrary refusal to furnish cars to a shipper, even though the carrier might be considered an agency or instrumentality of the federal government,⁵ and it has been held that a state Public Utilities Commission is not prevented by this Act or the General Orders of the Director General, from taking jurisdiction to make an order requiring a railroad company to erect a new station and construct a spur track;⁶ that the Industrial Commission in New York could award against the Pullman Car Company compensation for injuries to a porter received while the car was operated by the Director General;⁷ that the government in taking over the railroads did not assume exclusive authority to regulate rates so as to prevent a state Public Utilities Commission from permitting an increase of switching charges of a railroad;⁸ and that a suit for a penalty provided by the Mississippi code for failure to maintain a plantation crossing may be instituted against the company although the Director General was in control at the time the penalty was incurred.⁹ But the power of the state over local or intrastate

poses under Act of Aug. 29, 1916, did not suspend the operation of hours of service Act. *United States v. Geer*, 268 Fed. 385. Railroad company under federal control has also been held subject to franchise tax. *St. Louis &c. Ry. Co. v. Middlekamp* (U. S.), 41 Sup. Ct. 489. See also as to taxation of foreign company, *Wallace v. Hines*, 253 U. S. 66, 40 Sup. Ct. 435.

⁵ *Hines v. Henaghan*, 265 Fed. 831.

⁶ *Chicago &c. R. Co. v. Public Utilities Com.* (Colo.), 190 Pac. 539. See also *Commercial Club v. Chicago &c. R. Co.*, 142 Minn. 169, 171 N. W. 312, P. U. R. 1919D, 417. But compare *St. Louis &c. R. Co.*

v. State (Okla.), 170 Pac. 596, 170 Pac. 1146, P. U. R. 1918C, 596.

⁷ *Bryant v. Pullman Co.*, 189 App. Div. 311, 177 N. Y. S. 488. But see *Pullman Co. v. Sweeney*, 269 Fed. 764.

⁸ *Public Utilities Com. v. Springfield Terminal R. Co.*, 292 Ill. 505, 127 N. E. 128. See also *Fish v. Rutland R. Co.*, 189 App. Div. 352, 178 N. Y. S. 439.

⁹ *Mobile &c. R. Co. v. Jobe* 122 Miss. 696, 84 So. 910. But in *Hines v. Taylor* (Fla.), 84 So. 381, it is held that the state statute providing for recovery of double damages for killing stock by reason of failure to fence was not applicable in action against railroad operated by

rates is subordinate to the war power of the President to such an extent that he had the power to fix intrastate as well as interstate rates for railroads under federal control.¹⁰ And while the federal control Act should not be construed as impairing ordinary lawful police regulations of the states not in conflict with the Act, control of the operation of railroads by restraining order or injunction and preventing the Director General from transferring his employes from one point to another and from regulating their duties is in contravention of the Act.¹¹ So no attachment or writ in the nature of levy and execution, so as to interfere with the possession of the Director General can be issued against the property.¹² But it has been held that railroads are not exempt by this Act from garnishment in a state court of an account due from a non-resident road for the purpose of securing jurisdiction over the latter.¹³

§ 2658. Actions not limited to those arising out of breach of duty as common carrier.—Actions against carriers under fed-

the federal government under the Federal Control Act, though attorney's fees might be recovered in suit against the Director General. See also *Missouri Pac. R. Co. v. Ault* (U. S.), 41 Sup. Ct. 593; *Norfolk &c. R. Co. v. Owens* (U. S.), 41 Sup. Ct. 597; *State v. Hines* (Tex. Civ. App.), 228 S. W. 667.

¹⁰ *Northern Pac. Ry. Co. v. State of North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. ed. 897; *Dakota Cent. Tel. Co. v. State of South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. ed. 910, 4 A. L. R. 1623, and note on p. 1705 et seq. See also *Kneeland-Bigelow Co. v. Michigan Cent. R. Co.*, 207 Mich. 546, 174 N. W. 605; *State v. Public Service Com.* (Wash.), 188 Pac. 7.

¹¹ *Nueces Valley Town-Site Co. v. McAdoo*, 257 Fed. 143.

¹² *Dahn v. McAdoo*, 256 Fed. 549; *Dooley v. Pennsylvania R. Co.*, 250 Fed. 142; *Louisville &c. R. Co. v. Steele*, 180 Ky. 290, 202 S. W. 878; *West v. New York &c. R. Co.*, 233 Mass. 162, 123 N. E. 621 (but judgment may be obtained). See also *Johnson v. McAdoo*, 257 Fed. 757. But compare *Salant v. Pennsylvania R. Co.*, 188 App. Div. 851, 177 N. Y. 475; Director General was held liable to garnishment in *Hines v. Minor* (Ga. App.), 105 S. E. 851.

¹³ *L. N. Dantzler Lumber Co. v. Texas &c. R. Co.*, 119 Miss. 328, 80 So. 770, 4 A. L. R. 1669. Compare *Davis v. L. N. Dantzler Lumber Co.* (Miss.), 89 So. 148; *Fitzhugh v. Grand Trunk Ry.* (N. H.), 109 Atl. 562.

eral control authorized by the Federal Control Act are not limited to such as arise out of a breach of duty imposed on the carrier as a common carrier;¹⁴ nor is the liability of the Director General limited to actions brought solely to enforce purely common carrier liabilities, and it has been held that he may be joined with the railroad company in an action for damages caused by a fire caused by the operation of the railroad.¹⁵ It has also been held that the double damages for injuries to stock by reason of failure to fence imposed by a state statute are not in the nature of a penalty but, on the contrary, are in the nature of compensation provided for by a lawful police regulation, which is not to be impaired by the Federal Control Act, and that a judgment therefor may be rendered against the Director General.¹⁶

§ 2659. Parties to actions—Director General or corporation—When company is liable.—There is sharp conflict among the authorities as to whether actions were required to be brought against the Director General where he had made a general order to that effect or could be brought against the corporation. It is held by a number of the courts that an action for death or injury to person or property, or for loss or damage to property, arising while under federal control should be brought against the Director General in accordance with his general order,¹⁷ but cases

¹⁴ *Hines v. Sangstad S. S. Co.*, 266 Fed. 502.

¹⁵ *Anderson v. Minneapolis &c. Ry. Co. (Minn.)*, 179 N. W. 45, See also *Hines v. Zellner (Ga. App.)*, 103 S. E. 97. Compare *Beebe v. Minneapolis &c. Ry. Co. (Wis.)*, 182 N. W. 743.

¹⁶ *Chilton v. Hines (Mo. App.)*, 224 S. W. 18. But it is held that he is not liable for punitive damages for wilful tort of his agents and servants. *Massey v. Hines (S. Car.)*, 108 S. E. 181. And compare *Hines v. Taylor (Fla.)*, 84 So. 381, with the Missouri case. See also Common-

wealth v. Louisville &c. R. Co., 189 Ky. 309, 224 S. W. 847, 11 A. L. R. 1446.

¹⁷ *Rutherford v. Union Pac. R. Co.*, 254 Fed. 880; *Mardis v. Hines*, 258 Fed. 945; *Haubert v. Baltimore &c. R. Co.*, 259 Fed. 361; *McGrath v. Northern Pac. R. Co. (N. Dak.)*, 177 N. W. 383; *Castle v. Southern R. Co.*, 112 S. Car. 407, 99 S. E. 846; *Baker v. Bell (Tex. Civ. App.)*, 219 S. W. 245 (holding that motion to dismiss as to receiver should have been sustained). See also *Hines v. Robey (Tex. Civ. App.)*, 225 S. W. 201.

especially the earlier ones, are to the effect that such an order is void as in conflict with the Act of March 21, 1918, which provides that actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law, and in an action against the carrier no defense shall be made thereto, on the ground that the carrier is an instrumentality or agency of the federal government.¹⁸ Even under this rule, however, it has been held that a judgment against the Director General will not be reversed on his appeal where he defended the action on the merits and did not raise the question until after verdict.¹⁹ It has also been held that it would be inconsistent to subject a railroad company to liability for acts and conduct of public agents operating the property under federal control, and that a claimant under such circumstances is limited to right of action against the federal control agency and

¹⁸ *Jensen v. Lehigh Val. R. Co.*, 255 Fed. 795; *Vaughn v. State*, 17 Ala. App. 35, 81 So. 417; *Bolton v. Hines* (Ark.), 221 S. W. 459 (Director General not liable and cannot be sued on cause of action that accrued prior to his appointment); *Lavalle v. Northern Pac. Ry. Co.* 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; *Gowan v. McAdoo*, 143 Minn. 227, 173 N. W. 440; *McGregor v. Great Northern R. Co.* (N. Dak.), 72 N. W. 841, 4 A. L. R. 1635 (as to causes of action already vested); *Parkinson v. Chicago &c. R. Co.* (S. Dak.), 178 N. W. 293; *Franke v. Chicago &c. Ry. Co.*, 170 Wis. 71, 173 N. W. 701. See also to effect that cause of action already accrued could be pursued against the railroad company. *Missouri Pac. R. Co. v. Ault*, 140 Ark. 572, 216 S. W. 3. And it has been held that an order limiting the existing right of a plaintiff so as to require that suit be brought only in the county or

district of his residence was ineffective. *Friesen v. Chicago &c. R. Co.*, 254 Fed. 875; *Hines v. Kelly* (Tex. Civ. App.), 222 S. W. 648; *El Paso &c. R. Co. v. Lovick* (Tex. Civ. App.), 210 S. W. 283. See also *McGovern & Co. v. Atlantic &c. R. Co.*, 180 N. Car. 219, 104 S. E. 534; *Vann v. Southern R. Co.*, 180 N. Car. 659, 104 S. E. 170 (Director General and company properly joined); *Hill v. Director General*, 178 N. Car. 607, 101 S. E. 376; *Chambers &c. v. Hines* (Tex. Civ. App.), 225 S. W. 200. But compare *Rhodes v. Tatum* (Tex. Civ. App.), 206 S. W. 114, and see *West v. New York &c. R. Co.* (Mass.), 123 N. E. 621. Now settled that order or to venue is valid. *Alabama &c. Ry. Co. v. Journey* (U. S.), 42 Sup. Ct. 6.

¹⁹ *Leemans v. Hines*, 171 Wis. 278, 177 N. W. 27. And the Director General was held precluded from obtaining a removal of the cause to a federal court where the suit was

to such sources of payment as are provided by the Federal Control Act.²⁰ But it is generally held, aside from the question as to the orders of the Director General, that what has been called a vested right of action, on a cause of action existing before his appointment, may be pursued to judgment either by or against the corporation,²¹ and, in some instances at least the liability of the company has been held to be the same even though the cause

brought against a domestic corporation and he had voluntarily appeared and obtained a stay of proceedings. *Hill v. Director General*, 178 N. Car. 607, 101 S. E. 376. So it has been held that the company may waive the objection by not making it in time, that it was not liable to be sued in the action on the ground that it was under control of the Director General and the agent on which service was made was his agent and not that of the company. *Wyman v. Atlantic Coast &c. R. Co. (S. Car.)*, 104 S. E. 542. And in an action against the railroad company and the Director General, the company cannot complain that judgment was rendered against the Director General alone. *Dudley v. Atlantic Coast Line R. Co.*, 180 N. Car. 34, 103 S. E. 905.

²⁰ *Haubert v. Baltimore &c. R. Co.*, 259 Fed. 361; *Hatcher v. Atchison &c. Ry. Co.*, 258 Fed. 952. Compare also *Johnson v. McAdoo*, 257 Fed. 757; *Erie R. Co. v. Caldwell*, 264 Fed. 947; *Blevins v. Hines*, 264 Fed. 1005; *Commonwealth v. Louisville &c. R. Co.*, 189 Ky. 309, 224 S. W. 847; *Groves v. Grand Trunk &c. Ry. Co. (Mich.)*, 178 N. W. 232; *Schumacher v. Pennsylvania R. Co.*, 106 Misc.

564, 175 N. Y. S. 84; *McGrath v. Northern Pac. R. Co. (N. Dak.)*, 177 N. W. 383; *Morrell v. Northern Pac. Ry. Co. (N. Dak.)*, 179 N. W. 922; *Texas &c. R. Co. v. Clevenger (Tex. Civ. App.)*, 223 S. W. 1036. But see *Wheeler v. Atlantic Coast Line R. Co. (Ga. App.)*, 103 S. E. 178. The statutory presumption of negligence in Georgia is held applicable in an action against the Director General where the damage is caused by the running of locomotives or cars of a railroad under his control. *Hines v. McCook (Ga. App.)*, 103 S. E. 690. But Director General is not liable for willfulness and punitive damages. *Rowell v. Hines*, 114 S. Car. 339, 103 S. E. 545; *Ginn v. U. S. Railroad Adm.*, 114 S. Car. 236, 103 S. E. 548.

²¹ *Louisville &c. R. Co. v. Western Un. Teleg. Co.*, 250 U. S. 363, 39 Sup. Ct. 513, 63 L. ed. 1032; *Vicksburg &c. R. Co. v. Anderson-Tully Co. (U. S.)*, 41 Sup. Ct. 524 (action to enforce order requiring carrier to repay shipper excessive charges collected before federal control can be maintained against company during such control); *Muir v. Louisville &c. R. Co.*, 247 Fed. 888; *Postal Teleg. &c. Co. v. Call*, 255 Fed. 850; *Scarborough v.*

of action arose while the railroad was under federal control.²² The question now seems to set at rest by a very recent decision of the Supreme Court of the United States, holding that the corporations are not liable for acts of the Director General while the railroads were under his control and that he is the proper party to be sued, or substituted, and a judgment against the corporation, thereafter is not authorized.^{22a} In a recent Michigan case it was held that the relation between the railroad and the government after the road had been placed under federal control, was that of landlord and tenant, or analogous thereto, and that under the rule in that state a railroad company which has leased its property to another is not liable for the negligent acts of the lessee.²⁸

Louisiana &c. R. Co., 145 La. 323, 82 So. 286; *West v. New York &c. R. Co.*, 233 Mass. 162, 123 N. E. 621; *Benjamin Moore Co. v. Atchison &c. R. Co.*, 106 Misc. 58, 174 N. Y. S. 60; *LeClair v. Montpelier &c. R. Co.*, 93 Vt. 92, 106 Atl. 587. And in *Bolton v. Hines*, 143 Ark. 601, 221 S. W. 459, it is held that no action against the Director General can be maintained on a cause accruing before his appointment. So, also, in *Standley v. U. S. R. R. Administration*, 271 Fed. 794. But compare *Hines v. Taylor* (Fla.), 84 So. 381; *Hines v. Zellner* (Ga. App.), 103 S. E. 97; *Rose v. Hines* (Ga. App.), 104 S. E. 784.

²²*Smith v. Babcock &c. Co.*, 260 Fed. 679; *Johnson v. McAdoo*, 257 Fed. 757; *Missouri Pac. R. Co. v. Ault*, 140 Ark. 572, 216 S. W. 3. See also *Witherspoon v. Postal Teleg. &c. Co.*, 257 Fed. 758; *Vaughn v. State*, 17 Ala. App. 35, 81 So. 417; *McAdoo v. Martin*, 24 Ga. App. 485, 101 S. E. 312; *Clapp v. American Exp. Co.*, 234 Mass. 174, 125 N. E. 162, and authorities cited in third note to this section.

^{22a}*Missouri Pac. R. Co. v. Ault*

(U. S.), 41 Sup. Ct. 593, followed in *Galehouse v. Baltimore &c. Ry. Co.*, 274 Fed. 370. The conflicting decisions on both sides are reviewed in note in 14 A. L. R. 235 and other notes in that series therein referred to. The decision of the Supreme Court of the United States above cited may, perhaps, leave open the question as to liability between Dec. 26, 1917, the date of the President's proclamation and Jan. 1, 1918, the date to which General Order 50 relates; and there is some reason for the view that under the arrangements made and the standard contract and provisions of the law the corporation may be held liable during that time. Director General has been held proper plaintiff to recover claim accruing to United States under federal control. *Hines v. Struthers Furnace Co.*, 271 Fed. 792. He has also been held entitled to remove cause in action of tort against him in cause of action arising out of federal control, *Stark v. Payne*, 271 Fed. 477.

²³*Peacock v. Detroit &c. R. Co.*, 208 Mich. 403, 175 N. W. 580.

§ 2660. **Transportation Act, 1920—Termination of Federal control—Extent to which powers of President withdrawn.**—“Federal control” is defined in the Transportation Act, 1920, as meaning the possession, use, control, and operation of railroads and systems of transportation, taken over or assumed by the President under section 1 of the Act of August 29, 1916, making appropriations for the support of the army for the fiscal year ending June 30, 1917, or under the Federal Control Act of March 21, 1918, and its amendments; and it is provided that such control should terminate at 12:01 a. m., March 1, 1920, and the President should then relinquish possession and control of such railroads and systems and cease the use and operation thereof. The powers conferred upon the President by the Federal Control Act relating to such use and operation, to the control or supervision of such carriers or their business, and to their rates, fares, charges, classifications, regulations and practices are expressly taken away; and so are those as to the purchase of their securities, except in pursuance of contracts or agreements entered into before the termination of Federal control, or as a proper incident to the adjustment, settlement, liquidation and winding up of matters arising out of such control; and so, too, are those relating to the use for any of such purposes (except in pursuance of contracts or agreements entered into before the termination of Federal control, and except as a necessary or proper incident to the winding up or settling of matters arising out of Federal control, and except as provided in section 202) of the revolving fund created by such Act, or of any of the additions thereto made under such Act, or by the Act entitled “An Act to supply a deficiency in the appropriation for carrying out the Act entitled ‘An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,’ approved March 21, 1918,” approved June 30, 1919. But nothing in this Act is to be construed as affecting or limiting the power of the President in time of war (under section 1 of said Act of August 29, 1916)

to take possession and assume control of any system of transportation and utilize the same.²⁴

§ 2661. Settlement of matters arising out of Federal control—Appropriations.—Special provision is made, in a separate section, as to government owned boats and transportation facilities on inland waterways and matters relative to their transfer and control are turned over to the Secretary of War. Then follow important sections relating to settlement of matters arising out of Federal control. It is made the duty of the President, as soon as practicable, to adjust, settle, liquidate, and wind up all such matters, including compensation, and all questions and disputes of whatever nature, arising out of or incident to Federal control. For these purposes all unexpended balances in the revolving fund created by the Federal Control Act or of the money appropriated by the Deficiency Appropriation Act of June 30, 1919, are reappropriated and made available until expended, and so are all moneys derived from the operation of carriers or otherwise arising out of Federal; and a further appropriation of \$200,000,000, out of any money in the Treasury not otherwise appropriated is made.²⁵

²⁴ Instead of adopting the Senate Bill repealing the Federal Control Act, the conference committee adopted the method of the House Bill specifying the powers given by that act which the President should no longer exercise after the termination of Federal control, as herein shown. See also Conference Report No. 650. It has been held that the liability of railroads for negligence occurring during the period of federal control, and recovery against them in such cases, is not affected by the return of the railroads to their owners under this act. *Gilliam v. Atlantic Coast Line R. Co.*, 179 N. Car. 508, 103 S. E. 10; *Clements v. Southern R. Co.*, 179 N. Car. 225, 102 S. E. 399.

²⁵ It is stated in the conference report that for the purposes stated this section makes available the unexpended balance of the revolving fund created by the Federal Control Act, and of the \$750,000,000 deficiency appropriation of June 30, 1919, and also all moneys derived from the operation of carriers or otherwise arising out of Federal control, and adds an appropriation of \$200,000,000 in order to enable the President to comply with the provision of section 207, that the carriers when restored to their own operation shall have on hand at least half a months' working capital. See also Barnes' Fed. Code, Supplement 1921, §§ 10159, 10159a.

§ 2662. Compensation of carriers with which no contract made—Effect of acceptance of benefits.—Section 203 provides that upon the request of any carrier entitled to just compensation under the Federal Control Act, but with which no contract fixing or waiving compensation has been made and which has made no waiver of compensation, the President shall pay to it so much of the amount he may determine to be just compensation as may be necessary to enable such carrier to have the sums required for interest, taxes, and other corporate charges and expenses referred to in paragraph (b) of section 7 of the standard contract between the United States and the carriers, accruing during the period for which such carrier is entitled to just compensation under the Federal Control Act, and also the sums required for dividends declared and paid during the same period, including, also, in addition, a sum equal to that proportion of such last dividend which the period between its payment and the termination of the period for which the carrier is entitled to just compensation under the Federal Control Act bears to the last dividend period; and he may, in his discretion, pay to such carrier the whole or any part of the remainder of such estimated amount of just compensation. The acceptance of any benefits by a carrier under this section shall not deprive it of the right to claim additional compensation, which, unless agreed upon, shall be ascertained in the manner provided in section 3 of the Federal Control Act; but shall constitute an acceptance by the carrier of all the provisions of the Federal Control Act as modified by this Act, and obligate the carrier to pay to the United States, with interest at the rate of 6 per centum per annum from a date or dates fixed in proceedings under section 3 of the Federal Control Act, the amount by which the sums received on account of such compensation, under this section or otherwise, exceed that found due in such proceedings.²⁶

§ 2663. Reimbursement of deficits during Federal control.—Section 204 provides for reimbursement of carriers substantially

²⁶ As to the standard contract referred to in this section, see note to section 207 of the conference bill, fourth succeeding section herein.

as follows: (a) When used in this section "carrier" means a carrier by railroad which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and "test period" means the three years ending June 30, 1917.

(b) For the purpose of this section railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called "Federal control return"), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together, (hereinafter called "test period return"): *Provided*, That "test period return," in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation. (d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under

Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier. (e) For every such month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States. (f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computations shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation. (g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f), and he is authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is appropriated out of any money in the Treasury not otherwise appropriated.^{26a}

^{26a} It is said that the evident purpose of section 1 of the Federal Control Act of 1918 and Transportation Act 1920 providing for reimbursement to carriers for deficits, was to reinsure to the companies an in-

come for their operating expenses and not to provide a fund for payment of their bonded indebtedness. *Wilson v. Central Vt. R. Co.* (Mass.), 131 N. E. 169.

§ 2664. Inspection of carriers' records.—Section 205 provides that the President shall have the right, at all reasonable times until the affairs of Federal control are concluded, to inspect the property and records of all carriers whose railroads or systems of transportation were at any time under Federal control, whenever such inspection is necessary or appropriate (1) to protect the interests of the United States, or (2) to supervise matters being handled for the United States by agents of the carriers, or (3) to secure information concerning matters arising during Federal control, and such carriers shall provide all reasonable facilities therefor, including the issuance of free transportation to all agents of the President while traveling on official business for these purposes. Such carriers shall, at their expense, upon the request of the President, or those duly authorized by him, furnish all necessary and proper information and reports compiled from the records made or kept during the period of Federal control affecting their respective lines, and shall keep and continue such records and furnish like information and reports compiled therefrom. Any carrier which refuses or obstructs such inspection, or which willfully fails to provide reasonable facilities therefor, or to furnish such information or reports shall be liable to a penalty of \$500 for each day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

§ 2665. Causes of action arising out of Federal control.—Section 206 provides that (a) actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later

than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier. (b) Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brought against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. Such agent designated by the President shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall be supplemented from time to time, if additional contracts are made or other agents or officers appointed. (c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic), which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such

complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a). (d) Actions, suits, proceedings, and reparation claims of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a). In an action against the Director General pending when this Act took effect the agent designated by the President under this section should be substituted as defendant,²⁷ and it is held that if no such agent has yet been designated the further prosecution of the action should be stayed until he is designated; but, where an action was brought against the Director General for damages for personal injuries incurred while he was in control, and verdict was rendered in his favor on March 11, 1920, a motion to set aside the verdict on the ground that his authority was terminated on March 1, before the trial, was held properly denied if he was designated as such agent so that there was no hiatus between cessation of Federal control and such appointment.²⁸

§ 2666. Payment and enforcement of judgments—Limitation of actions.—Clause (e) of section 206 provides that final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210. Clause (f) provides that the period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal con-

²⁷ Kersten v. Hines (Mo.), 223 S. W. 586; Goldstein v. Hines, 183 N. Y. S. 518. See also Robinson v. Central of Ga. Ry. Co. (Ga.), 103 S. E. 737.

²⁸ Keene v. Hines, 183 N. Y. S. 520. See generally as to actions ante,

§§ 2656-2659; Crim v. Louisville &c. R. Co. (Ala.), 89 So. 376; Lutsch v. Director General (Cal. App.), 199 Pac. 861; Underwood v. Hines (Mo. App.), 222 S. W. 1037; State v. Calhoun, 281 Mo. 583, 220 S. W. 6; Houston &c. R. Co. v. Long (Tex.),

trol.²⁹ And clause (g) provides that no execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control.

§ 2667. Refunding of carriers' indebtedness to United States—Set off.—Under clause (a) of section 207, it is made the duty of the President as soon as practicable after the termination of Federal control to ascertain (1) the amount of the indebtedness of each carrier to the United States, which may exist at the termination of Federal control, incurred for additions and betterments made during Federal control and properly chargeable to capital account; (2) the amount of indebtedness of such carrier to the United States otherwise incurred; and (3) the amount of the indebtedness of the United States to such carrier arising out of Federal control. The amount under clause (3) may be set off against either or both of the amounts under clauses (1) and (2), so far as deemed wise by the President, but only to the extent permitted under any contract now or hereafter made between such carrier and the United States in respect to the matters of Federal control, or, where no such contract exists, to the extent permitted under paragraph (b) of section 7 of the standard contract between the United States and the carriers relative to deductions from compensation: Provided, That such right of set-off shall not be so exercised as to prevent such carrier from having the sums required for interest, taxes, and other corporate charges and expenses referred to in paragraph

219 S. W. 212; *Hines v. Jordan* (Tex. Civ. App.), 228 S. W. 633. And as to venue and other matters under different general order, see notes in 4 A. L. R. 1680, et seq.; 8 A. L. R. 969, et seq.; 10 A. L. R. 956, et seq.; 11 A. L. R. 1450, et seq.; 14 A. L. R. 234 et seq. Soldier in service can not recover for negligence of government in operat-

ing train under federal control. *Bryson v. Hines*, 268 Fed. 290, 11 A. L. R. 1438; *Moon v. Hines* (Ala.), 87 So. 603, 13 A. L. R. 1020.

²⁹ This provision has been held valid even as to cause of action otherwise barred when it took effect. *Standley v. U. S. Railroad Admr.*, 271 Fed. 794.

(b) of section 7 of such standard contract, accruing during Federal control, and also the sums required for dividends declared and paid during Federal control, including, also in addition, a sum equal to that proportion of such last dividend which the period between its payment and the termination of Federal control bears to the last regular dividend period: And provided further; That such right of set-off shall not be exercised unless there shall have first been paid such sums in addition as may be necessary to provide the carrier with working capital in amount not less than one twenty-fourth of its operating expenses for the calendar year 1919.³⁰

§ 2668. Funding indebtedness for additions and betterments—Where indebtedness for equipment is not refundable.—(b) Any remaining indebtedness of the carrier to the United States in respect to such additions and betterments shall, at the request of the carrier, be funded for a period of ten years from the termination of Federal control, or a shorter period at the option of the carrier, with interest at the rate of 6 per centum per annum, payable semiannually, subject to the right of such carrier to pay, on any interest-payment day, the whole or any part of such indebtedness. Any carrier obtaining the funding of such indebtedness as aforesaid shall give, in the discretion of the President, such security, in such form and upon such terms, as he may prescribe. (c) If the President and the various carriers, or any of them, shall enter into an agreement for funding, through the medium of car trust certificates, or otherwise, the indebtedness of any such carrier to the United States incurred for equipment ordered for the benefit of such carrier, such indebtedness so funded shall not be refundable under the foregoing provisions.

§ 2669. Notes and other evidences of indebtedness.—Under clause (d) of section 207 any other indebtedness of any such

³⁰ The "standard contract" above referred to provides that the set-off shall not be made in such manner as to deprive the carrier of sums necessary to pay fixed charges taxes and other corporate charges

and expenses, but give the President power to make a set-off, if he sees fit, even though this might leave the carrier without funds with which to pay dividends.

carrier to the United States which may exist after the settlement of accounts between the United States and the carrier and is then due shall be evidenced by notes payable in one year from the termination of Federal control, or a shorter period at the option of the carrier, with interest at the rate of 6 per centum per annum, and secured by such collateral security as the President may deem it advisable to require. Under clause (e) with respect to any bonds, notes, or other securities, acquired under the provisions of this section or of the Federal Control Act or of the Act entitled "An Act to provide for the reimbursement of the United States for motive power, cars and other equipment ordered for railroads and systems of transportation under Federal control, and for other purposes," approved November 19, 1919, the President shall have the right to make such arrangements for extension of the time of payment or for the exchange of any of them for other securities, or partly for cash and partly for securities, as may be provided for in any agreement entered into by him or as may in his judgment seem desirable. Clause (f) provides that carriers may, by agreement with the President, issue notes or other evidences of indebtedness, secured by equipment trust agreements, for equipment purchased during Federal control by or through the President under section 6 of the Federal Control Act, and allocated to such carriers respectively; and the filing of such equipment trust agreements with the Commission shall constitute notice thereof to all the world. And clause (g) provides that a carrier may issue evidences of indebtedness pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification.

§ 2670. Existing rates to continue in effect.—Section 208 provides substantially as follows: (a) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal

authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce it, unless such reduction or change is approved by the Commission. (b) All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively. (c) Any land grant railroad organized under the Act of July 28, 1866 (chapter 300), shall receive the same compensation for transportation of property and troops of the United States as is paid to land grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278).³¹

§ 2671. Guaranty to carriers after termination of Federal control—Definition of terms used.—Section 209 relates to guarantes to carrier after Federal control is terminated, and clause (a) defines certain terms used in the section. “Carrier” means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; “guaranty period” means the six months beginning March 1, 1920; “test

³¹ Public Service Com. v. New York Cent. R. Co., 183 N. Y. 149, 129 N. E. 455; New York Cent. R. Co. v. Public Service Com., 268 Fed. 559; Texas Telephone Co. v. Mart (Tex. Civ. App.), 226 S. W. 497.

period" means the three years ending June 30, 1917; and the term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission. Clause (b) provides that this section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

§ 2672. Guarantees by United States enumerated.—Clause (c) is as follows: The United States hereby guarantees—(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 4 of the Federal Control Act; (2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller amount is due as just compensation, the guaranty under this paragraph shall be increased

or decreased accordingly; (3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operating income, the guaranty shall be a sum equal to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one-half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one-half the annual sum fixed by the President under section 4 of the Federal Control Act; (4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the average annual railway operating income of such carrier during the test period.

§ 2673. Guaranty in excess of minimum railway operating income.—Under section (d) if for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

§ 2674. Computation of operating income or deficit.—(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Federal Control Act. (f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded; (2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period; (3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the “standard contract” between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed); (4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and (5) The Commission shall require the elimination and restatement of the

operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

§ 2675. Ascertainment and payment of amounts of guaranty.—Clause (g) makes it the duty of the Commission as soon as practicable after the expiration of the guaranty period, to ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. He is authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is appropriated out of any money in the Treasury not otherwise appropriated.

§ 2676. Advances to carriers during guaranty period.—Clause (h) provides that upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as he may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any

money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision. The rest of section 209 relates to guaranty and advances to the American Railway Express Company.

§ 2677. New loans to railroads—Application therefor.—The first clause of section 210 is as follows: (a) For the purpose of enabling carriers by railroad subject to the Interstate Commerce Act properly to serve the public during the transition period immediately following the termination of Federal control, any such carrier may, at any time after the passage of this Act and before the expiration of two years after the termination of Federal control, make application to the Commission for a loan from the United States, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

§ 2678. Hearing of application and certificate of findings thereon by Commission.—Clause (b) provides that if the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan by the United States is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are

such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may certify to the Secretary of the Treasury its findings of fact and its recommendations as to: the amount of the loan which is to be made; the time, not exceeding five years from the making thereof, within which it is to be repaid; the character of the security which is to be offered therefor; and the terms and conditions of the loan.

§ 2679. Terms and conditions of new loans.—Clause (c) provides that upon receipt of such certificate from the Commission, the Secretary of the Treasury, at any time before the expiration of twenty-six months after the termination of Federal control, is authorized to make a loan, not exceeding the maximum amount recommended in such certificate, out of any moneys in the revolving fund provided for in this section. All such loans shall bear interest at the rate of 6 per centum per annum, payable semi-annually to the Secretary of the Treasury and to be placed to the credit of the revolving fund provided for in this section. The time, not exceeding five years from the making thereof, within which such loan is to be repaid, the security which is to be taken therefor, which shall be adequate to secure the loan, the terms and conditions of the loan, and the form of the obligation to be entered into, shall be prescribed by him.

§ 2680. Advice or assistance from Federal Reserve Board.—**Appropriation.**—Clause (d) provides that the Commission or the Secretary of the Treasury may call upon the Federal Reserve Board for advice and assistance with respect to any such application or loan; and clause (e) appropriates out of any moneys in the Treasury not otherwise appropriated the sum of \$300,000,000, which shall be used as a revolving fund for the purpose of making the loans provided for in this section, and for paying the judgments, decrees, and awards referred to in subdivision (e) of section 206. Clause (f) provides that a carrier may issue evidences of indebtedness to the United States pursuant to this section without the authorization or approval of any authority,

State or Federal, and without compliance with any requirement, State or Federal, as to notification.

§ 2681. Evidences of indebtedness to United States by carriers.—Section 211 provides that all powers and duties conferred or imposed upon the President by the preceding sections of the act, except the designation of the agent under section 206, may be executed by him through such agency or agencies as he may determine.

CHAPTER LXXXIV.

ACTIONS AGAINST RAILROAD COMPANIES.

Sec.	Sec.
2690. Generally—Scope of chapter.	2704. Actions against common carriers—Form of action.
2691. Pleading—Ultimate facts—Conclusions.	2705. Actions against common carriers—Pleading.
2692. Direct averment of essential facts—Inferences.	2706. Actions against common carriers—Evidence.
2693. Negligence may be pleaded generally.	2707. Actions for injuries to passengers.
2694. Theory—Variance.	2708. Actions for injuries to employes.
2695. Construction of pleadings.	2709. Pleading ordinances.
2696. Essential elements—Duty, breach of duty, and resulting injury.	2710. Inspection and physical examination of party.
2697. Burden of proof.	2711. Experiments and practical tests—Real evidence.
2698. Judicial knowledge.	2712. Presumptions.
2699. Evidence.	2713. Withdrawing the case from the jury.
2700. Particular cases to be considered.	2714. Physical facts.
2701. Remedy for breach of duty as public or common carrier—Mandamus.	2715. Physical facts—Suction of train.
2702. Remedy for refusal to carry—Action for damages.	2716. Mode of submitting cause to jury—Special verdict—Federal courts.
2703. Actions against common carriers—Parties.	2717. Misconduct of counsel.

§ 2690. (1689.) **Generally—Scope of chapter.**—In this chapter we propose to consider some matters of pleading, practice and procedure generally that we have found to be of use and importance in railroad litigation. This is a treatise upon substantive law rather than upon procedure, and we shall not undertake to treat of pleading, practice or evidence, nor of the measure of damages, at great length. There is comparatively little in the law upon these subjects that is peculiarly applicable to railroads, and to treat them fully would require several volumes. The general subject of actions by and against corporations has

already been treated,¹ and the manner of enforcing particular rights and remedying particular wrongs has generally been pointed out in connection with the discussion of the substantive law governing such cases. We shall here consider merely such additional matters of pleading, practice and procedure as most frequently arise and are of practical use and importance in railroad litigation. We believe, however, that the treatment of such matters, to the extent indicated will be found of much practical use and value. Many of the points and authorities referred to have been found very useful in our own practice. In this chapter the subject will be considered generally, and in subsequent chapters particular attention will be given to actions against railroad companies as carriers of goods and live stock and to actions against such companies for personal injuries, especially for injuries to passengers and to employes.

§ 2691. (1689a.) Pleading—Ultimate facts — Conclusions.— It is a well-settled general rule that a pleading must state ultimate or operative facts² and not mere evidence,³ on the one hand, nor mere conclusions on the other. Mere conclusions of law should not be stated, and they add nothing to the effectiveness of the pleading.⁴ So, the facts should be stated by direct aver-

¹ Ante, chapter xxv.

² *Pennsylvania Co. v. Zwick*, 1 Ind. App. 280, 27 N. E. 508.

³ It has always been the general rule that it is not necessary to plead evidence. See cases cited in first two notes to section 2692; also *Philadelphia &c. R. Co. v. Allen*, 102 Md. 110, 62 Atl. 245; *Pennsylvania Co. v. Zwick*, 1 Ind. App. 280, 27 N. E. 508; *Wabash &c. R. Co. v. Johnson*, 96 Ind. 40.

⁴ *Warax v. Cincinnati &c. R. Co.*, 72 Fed. 637; *North Birmingham &c. R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18; *Stannard v. Aurora &c. R. Co.*, 220 Ill. 469, 77 N. E.

254; *Indianapolis &c. R. Co. v. Wilson*, 134 Ind. 95, 33 N. E. 793; *Pittsburgh &c. R. Co. v. Peck*, 165 Ind. 537, 76 N. E. 163; *Lake Erie &c. R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488; *Louisville &c. R. Co. v. Bell*, 18 Ky. L. 393, 38 S. W. 31. See also *Yeates v. Illinois Cent. R. Co.*, 137 Fed. 943; *Carlson v. Board*, 38 Wash. 616, 80 Pac. 795; *Wasler v. Great Northern R. Co.*, 18 S. Dak. 420, 100 N. W. 1097, 70 L. R. A. 731n. For allegations held to be statements of facts and not mere conclusions, see *Cleveland &c. R. Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198; *Chicago &c. R. Co. v.*

ment and not by way of recital.⁵ As a general rule an allegation in general terms that it was the duty of the defendant to do certain things is a mere conclusion, and the facts should be stated from which the law raises or implies the duty.⁶ But, either by statute or judicial decision there is some relaxation of these rules in a number of jurisdictions.⁷

§ 2692. (1689b.) **Direct averment of essential facts—Inferences.**—As already stated, the essential facts should be stated directly and not merely by way of recital, although it may be well to note that a complaint or declaration may be good after verdict where it might not have been good if attacked before verdict by a demurrer or the like. So, it is not sufficient in most jurisdictions, at least as against a demurrer, to merely state evidence or facts from which the ultimate facts may be inferred.⁸

Krayenbuhl, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920; Russell Grain Co. v. Wabash R. Co., 114 Mo. App. 488, 89 S. W. 908.

⁵ Lake Erie &c. R. Co. v. Mike-sell, 23 Ind. App. 395, 55 N. E. 488; Cleveland &c. R. Co. v. Lindsay, 33 Ind. App. 404, 408, 70 N. E. 283, 998; Graham v. Corvallis &c. R. Co., 71 Ore. 477, 142 Pac. 774. See Sutton v. Todd, 24 Ind. App. 519, 55 N. E. 980; Erwin v. Central Un. Tel. Co., 148 Ind. 365, 46 N. E. 667, 47 N. E. 663, and compare Louisville &c. R. Co. v. Kendall, 138 Ind. 313, 36 N. E. 415, as to what are or are not mere recitals.

⁶ Matz v. Chicago &c. R. Co., 88 Fed. 770; Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 12 So. 88, 53 Am. & Eng. R. Cas. 115; Chicago &c. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; McAndrews v. Chicago &c. R. Co., 222 Ill. 232, 78 N. E. 603, 605; Chicago v. Apel, 50

Ill. App. 132; Pittsburgh &c. R. Co. v. Lightheiser, 163 Ind. 247, 71 N. E. 218; Chicago &c. R. Co. v. Barnes, 164 Ind. 143, 73 N. E. 91; Pittsburgh &c. R. Co. v. Peck, 165 Ind. 537, 76 N. E. 163; Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767, 4 Am. Neg. 180, 3 Chic. L. J. Wk. 150; Sammins v. Wilhelm, 6 Ohio C. C. 565; Brown v. Mallett, 5 C. B. 599; Seymour v. Maddox, 16 Q. B. 326. See generally note in 59 L. R. A. 214, 215; Fremont &c. R. Co. v. Hagblad, 72 Nebr. 773, 101 N. W. 1033, 4 L. R. A. (N. S.) 254, 9 Ann. Cas. 1096; Southern Ry. Co. v. King, 217 U. S. 536, 537, 30 Sup. Ct. 594, 54 L. ed. 873.

⁷ Domestic Coal Co. v. De Armey, 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, and cases there cited. See also statute in Indiana, Acts 1915, p. 123.

⁸ Louisville &c. R. Co. v. Corps,

But even though a certain fact is not directly and specifically alleged, yet if it is shown by clear and necessary implication or inference the pleading may be regarded as sufficiently showing such fact.⁹ And under some of the Codes and decisions it is sufficient if the fact is shown by reasonable implication.¹⁰

§ 2693. (1689c.) Negligence may be pleaded generally.—In most jurisdictions, negligence may be pleaded somewhat generally.¹¹ A motion to make more specific, or the like, may lie when the facts are not stated with sufficient certainty, but the prevailing rule is that, as against a general demurrer, negligence may be pleaded in general terms, and the specific facts may be shown in evidence.¹² This is also true as to contributory negli-

124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636n; *McElwaine-Richards Co. v. Wall*, 159 Ind. 557, 65 N. E. 753; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245.

⁹ *Pittsburgh &c. R. Co. v. Rogers*, 45 Ind. App. 230, 239, 87 N. E. 28; *Evansville &c. R. Co. v. Darting*, 6 Ind. App. 375, 33 N. E. 636; *Cincinnati &c. R. Co. v. Case*, 122 Ind. 310, 23 N. E. 797; *Barstow v. Berlin*, 34 Wis. 357. See also *St. Louis &c. R. Co. v. Rollins* (Tex. Civ. App.), 89 S. W. 1099; *Indiana &c. Co. v. Lippencott &c. Co.*, 165 Ind. 361, 75 N. E. 649; *Malloy v. Benway*, 34 Wash. 315, 75 Pac. 869.

¹⁰ *Domestic Block Coal Co. v. De Armev*, 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, and cases cited; *Jones v. Monson*, 137 Wis. 478, 119 N. W. 179, 129 Am. St. 1002, 1082; *White v. White*, 132 Wis. 121, 111 N. W. 1116.

¹¹ See *King v. Oregon &c. R. Co.*, 6 Idaho 306, 55 Pac. 665, 59 L. R. A. 209, and elaborate note, reviewing many authorities.

¹² *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 935; *Cleveland &c. R. Co. v. Morrey*, 172 Ind. 513, 88 N. E. 932; *Stephenson v. Southern Pac. R. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Clark v. Chicago &c. R. Co.*, 28 Minn. 69, 9 N. W. 75; *Braxton v. Hannibal &c. R. Co.*, 77 Mo. 455; *Omaha &c. R. Co. v. Crow*, 54 Nebr. 747, 74 N. W. 1066, 69 Am. St. 741; *Chicago &c. R. Co. v. O'Donnell*, 72 Nebr. 900, 101 N. W. 1009; *Lake Erie &c. R. Co. v. Mackey*, 53 Ohio St. 370, 41 N. E. 980, 29 L. R. A. 757, 53 Am. St. 640; *Goldrick v. Union R. Co.*, 20 R. I. 128, 37 Atl. 635. See also *Mary Lee Coal &c. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897, 53 Am. & Eng. R. Cas. 254; *Gulf &c. R. Co. v. Washington*, 49 Fed. 347, 4 U. S. App. 121, 1 C. C. A. 286; *Lee v. Figg*, 37 Cal. 335, 99 Am. Dec. 271; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308; *Consumers' &c. Co. v. Pryor*, 44 Fla. 354, 32 So. 797; *Andrew v. Chi-*

gence in most jurisdictions in which the plaintiff is required to allege freedom from contributory negligence on his part.¹⁸ Such

cago &c. R. Co., 45 Ill. App. 269; Chicago &c. R. Co. v. Redmond, 70 Ill. App. 119; Ekman v. Minneapolis St. R. Co., 34 Minn. 24, 24 N. W. 291; Rolseth v. Smith, 38 Minn. 14; Hall v. Missouri &c. R. Co., 74 Mo. 298; Foster v. Missouri &c. R. Co., 115 Mo. 165, 21 S. W. 916; Dolan v. Moberly, 17 Mo. App. 436; Boone v. Wabash &c. R. Co., 20 Mo. App. 232. But compare Jacobson v. Dalles &c. Nav. Co., 93 Fed. 975; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; Atlanta &c. R. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818; Chicago &c. R. Co. v. Harwood, 90 Ill. 425; Funk v. Piper, 50 Ill. App. 163; Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Peerless Stone Co. v. Wray, 10 Ind. App. 324, 37 N. E. 1058; Illinois Cent. R. Co. v. Kelly, 167 Ky. 745, 181 S. W. 375; Thompson v. Flint &c. R. Co., 57 Mich. 300, 23 N. W. 820; Waldhier v. Hannibal &c. R. Co., 71 Mo. 514; Harrison v. Missouri &c. R. Co., 74 Mo. 364; Crane v. Missouri &c. R. Co., 87 Mo. 588; Race v. Easton &c. R. Co., 62 N. J. L. 536, 41 Atl. 710; Munnuci v. Philadelphia &c. R. Co., 68 N. J. L. 432, 53 Atl. 229; Tuchochi v. Cincinnati St. R. Co., 7 Ohio Dec. 219; Woodward v. Oregon R. &c. Co., 18 Ore. 289, 22 Pac. 1076; McPherson v. Pacific Bridge Co., 20 Ore. 486, 26 Pac. 560; Laporte v. Cook, 20 R. I. 261, 38 Atl. 700; Missouri &c. R. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608, 42 Am. & Eng. R. Cas. 225. And it has been held that the plead-

ing may be sufficient without giving the name of the alleged negligent servant, even as against a motion to make more specific. Louisville &c. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443.

¹⁸ Wilson v. Denver &c. R. Co., 7 Colo. 101, 2 Pac. 1; Lake Erie &c. R. Co. v. Griffin, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. 465; Louisville &c. R. Co. v. Sandford, 117 Ind. 265, 19 N. E. 770; Chicago &c. R. Co. v. McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; Baltimore &c. R. Co. v. Young, 146 Ind. 374, 45 N. E. 479; Louisville &c. R. Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714; Falk v. New York &c. R. Co., 56 N. J. L. 380, 29 Atl. 157, 158. But, as will be hereafter shown, the specific facts alleged may control such an allegation. So, the allegation must be broad enough to cover the charge and show that the injury was caused without contributory negligence on the part of the plaintiff. Chicago &c. R. Co. v. Thomas, 147 Ind. 35, 46 N. E. 73; Lake Erie &c. R. Co. v. Hancock, 15 Ind. App. 104, 43 N. E. 659; Scott v. Cleveland &c. R. Co., 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154. See also Thompson v. Flint &c. R. Co., 57 Mich. 300, 23 N. W. 820. As to pleading contributory negligence where it is required to be affirmatively pleaded as a defense, see Southern R. Co. v. Branyon, 145 Ala. 662, 39 So. 675; Tennessee &c. R. Co. v. Haddon, 100 Ala. 451, 14 So. 287; Price

allegations as to negligence and freedom from contributory negligence are regarded as statements of the ultimate facts¹⁴ rather than as mere conclusions, or, if they should be regarded as mere conclusions, they form an exception to the general rule against pleading conclusions.

§ 2694. (1689d.) **Theory—Variance.**—Although, as stated in the preceding section, negligence may often be alleged in somewhat general terms, yet a defendant is entitled, if he takes the proper steps, to have the complaint or declaration made reasonably specific and certain. A count or paragraph of pleading should proceed on a single definite theory,¹⁵ and if the evidence wholly fails to establish the theory of the complaint there can be no recovery thereunder.¹⁶ Where, therefore, specific acts of

v. Atchison &c. R. Co., 58 Kans. 551, 50 Pac. 450, 62 Am. St. 625; Birsch v. Citizens Elec. Co., 36 Mont. 574, 93 Pac. 940; Chicago &c. R. Co. v. Oyster, 58 Nebr. 1, 78 N. W. 359, and see note in 59 L. R. A. 275, 276, and note in 33 L. R. A. (N. S.) 1152; Murray v. Gulf &c. R. Co., 73 Tex. 2, 11 S. W. 125, with which compare Louisville &c. R. Co. v. Wolfe, 80 Ky. 82.

¹⁴ See Louisville &c. R. Co. v. Wolfe, 80 Ky. 84; Grindle v. Milwaukee &c. R. Co., 42 Iowa 376.

¹⁵ Chicago &c. R. Co. v. Bills, 104 Ind. 13, 16, 3 N. E. 611; F. C. Austin Mfg. Co. v. Clendenning, 21 Ind. App. 459, 52 N. E. 708.

¹⁶ Mescall v. Tully, 91 Ind. 96; Parrill v. Cleveland &c. R. Co., 23 Ind. App. 638, 55 N. E. 1026. See Harris v. Hannibal &c. R. Co., 37 Mo. 307; Waldhier v. Hannibal &c. R. Co., 71 Mo. 514; Rome Exchange Bank v. Eames, 1 Keyes (N. Y.) 588, 592; Moss v. North Carolina R. Co., 122 N. Car. 889, 29 S.

E. 410, 411; Johnson v. Galveston &c. R. Co. (Tex.), 66 S. W. 906, 908, 909; 1 Elliott Ev. § 194. Thus, it has been held that under a complaint based on the charge of wilful injury, there can be no recovery for mere negligence, and vice versa. Rideout v. Winnebago Traction Co., 123 Wis. 297, 101 N. W. 672, 29 L. R. A. 601, and note reviewing cases, some of which are conflicting, and see especially Kansas City &c. R. Co. v. Crocker, 95 Ala. 412, 11 So. 262; Louisville &c. R. Co. v. Johnston, 79 Ala. 436; Chicago &c. R. Co. v. Hedges, 105 Ind. 398, 7 N. E. 801; Indiana &c. R. Co. v. Overton, 117 Ind. 253, 20 N. E. 147; Cleveland &c. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 445; McCollum v. Chicago &c. R. Co., 154 Ind. 97, 55 N. E. 1024; Ramming v. Metropolitan St. R. Co., 157 Mo. 477, 50 S. W. 791, 57 S. W. 268; McClellan v. Chippewa &c. R. Co., 110 Wis. 326, 85 N. W. 1018; Haverlund v. Chicago &c. R. Co.,

negligence are charged as the cause of action, the evidence must establish the specific negligence necessary to constitute the cause of action alleged, and not merely some other cause of action.¹⁷ But these rules are not strictly enforced in all jurisdictions, and, even where they are, it is sufficient if the substance of the issue be proved, and where several acts of negligence are charged, each sufficient in itself, there may be a recovery, in a proper case, on proof of any one of them.¹⁸ The theory of a pleading, it has

143 Wis. 415, 128 N. W. 273. See also *Cohen v. Chicago &c. R. Co.*, 104 Ill. App. 314; *St. Louis &c. Co. v. Hopkins*, 100 Ill. App. 567; *Bailey v. North Carolina R. Co.*, 149 N. Car. 169, 62 S. E. 912; 6 *Thomp. Neg.* (2d ed.) § 7471.

¹⁷ *Rogers v. Louisville &c. R. Co.*, 88 Fed. 462; *Birmingham &c. R. Co. v. Baylor*, 101 Ala. 488, 13 So. 793; *Roberts v. Sierra R. Co.*, 14 Cal. App. 180, 111 Pac. 519; *Augusta R. &c. Co. v. Weekly*, 124 Ga. 384, 52 S. E. 444; *Terre Haute &c. R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62; *Louisville &c. Trac. Co. v. Worrell*, 44 Ind. App. 480, 86 N. E. 78; *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000, 13 Am. St. 453; *Pennington v. Detroit &c. R. Co.*, 90 Mich. 505, 51 N. W. 634; *McManamee v. Missouri &c. R. Co.*, 135 Mo. 440, 37 S. W. 119; *Gregory v. Chicago &c. R. Co.*, 42 Mont. 551, 113 Pac. 1123; *Moss v. North Carolina R. Co.*, 122 N. Car. 889, 29 S. E. 410, 411; *Gast v. Northern Pac. Ry. Co.*, 28 N. Dak. 118, 147 N. W. 793; *Missouri &c. R. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *San Antonio R. Co. v. Stolleis* (Tex. Civ. App.), 49 S. W. 679; *Seeley v. Central Vt. R. Co.*, 88 Vt. 178, 92 Atl.

28. As to whether pleading particular cause of injury waives or excludes right to rely on *res ipsa loquitur*, see *Walters v. Seattle &c. R. Co.*, 48 Wash. 233, 93 Pac. 419, 24 L. R. A. (N. S.) 788, and authorities cited in opinion and note on both sides of the question.

¹⁸ *Swift &c. Co. v. Rutowski*, 182 Ill. 18, 54 N. E. 1038; *Chicago &c. R. Co. v. Barnes*, 164 Ind. 143, 68 N. E. 166, 73 N. E. 91; *New York &c. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804; *Baxter v. Chicago &c. R. Co.*, 87 Iowa 488, 54 N. W. 350; *Atchison &c. R. Co. v. Lannigan*, 56 Kans. 109, 42 Pac. 343; *O'Connor v. Railroad Co.*, 135 Mass. 352; *Patterson v. Detroit &c. R. Co.*, 56 Mich. 172, 22 N. W. 260; *Ahern v. Oregon &c. R. Co.*, 24 Ore. 276, 33 Pac. 403, 35 Pac. 549; *San Antonio R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752; 1 *Elliott Ev.* § 194. See also *Alabama R. Co. v. Bailey*, 112 Ala. 167, 20 So. 313; *Savannah &c. R. Co. v. Evans*, 121 Ga. 391, 49 S. E. 308; *Fleener v. Oregon &c. R. Co.*, 16 Idaho 781, 102 Pac. 897; *Thompson v. Toledo &c. R. Co.*, 91 Mich. 255, 51 N. W. 995; *Thayer v. Flint &c. R. Co.*, 93 Mich. 150, 53 N. W. 216; *Lepard v. Michigan Cent. R. Co.*,

been held, must be determined by its material allegations, well pleaded, and its general scope and tenor, and it must stand or fall by that theory.¹⁹

§ 2695. (1689e.) **Construction of pleadings.**—Pleadings are generally to be construed reasonably, but against rather than for the pleader.²⁰ In some states, however, it is provided by statute that the construction shall be liberal in favor of the pleader.²¹

166 Mich. 373, 130 N. W. 668, 40 L. R. A. (N. S.) 1105. And under the Federal Employers' Liability Law it has been held that where the complaint states a good cause of action both under that law and the state law, a state court, on proof of the case under the state law and failure to prove the allegation as to interstate commerce may treat the latter as amended or as surplusage and allow a recovery under the state law. *Illinois Cent. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. ed. 1226 (holding it a question of local practice and not a denial of any right or immunity under the Federal law). But see contra *Louisville &c. R. Co. v. Stranges Admx.*, 156 Ky. 439, 161 S. W. 239.

¹⁹ *South Bend &c. Plow Co. v. Cissne*, 35 Ind. App. 373, 74 N. E. 282. See also *Cleveland &c. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571, 52 N. E. 1013; *Pennsylvania Co. v. Walker*, 29 Ind. App. 285, 64 N. E. 473. But compare *Drefahl v. Connell*, 85 Wis. 109, 55 N. W. 160.

²⁰ *North Birmingham &c. R. Co.*

v. Liddecoat, 99 Ala. 545, 551, 13 So. 18, 20; *Atlantic &c. Co. v. Benedict Pineapple Co.*, 52 Fla. 165, 42 So. 529, and authorities cited in concurring opinion of Shackleford, C. J.; *Markey v. Griffin*, 109 Ill. App. 212; *Wright v. Illinois Cent. R. Co.*, 119 Ill. App. 132; *Cincinnati &c. R. Co. v. Smock*, 133 Ind. 411, 33 N. E. 108; *Heintz v. Mueller*, 19 Ind. App. 240, 49 N. E. 293; *Beadle v. Kansas City &c. R. Co.*, 48 Kans. 379, 29 Pac. 696; *Clark v. Dillon*, 97 N. Y. 370.

²¹ *Ean v. Chicago &c. R. Co.*, 95 Wis. 69, 69 N. W. 997; *Hart v. Neillsville*, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952; *Witham v. Blood*, 124 Iowa 695, 100 N. W. 558; *Malloy v. Benway*, 34 Wash. 315, 75 Pac. 869; *Midland R. Co. v. Gascho*, 7 Ind. App. 407, 34 N. E. 643; *Smith v. Borden*, 160 Ind. 223, 228, 66 N. E. 681, and authorities there cited. So, after verdict, this rule is usually applied. *Chicago &c. R. Co. v. Kerr*, 74 Nebr. 1, 104 N. W. 49. But as shown in the opinion in the Florida case referred to in the last preceding note, there is considerable difference of opinion as to how far such statutes affect the question,

Specific allegations control mere general allegations on the same subject.²² Under this rule a general allegation as to negligence or freedom from contributory negligence, or the like, has often been held overcome by specific averments of fact to the contrary.²³

§ 2696. (1689f.) Essential elements—Duty, breach of duty, and resulting injury.—In ordinary actions against a railroad company for negligence there are three essential elements of the plaintiff's cause of action, which he must aver and prove, and these are: (1) the existence of a duty on the part of the defendant owing from it to the plaintiff; (2) the breach of such duty by the defendant; and (3) injury to the plaintiff caused by the breach or failure of the defendant to perform such duty.²⁴ There

most of them apparently going to the matter of form rather than substance.

²² *Hayes &c. Plate Co. v. St. Louis Transit Co.*, 137 Fed. 80; *Conrad v. Gray*, 109 Ala. 130, 19 So. 398; *Highland Ave. &c. R. Co. v. South*, 112 Ala. 642, 20 So. 1003; *Wright v. Wilmington &c. R. Co.*, 2 Marv. (Del.) 141, 42 Atl. 440; *Moyer v. Ft. Wayne &c. R. Co.*, 132 Ind. 88, 31 N. E. 567; *Chicago &c. R. Co. v. Dinnis*, 170 Ind. 222, 84 N. E. 9; *Ramsey v. Cedar Rapids &c. R. Co.*, 135 Iowa 329, 112 N. W. 798; *Clark v. Missouri Pac. R. Co.*, 48 Kans. 654, 29 Pac. 1138; *Chicago &c. R. Co. v. Wheeler*, 70 Kans. 755, 79 Pac. 673; *Willison v. Northern Pac. R. Co.*, 111 Minn. 370, 127 N. W. 4; *McManamee v. Missouri &c. R. Co.*, 135 Mo. 440, 37 S. W. 119.

²³ *Baumler v. Narragansett &c. Co.*, 23 R. I. 430, 50 Atl. 841; *Ivens v. Cincinnati &c. R. Co.*, 103 Ind. 27, 2 N. E. 134; *Jones v. Klawiter*,

110 Ill. App. 31; *Jeffersonville &c. R. Co. v. Goldsmith*, 47 Ind. 43; *Spencer v. Ohio &c. R. Co.*, 130 Ind. 181, 29 N. E. 915. See also *Politowitz v. Citizens' &c. Co.*, 115 Mo. App. 57, 90 S. W. 1031; *Gilbert v. Erie R. Co.*, 97 Fed. 747; *Goodrich v. Chippewa &c. R. Co.*, 108 Wis. 329, 84 N. W. 419; *Southern R. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973.

²⁴ *Mackey v. Northern &c. Co.*, 210 Ill. 115, 71 N. E. 448; *McAndrews v. Chicago &c. R. Co.*, 222 Ill. 232, 78 N. E. 603, 605; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261, 265; *Louisville &c. R. Co. v. Treadway*, 143 Ind. 689, 700, 40 N. E. 807, 41 N. E. 794; *Hern v. Southern Pac. Co.*, 29 Utah 127, 81 Pac. 902, 906; *Hortenstien v. Virginia &c. R. Co.*, 102 Va. 914, 47 S. E. 996. See also *Nashville &c. R. Co. v. Reynolds*, 148 Ala. 680, 41 So. 1001; *Scott v. Cleveland &c. R. Co.*, 144 Ind. 125, 132, 43 N. E. 133, 32 L. R. A. 154; *Cleveland &c.*

are numerous cases showing the application of this proposition and the necessity for the existence of each of these elements. The subject will be further considered in another chapter in treating of actions for damages for personal injuries, but we refer to some of the cases here. Thus, it is held in many cases that there must be a legal duty owing from the defendant to the plaintiff at the time and place of the injury.²⁵ So, while circumstantial evidence may be sufficient to show the violation of the duty, and resulting injury, it must not be left to mere surmise or conjecture.²⁶ Some causal connection must be shown be-

R. Co. v. Stephenson, 139 Ind. 641, 37 N. E. 720; Langenfeld v. Union Pac. R. Co., 85 Nebr. 527, 123 N. W. 1086; 3 Elliott Ev. §§ 2496, 2499. In the first case cited it is also said: "When these three elements concur, they unitedly constitute actionable negligence, and the absence of any one of these elements, either in the declaration or proof, renders the declaration insufficient to sustain a judgment for negligence, even after verdict or the proof to establish a cause of action involving actionable negligence (Schueler v. Mueller, 193 Ill. 402, 61 N. E. 1044; Mackey v. Northern &c. Co., 210 Ill. 115, 71 N. E. 448; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261), and it is not sufficient in the declaration to allege that it is the duty of the defendant to do certain things as that would be but the averment of a conclusion, but the declaration must state facts from which the law will raise the duty (Ayers v. Chicago, 111 Ill. 406; Chicago &c. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; Schueler v. Mueller, 193 Ill. 402, 61 N. E. 1044)."

²⁵ McAndrews v. Chicago &c. R. Co., 222 Ill. 232, 78 N. E. 603; Cleveland &c. R. Co. v. Stephenson, 139 Ind. 641, 37 N. E. 720; Chicago &c. R. Co. v. Barker, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440; Murphy v. Brooklyn, 118 N. Y. 575, 23 N. E. 887; Kennedy v. Hawkins, 54 Ore. 164, 102 Pac. 733, 25 L. R. A. (N. S.) 606; Norfolk &c. Co. v. Ferguson, 79 Va. 241. See also 1 Thomp. Neg. § 3, 2 Thomp. Neg. § 1244. But it is sufficient if the facts out of which or from which the duty springs and is implied by law, are alleged and proved, and, as already shown, it is not usually sufficient to merely allege the duty in general terms, without stating the facts. Welfelt v. Illinois Cent. R. Co., 149 Ill. App. 317; Pittsburgh &c. R. Co. v. Peck, 165 Ind. 537, 76 N. E. 163.

²⁶ See Neal v. Chicago &c. R. Co., 129 Iowa 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905, and numerous cases cited in note, showing when such evidence is and is not sufficient; Griffin v. Boston &c. R. Co., 148

tween the negligence charged and the injury,²⁷ and the negligence complained of must be a proximate cause of the injury.²⁸

Mass. 143, 19 N. E. 166, 1 L. R. A. 698n, 12 Am. St. 526. *Ruppert v. Brooklyn &c. R. Co.*, 154 N. Y. 90, 47 N. E. 971; *Kearns v. Southern R. Co.*, 139 N. Car. 470, 52 S. E. 131; *Lake Shore &c. R. Co. v. Andrews*, 58 Ohio St. 426, 51 N. E. 26; *Norfolk &c. R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; 3 Elliott Ev. §§ 2502, 2503. See also *Sherman v. Monominee &c. Co.*, 77 Wis. 14, 45 N. W. 1079; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142, 24 Am. St. 748; *Baltimore &c. R. Co. v. State*, 71 Md. 590, 18 Atl. 969; *Hudson v. Rome &c. R. Co.*, 145 N. Y. 408, 40 N. E. 8; *Morris v. Lake Shore &c. R. Co.*, 148 N. Y. 182, 42 N. E. 579; *Toomey v. London &c. R. Co.*, 3 C. B. (N. S.) 146, 150; *Lovegrove v. London &c. R. Co.*, 16 C. B. (N. S.) 669, 692.

²⁷ *Pittsburgh &c. R. Co. v. Conn*, 104 Ind. 64, 3 N. E. 636; *Cleveland &c. R. Co. v. Perkins*, 171 Ind. 307, 86 N. E. 405; *South Bend &c. Co. v. Cissne*, 35 Ind. App. 373, 74 N. E. 282. See also *Seaboard &c. R. Co. v. Rentz*, 60 Fla. 429, 54 So. 13; *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Chicago &c. R. Co. v. Thomas*, 147 Ind. 35, 46 N. E. 73; *Southern R. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973; *Cleveland &c. R. Co. v. Stewart*, 24 Ind. App. 374, 55 N. E. 917; *Cincinnati &c. R. Co. v. Voght*, 26 Ind. App. 665, 60 N. E. 797; *Minnuci v. Philadelphia &c. R. Co.*, 68 N. J. L. 432, 53 Atl. 229; *Chesapeake &c.*

R. Co. v. Melton, 110 Va. 728, 67 S. E. 346, and authorities cited in next following note.

²⁸ *Pike v. Chicago &c. R. Co.*, 39 Fed. 754; *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Wabash R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *Evansville &c. R. Co. v. Krapf*, 143 Ind. 647, 36 N. E. 901; *Enochs v. Pittsburgh &c. R. Co.*, 145 Ind. 635, 44 N. E. 658; *Evansville &c. R. Co. v. Welch*, 25 Ind. App. 308, 58 N. E. 88; *Cox v. Chicago &c. R. Co.*, 102 Iowa 711, 72 N. W. 301; *State v. Baltimore &c. R. Co.*, 58 Md. 482; *Cumberland &c. R. Co. v. Thompson*, 102 Md. 193, 62 Atl. 243; *Stone v. Boston &c. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Larson v. St. Paul &c. R. Co.*, 43 Minn. 488, 45 N. W. 1096; *Short v. New Orleans &c. R. Co.*, 69 Miss. 848, 13 So. 826; *Gulf &c. R. Co. v. Blockman*, 87 Miss. 192, 39 So. 479; *Henry v. Grand Ave. R. Co.*, 113 Mo. 525, 21 S. W. 214; *Kearns v. Southern R. Co.*, 139 N. Car. 470, 52 S. E. 131; *Kincaid v. Oregon &c. R. Co.*, 22 Ore. 35, 29 Pac. 3; *Glenn v. Columbia &c. R. Co.*, 21 S. Car. 466; *Galveston &c. R. Co. v. Chambers*, 73 Tex. 296, 11 S. W. 279; *Huber v. LaCrosse &c. R. Co.*, 92 Wis. 636, 66 N. W. 708, 31 L. R. A. 583n, 53 Am. St. 940; post, § 2708. In most of the cases above cited it was held that it was not shown that the alleged negligence of the defendant was the proximate cause of the injury. For

§ 2697. (1689g.) **Burden of proof.**—The burden of proof is upon the plaintiff to prove the alleged negligence of the defendant and the other essential elements of his cause of action.²⁹ In some jurisdictions he must also allege and prove, where his action is based on negligence, that he himself was free from con-

cases in which it was held to have been sufficiently shown, see *Dugan v. St. Paul &c. R. Co.*, 40 Minn. 544, 42 N. W. 538; *Alabama &c. R. Co. v. Chapman*, 80 Ala. 615; *Evansville &c. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Lake Erie &c. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923, and cases cited; *Handelun v. Burlington &c. R. Co.*, 72 Iowa 709, 32 N. W. 4; *Cincinnati &c. R. Co. v. Curd*, 28 Ky. L. 177, 89 S. W. 140; *Kincaid v. Kansas City R. Co.*, 62 Mo. App. 365; *Jackson v. Galveston &c. R. Co.*, 90 Tex. 372, 38 S. W. 745. See generally *Cleveland &c. R. Co. v. Berry*, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 3, and note; *The Joseph B. Thomas*, 86 Fed. 658, 46 L. R. A. 58, and note, particularly on page 119, et seq.; *Gilson v. Delaware &c. Co.*, 65 Vt. 213, 26 Atl. 70, 36 Am. St. 802, and note; ante, §§ 842, 1445-1446, 1582, 1648, 1720, 1722, 1803-1804, 1873, 1877, 1942, 2057, 2204, 2211, 2237.

²⁹ *Texas &c. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. ed. 1136; *Illinois Cent. R. Co. v. Coughlin*, 132 Fed. 801; *Denver &c. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79; *Button v. Frink*, 51 Conn. 342; *Adams v. Wilmington &c. R. Co.*, 3 Pen. (Del.) 512, 52 Atl. 264; *Farley v. Wilmington &c. Electric R. Co.*, 3 Pen. (Del.) 581, 52 Atl. 543; *Cox v. Wilmington City R. Co.*, 4 Pen.

(Del.) 162, 53 Atl. 569; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199, 40 Atl. 945; *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123, 42 Atl. 442; *Jacksonville St. R. Co. v. Chappell*, 21 Fla. 175; *Jacksonville &c. R. Co. v. Peninsular Land &c. Co.*, 27 Fla. 157, 9 So. 661; *Western Wheels Works v. Stachnick*, 102 Ill. App. 420; *Tubelowish v. Lathrop*, 104 Ill. App. 82; *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 376, 45 N. E. 479, citing §§ 1648, 1649, ante, and numerous cases; *Huntingburg v. First*, 22 Ind. App. 66, 53 N. E. 246; *Case v. Chicago &c. R. Co.*, 69 Iowa 449, 29 N. W. 596; *Gordon v. Louisville R. Co.*, 19 Ky. L. 1959, 44 S. W. 972; *Baltimore &c. Road v. State*, 71 Md. 573, 18 Atl. 884; *Doyle v. Boston &c. R. Co.*, 145 Mass. 386, 14 N. E. 461; *Brown v. Congress St. &c. R. Co.*, 49 Mich. 153, 13 N. W. 494; *Renders v. Grand Trunk R. Co.*, 144 Mich. 387, 108 N. W. 368; *Larson v. St. Paul &c. R. Co.*, 43 Minn. 488, 45 N. W. 1096; *Lowe v. Alabama &c. R. Co.*, 81 Miss. 9, 32 So. 907; *Egan v. Dry Dock &c. R. Co.*, 12 App. Div. 556, 42 N. Y. S. 188; *Dobbins v. Brown*, 119 N. Y. 188, 28 N. Y. St. 957, 23 N. E. 537; *Miller v. Lebanon &c. R. Co.*, 186 Pa. St. 190, 40 Atl. 413; *Allen v. Union &c. R. Co.*, 7 Utah 239, 26 Pac. 297; *Richmond &c. R. Co. v. Yeamans*, 86 Va. 860, 12 S.

tributory negligence.⁸⁰ And it has been held that where this is the rule the burden of the issue is not thrown upon the defendant by unnecessarily pleading in his answer that the plaintiff

E. 946. As to the effect of an admission upon the burden of proof and right to open and close see *Brunswick &c. R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513, and note.

⁸⁰ The subject is fully considered, and the cases are classified by states in 1 *Thomp. Neg.* (2d ed.) § 395, et seq., and in 7 *Am. & Eng. Ency. of Law* (2d ed.), 453; also in elaborate note in 33 L. R. A. (N. S.) 1085. In a majority of the states the burden of showing contributory negligence, especially in personal injury and death cases, is upon the defendant, but in some of such states it may be shown under the general denial and it is sufficient if it is shown either by the plaintiff's own evidence, or by a preponderance of all the evidence. *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456; *Grand Trunk &c. R. Co. v. Reynolds* (Ind. App.), 90 N. E. 94; *O'Hara v. Central R. Co.*, 183 Fed. 739; *Burns v. Metropolitan St. R. Co.*, 66 Kans. 188, 71 Pac. 244; *Hunter v. Montana Cent. R. Co.*, 22 Mont. 525, 57 Pac. 140; *Cook v. Missouri Pac. R. Co.* (Mo.), 68 S. W. 230; 3 *Elliott Ev.* § 2500; note in 33 L. R. A. (N. S.) 1183. We cite only the more recent cases upon the subject. In the following the burden is held to be upon the plaintiff. *Clark v. Connecticut Co.*, 83 Conn. 219, 76 Atl. 523; *Prather v. Richmond &c. R. Co.*, 80 Ga. 427, 9 S. E. 530, 12 Am. St. 263; *Stack*

v. East St. Louis &c. R. Co., 245 Ill. 308, 92 N. E. 241, 137 Am. St. 318; *Hewes v. Chicago &c. R. Co.*, 119 Ill. App. 393, affirmed in 217 Ill. 500, 75 N. E. 515; *Crawford v. Chicago &c. R. Co.*, 109 Iowa 433, 80 N. W. 519; *Bucholtz v. Radcliffe*, 129 Iowa 27, 105 N. W. 336; *State v. Maine &c. R. Co.*, 77 Maine 538, 1 N. Eng. 286; *Ward v. Cent. R. Co.*, 96 Maine 136, 51 Atl. 947; *Day v. Boston &c. R. Co.*, 96 Maine 207, 52 Atl. 771; *Taylor v. Carew Man. Co.*, 143 Mass. 470, 3 N. E. 21; *Cox v. South Shore &c. R. Co.*, 182 Mass. 497, 65 N. E. 823; *Frounfelker v. Delaware &c. R. Co.*, 74 App. Div. 224, 77 N. Y. S. 470; *Axelrod v. New York City R. Co.*, 109 App. Div. 87, 95 N. Y. S. 1072; *Lewin v. Pauli*, 19 Pa. Sup. Ct. 447; *Mobus v. Waitsfield*, 75 Vt. 122, 53 Atl. 775. See also *Merchants &c. Co. v. Chicago &c. Ry. Co.*, 170 Iowa 378, 150 N. W. 720. In the following the burden is held to be on the defendant: *Pullman Palace-Car Co. v. Adams*, 120 Ala. 103, 24 So. 921; *Mobile Elec. Co. v. Sanges*, 169 Ala. 341, 53 So. 176, Ann. Cas. 1912B, 461; *Hemingway v. Illinois &c. R. Co.*, 114 Fed. 843; *Little Rock &c. R. Co. v. Cavenesse*, 48 Ark. 106, 5 S. W. 505; *St. Louis &c. R. Co. v. Grimsley*, 90 Ark. 64, 117 S. W. 1064; *Heckle v. Southern Pac. Co.*, 123 Cal. 441, 56 Pac. 56; *Mares v. Northern &c. R. Co.*, 3 Dak. 336, 21 N. W. 5; *Boyd v. Blumenthal*, 3 Pen. (Del.) 564, 52 Atl. 330; *Mul-*

was guilty of contributory negligence.⁸¹ Under the doctrine *res ipsa loquitur*, where it applies, the plaintiff may be relieved from showing the exact cause of the so-called accident, and the burden of giving evidence to explain or suffer defeat may be cast upon the defendant.⁸² So, in other cases, presumption may arise, from evidence introduced by the plaintiff, on which he may rely without going further unless required to do so by evidence on the part of the defendant. But, although there is much confusion and apparent conflict among the authorities, we think

ler v. District of Columbia, 5 Mackey (D. C.) 286, 5 Cent. 428; *Louisville &c. R. Co. v. Yniestra*, 21 Fla. 700; *Central &c. Co. v. Small*, 80 Ga. 519, 5 S. E. 794; *Howard v. Indianapolis St. R. Co.*, 29 Ind. App. 514, 64 N. E. 890; *Cleveland &c. R. Co. v. Coffman*, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; *Union Trac. Co. v. Sullivan*, 38 Ind. App. 513, 76 N. E. 116; *Burns v. Metropolitan St. R. Co.*, 66 Kans. 188, 71 Pac. 244; *Chicago &c. R. Co. v. Lee*, 66 Kans. 806, 72 Pac. 266; *Pollich v. Sellers*, 42 La. Ann. 623, 7 So. 786; *Hill v. Minneapolis St. R. Co.*, 112 Minn. 503, 128 N. W. 831; *Louisville &c. R. Co. v. Natchez &c. R. Co.*, 67 Miss. 399, 7 So. 350, 43 Am. & Eng. R. Cas. 54; *Petty v. Hannibal &c. R. Co.*, 88 Mo. 306; *Thorpe v. Missouri &c. R. Co.*, 89 Mo. 650, 58 Am. Rep. 120; *Cook v. Chicago &c. R. Co.*, 78 Nebr. 64, 110 N. W. 718; *St. Louis &c. R. Co. v. Gammage* (Tex. Civ. App.), 96 S. W. 645; *Hickey v. Rio Grande &c. R. Co.*, 29 Utah 392, 82 Pac. 29. The rule was formerly otherwise in Indiana, but was changed by statute a few years ago, as to action for personal injuries. As to the "last clear

chance doctrine," see note in 55 L. R. A. 418.

⁸¹ *Indianapolis &c. R. Co. v. Evans*, 88 Ill. 63; *Hawes v. Burlington &c. R. Co.*, 64 Iowa 315, 20 N. W. 717; *Gamble v. Mullin*, 74 Iowa 99, 36 N. W. 909. But compare *Falls Twp. v. Stewart*, 3 Kans. App. 403, 42 Pac. 926.

⁸² See ante, §§ 1802, 2482, 2498, also *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601, 16 S. E. 118; *Clark v. Chicago &c. R. Co.*, 127 Mo. 197, 29 S. W. 1013; *Sweeney v. Kansas City &c. R. Co.*, 150 Mo. 385, 51 S. W. 682; *Central &c. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Am. St. 309; *Missouri Pac. R. Co. v. Brazzil*, 72 Tex. 233, 10 S. W. 403. Some of these cases, however, seem to go too far. Many other cases illustrating the doctrine are cited in the notes to §§ 2482, 2483, and 2498, ante. See also 3 Thompson Neg. § 7635, et seq. As to whether the doctrine applies as between master and servant see both principal and dissenting opinions in *Highland &c. Min. Co. v. Pouch*, 124 Fed. 148; *Cincinnati &c. R. Co. v. South Fork Coal Co.*, 139 Fed. 528, 536; 3 Elliott Ev. §§ 2498, 2579; 3 Thompson Neg. § 7646, et seq.

the true rule is that, while the plaintiff may not have to go further when he has introduced evidence sufficient to bring into play the doctrine *res ipsa loquitur* or some presumption which is sufficient as the case stands, the burden of proof in the sense of ultimately establishing all the essential facts of his cause of action when evidence for and against such facts is introduced on both sides, does not shift, but remains upon the plaintiff.³³

§ 2698 (1689h). **Judicial knowledge.**—It is well settled that the courts may, and will, in a proper case, take judicial notice of the general and well-known features of railroad operation or business and the ordinary incidents of railway travel.³⁴ This

³³ *Louisville &c. R. Co. v. Pimon*, 98 Ala. 570, 14 So. 619, 620; *Cleveland &c. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Young v. Miller*, 145 Ind. 652, 44 N. E. 757; *Holt Ice Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575; *Black v. Boston &c. R. Co.*, 187 Mass. 172, 72 N. E. 970, 68 L. R. A. 799, and note; *Lincoln Trac. Co. v. Shepherd*, 74 Nebr. 369, 107 N. W. 764; *Omaha St. R. Co. v. Boesen*, 74 Nebr. 764, 105 N. W. 303, 4 L. R. A. (N. S.) 122n; *Maher v. Metropolitan St. R. Co.*, 102 App. Div. 517, 92 N. Y. S. 825; *Kay v. Metropolitan St. R. Co.*, 163 N. Y. 447, 57 N. E. 751; 1 Elliott Ev. §§ 139, 140. See also note in 16 L. R. A. (N. S.) 527, and note in 33 L. R. A. (N. S.) 1088, 1089, 1188, et seq. In a recent case it is said: "Even in a case to which the doctrine of *res ipsa loquitur* is applicable, it is erroneous for the court to charge the jury that a given state of facts either constitutes, or affords *prima facie* proof of, negligence, when there is no statute expressly declaring that this

is true as matter of law." *Augusta R. &c. Co. v. Weekly*, 124 Ga. 384, 52 S. E. 444. See also *Palmer Brick v. Chenall Co.*, 119 Ga. 837, 843, 47 S. E. 329, 330.

³⁴ *Condran v. Chicago &c. R. Co.*, 67 Fed. 522, 523, 28 L. R. A. 749n; *Central of Ga. R. Co. v. Crane* (Ala.), 65 So. 866; *Soutle &c. R. Co. v. Pilgreen*, 62 Ala. 305; *Atchison &c. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822; *McDonald v. Illinois Cent. R. Co.*, 187 Ill. 529, 58 N. E. 463; *Louisville &c. R. Co. v. Bisch*, 120 Ind. 549, 22 N. E. 662; *Cincinnati &c. R. Co. v. Davis*, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503; *Union Pac. R. Co. v. Winterbotham*, 52 Kans. 433, 34 Pac. 1052; *Yazoo &c. R. Co. v. Peeples*, 106 Miss. 604, 64 So. 262; *Finnegan v. Missouri Pac. R. Co.*, 261 Mo. 481, 169 S. W. 696; *Isaacson v. New York &c. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142; *Kansas City &c. Ry. Co. v. Fugatt*, 47 Okla. 727, 150 Pac. 669, L. R. A. 1916A, 545; 1 Elliott Ev. § 72, and numerous authorities there cited.

rule is well stated in a case in Michigan where it is laid down that courts may take judicial notice of the ordinary incidents of railway travel,⁸⁵ and a passage is quoted from an English case that "judges cannot denude themselves of a knowledge of the incidents of railway travelling which is common to us all."⁸⁶ Among the things of which the courts have taken such knowledge are the locality of such railway including the place of its termination,⁸⁷ the functions of such railway employes as ticket agents and conductors, and that passengers are supposed to know these functions;⁸⁸ that a disturbance in the regular time schedule of trains is frequent and necessary in the operation of all railroads;⁸⁹ that there is more or less violent jolting and jerking inci-

⁸⁵ Downey v. Hendrick, 46 Mich. 498, 501. See also Cleveland &c. R. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, rev'g 70 Ill. App. 415. Courts are bound to take judicial notice of the general features of railroad business in respect to the separation of passenger and freight trains: Atchison &c. R. Co. v. Headland, 18 Colo. 477, 32 Pac. 185, 20 L. R. A. 822.

⁸⁶ Siner v. Great Western R. Co., L. R. 4 Exch. 123. See also Dublin &c. R. Co. v. Slattery, 3 App. Cas. 1115; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274.

⁸⁷ Galveston &c. R. Co. v. Johnson (Tex. Civ. App.), 29 S. W. 428. See also Gulf &c. R. Co. v. State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. 815, 1 L. R. A. 849, and note; Meyer v. Krauter, 56 N. J. L. 696, 29 Atl. 426, 24 L. R. A. 575; Alabama &c. R. Co. v. Coskry, 92 Ala. 254, 9 So. 202; Hobbs v. Memphis &c. R. Co., 9 Heisk. (Tenn.) 873; Hunt v. Card, 94 Maine 386, 47 Atl. 921. But while general railroad laws and charters

declared to be public are so noticed (Heaton v. Cincinnati &c. R. Co., 16 Ind. 275, 79 Am. Dec. 430; Cincinnati &c. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524; Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513), it has been held that the court will not judicially notice whether a particular company has complied with a general railroad law, Hammett v. Little Rock &c. R. Co., 20 Ark. 204; Railroad Co. v. Hofflinies, 46 Ohio St. 643, 22 N. E. 871; nor the history and location of particular lines. Purdy v. Erie R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; Indianapolis &c. R. Co. v. Stephens, 28 Ind. 429; Georgia &c. R. Co. v. Gaines, 88 Ala. 377, 7 So. 382; McKeoin v. Northern Pac. R. Co., 45 Fed. 464.

⁸⁸ Dye v. Virginia &c. R. Co., 9 Mackey (D. C.) 63, 19 Wash. L. 369.

⁸⁹ Oregon &c. R. Co. v. Frost, 74 Fed. 965, 44 U. S. App. 606, 21 C. A. 186.

dent to the movement of long and heavy freight trains;⁴⁰ that the speed of a railroad train can ordinarily be slackened sufficiently in a distance of two hundred yards to avoid running down a horse going at full speed on the track ahead of it;⁴¹ that a railroad yard consists of side tracks upon either side of the main tracks and adjacent to some principal station or depot grounds where cars are placed for deposit and where arriving trains are separated and departing trains made up;⁴² that the maintenance of gates and a gate-keeper at a railroad crossing tends to promote safety;⁴³ that a brakeman is subject to his conductor's orders;⁴⁴ that passenger conductors enter and leave their trains while in motion;⁴⁵ that the usual speed of railroad trains outside of cities and towns exceeds fifteen miles per hour;⁴⁶ that no device has been introduced which will wholly prevent the ordinary emission of sparks or cinders from locomotives;⁴⁷ that brakemen frequently go between cars to couple and uncouple them while in motion, and that it is quite a general practice for a brakeman to go ahead of a train and open switches, and that these acts occur at all times, day or night, and in all kinds of weather;⁴⁸ that horses are liable to take fright at escaping steam and noise

⁴⁰ *Guffey v. Hannibal &c. R. Co.*, 53 Mo. App. 462. See also *Scrivner v. Missouri Pac. R. Co.*, 260 Mo. 421, 169 S. W. 83.

⁴¹ *Gulf &c. R. Co. v. Ellis*, 54 Fed. 581, 10 U. S. App. 640. And it has been held, on the other hand, that a court can take judicial knowledge that the dispatch with which the business of railroad is conducted does not admit of trains coming to a full stop at junction points and that signals are devised for safety at such places. *Finnegan v. Missouri Pac. Ry. Co.*, 261 Mo. 481, 169 S. W. 969.

⁴² *Harley v. Louisville &c. R. Co.*, 57 Fed. 144.

⁴³ *Richmond &c. R. Co. v. Rich-*

mond &c. R. Co., 96 Va. 670, 32 S. E. 787.

⁴⁴ *Mason v. Richmond &c. R. Co.*, 111 N. Car. 482, 16 S. E. 698, 18 L. R. A. 845.

⁴⁵ *Dailey v. Preferred Masonic &c. Assn.*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

⁴⁶ *Benson v. Central &c. R. Co.*, 98 Cal. 45, 32 Pac. 809.

⁴⁷ *Lake Erie &c. R. Co. v. Gosart*, 14 Ind. App. 244, 42 N. E. 818; *Menominee River Sash &c. Co. v. Milwaukee &c. R. Co.*, 91 Wis. 447, 65 N. W. 176. See also *Louisville &c. R. Co. v. Com.*, 158 Ky. 773, 166 S. W. 237.

⁴⁸ *Indianapolis &c. R. Co. v. Clay*, 4 Ind. App. 282, 28 N. E. 567, 30 N. E. 916.

caused by the blowing of locomotive whistles in close proximity to them;⁴⁹ that the demands and exigencies of commerce require the cars of one railroad company to be hauled over the road of another;⁵⁰ that railroad passenger trains are operated to carry passengers for hire;⁵¹ that in many and possibly in the majority of cases where the carriage of a passenger upon a sleeping car begins at a terminal point or in a large city or considerable town, the passenger receives a ticket at the ticket office and surrenders it upon entering the car and receives from the conductor of the car a berth check.⁵² It has also been held that courts will take judicial notice of the way street cars are run;⁵³ that within the last thirty years or so the motive power of street railroads has in most cases been changed to steam and electricity and that the maximum speed of such cars has been greatly increased thereby;⁵⁴ that electric cars can proceed at a rate greater than seven or eight miles per hour;⁵⁵ that street cars are easily and readily stopped;⁵⁶ and that a trolley car operated at an ordinary safe rate of speed can be stopped in less than one hundred and two feet.⁵⁷ Courts will, of course, take judicial notice that street railway companies and ordinary commercial railroad companies are common carriers of passengers;⁵⁸ and that street railway companies not only per-

⁴⁹ *Northern &c. R. Co. v. Sullivan*, 53 Fed. 219.

⁵⁰ *Louisville &c. R. Co. v. Bolland*, 96 Ala. 626, 11 So. 667, 18 L. R. A. 260.

⁵¹ *Condran v. Chicago &c. R. Co.*, 67 Fed. 522, 28 L. R. A. 749, and note; *White v. Evansville &c. R. Co.*, 133 Ind. 480, 33 N. E. 273.

⁵² *Mann Boudoir Car Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289.

⁵³ *Schwartz v. Cincinnati St. R. Co.*, 8 Ohio C. C. 484, 1 Ohio Dec. 197.

⁵⁴ *Glenville v. St. Louis R. Co.*, 51 Mo. App. 629.

⁵⁵ *Cicero &c. St. R. Co. v. Meixner*, 55 Ill. App. 288.

⁵⁶ *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. 829.

⁵⁷ *Young v. Atlantic Ave. R. Co.*, 10 Misc. 541, 64 N. Y. St. 124, 31 N. Y. S. 441.

⁵⁸ *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Caldwell v. Richmond &c. R. Co.*, 89 Ga. 550, 15 S. E. 678; *Boyle v. Great Northern &c. R. Co.*, 13 Wash. 383, 43 Pac. 344; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322 (and of the legal duty resulting). And of the application of the Federal Employers' Liability Act to railroads of the state engaged in interstate commerce. *McIntosh v.*

mit but sometimes seem to encourage passengers to ride upon the car platform.⁵⁹ Courts will not, however, take judicial notice of all details, nor of an unusual manner of operating a particular road, not generally known; nor of the precise duties and authority of particular employes,⁶⁰ although they may take notice in a general way of the ordinary and usual duties or authority of certain classes of officers or employes.⁶¹ So, it is held in a recent case that the court, on considering a demurrer to an information to collect taxes from a railroad company, can not take judicial notice of reports of the company to the state, and proceedings thereon by state officers, for the purpose of overcoming the charge in the information that the railroad officers had concealed from the officers of the state the amount of capital stock and loans subject to taxation.⁶²

§ 2699. (1689i.) Evidence. — Questions as to the competency, relevancy and admissibility of evidence in particular cases have already been considered in the treatment of specific subjects,⁶³ and other questions of the same character will be

St. Louis &c. R. Co., 182 Mo. App. 288, 168 S. W. 82. But compare Southern R. Co. v. Railroad Com., 179 Ind. 23, 100 N. E. 337.

⁵⁹ Metropolitan R. Co. v. Snashall, 3 App. Cas. (D. C.) 420.

⁶⁰ Southern R. Co. v. Hagan, 103 Ga. 564, 29 S. E. 760; McGowan v. St. Louis &c. R. Co., 61 Mo. 528; Wood v. Chicago &c. R. Co., 59 Iowa 196, 13 N. W. 99; Hull v. East Line &c. R. Co., 66 Tex. 619, 2 S. W. 831. See also Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770; Cleveland &c. R. Co. v. Nichols, 52 Ind. App. 349, 99 N. E. 497.

⁶¹ Condran v. Chicago &c. R. Co., 67 Fed. 522, 523, 28 L. R. A. 749, and note; Union Pac. R. Co. v. Winterbotham, 52 Kans. 433, 34 Pac.

1052; Dailey v. Preferred &c. Assn., 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; Sax v. Detroit &c. R. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. 572; Brown v. Minneapolis &c. R. Co., 31 Minn. 553, 18 N. W. 834; Travers v. Kansas Pac. R. Co., 63 Mo. 421. See ante, §§ 260, 341, 345. And see as to authority of brakeman to eject trespassers, conflicting authorities cited ante, § 1793.

⁶² People v. Michigan Cent. R. Co., 145 Mich. 140, 108 N. W. 772. But compare Chicago &c. R. Co. v. Railroad Com., 156 Wis. 47, 145 N. W. 216.

⁶³ See as to matters relating to incorporation, records and by-laws: ante, §§ 23, 24, 47, 92, 221, 306, 307, 373. In condemnation proceedings:

treated in the chapter on actions against common carriers for personal injuries. In this section attention will be called to some of the important and most useful decisions upon miscellaneous questions as to the admissibility of evidence. Many railroad cases illustrate and enforce the rule that hearsay evidence is inadmissible.⁶⁴ But declarations, statements and circumstances constituting part of the *res gestae* are usually admissible.⁶⁵ And in several recent cases a train sheet constitut-

§§ 1259, 1326, 1330. Positive and negative: § 1652. Negligence and contributory negligence: §§ 1445, 1446, 1648, 1746, 1767, 1876. Knowledge of defects: § 1879. Subsequent repairs or precautions: §§ 1942, 2708. *Res gestae*, declarations and admissions: §§ 254, 255, 345, 1330. Life or mortality tables: § 2067. In actions against carriers: §§ 2118, 2124, 2125, 2139, 2140, 2232, 2415, 2416, 2518, 2522, 2524. Real evidence and experiments: § 2711. Opinion and expert evidence: §§ 1333, 1334, 1734, 1763, 2706.

⁶⁴ *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713 (entry in report of police surgeon as to what a policeman had heard others say about a railroad accident); *Gulf &c. R. Co. v. Bruce* (Tex. Civ. App.), 24 S. W. 927. Statements as to what by-standers said afterwards: *Atchison &c. R. Co. v. Frazier*, 27 Kans. 463; *Felska v. New York &c. R. Co.*, 152 N. Y. 339, 46 N. E. 613; *Haase v. Oregon R. &c. Co.*, 19 Ore. 354, 34 Pac. 238. Reports made by employes to the company may be hearsay or privileged and are usually inadmissible against the principal: *Carrol v. East Tenn. &c. R. Co.*, 82 Ga. 452, 10 S. E. 163, 6 L. R. A.

214, and note; *Howard v. Savannah &c. R. Co.*, 84 Ga. 711, 11 S. E. 452; *St. Louis &c. R. Co. v. Maddox*, 18 Kans. 546; *Warner v. Maine Cent. R. Co.*, 111 Maine 149, 88 Atl. 430, 47 L. R. A. (N. S.) 830, and note. But see *Mexican Nat. R. Co. v. Musette*, 7 Tex. Civ. App. 169, 24 S. W. 520; *Vicksburg &c. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. ed. 257. Compare also *Hilbert v. Spokane &c. R. Co.*, 20 Idaho 54, 116 Pac. 1116; *Lemen v. Kansas City &c. R. Co.*, 151 Mo. App. 511, 132 S. W. 13. As to the production of reports, papers and documents, and their use in evidence, see notes in 22 Am. St. 640 and 41 Am. St. 387-396. As to the general rule that a report by an agent to his principal is not evidence against the latter, see *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954, 985; *Devala Co. In re*, L. R. 22 Ch. Div. 593; *Schoepf, Ex parte*, 74 Ohio St. 1, 77 N. E. 276; *Davenport v. Pennsylvania R. Co.*, 166 Pa. St. 480, 31 Atl. 245; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202.

⁶⁵ *Mack v. Porter*, 72 Fed. 236, 25 U. S. App. 595; *Delaware &c. R. Co. v. Ashley*, 67 Fed. 209; *Denver &c. R. Co. v. Roller*, 100 Fed. 738;

ing the train dispatcher's record of the arrival and departure of trains along the line was held admissible to show the location of the train at the time an alleged injury was received on the

Kansas City &c. R. Co. v. Moles, 121 Fed. 351. See Alabama &c. R. Co. v. Frazier, 93 Ala. 45, 9 So. 303; Alabama &c. R. Co. v. Tapia, 94 Ala. 226, 10 So. 236; Elledge v. National City &c. R. Co., 100 Cal. 282, 34 Pac. 720, 852; Washington &c. R. Co. v. McLane, 11 App. (D. C.) 220; Augusta Factory v. Barnes, 72 La. 217, 53 Am. Rep. 838; Ferguson v. Columbus &c. R. Co., 75 Ga. 637; Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911; Springfield &c. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884, aff'g 71 Ill. App. 162; Cleveland &c. R. Co. v. Newell, 104 Ind. 264, 3 N. E. 836; Louisville &c. R. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520; Ohio &c. R. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733; Winter v. Central &c. R. Co., 74 Iowa 448, 38 N. W. 154; Louisville &c. R. Co. v. Earl, 94 Ky. 368, 22 S. W. 607; De Mahy v. Morgan's Louisiana &c. Co., 45 La. Ann. 1329, 14 So. 61; Commonwealth v. Hackett, 2 Allen (Mass.) 136; Mobile &c. R. Co. v. Stinson, 74 Mass. 453, 21 So. 14, 522; Harris v. Detroit City R. Co., 76 Mich. 227, 42 N. W. 1111; Waller v. Hannibal &c. R. Co., 83 Mo. 608; Leahey v. Cass Ave. &c. R. Co., 97 Mo. 165, 10 S. W. 58; Hewitt v. Eisenbart, 36 Nebr. 794, 55 N. W. 252; Murray v. Boston &c. R. Co., 72 N. H. 32, 54 Atl. 289, 290, 61 L. R. A. 495, 101 Am. St. 660; Trenton Pass. R. Co. v. Cooper, 60 N. J.

L. 219, 37 Atl. 730, 38 L. R. A. 637; Means v. Carolina &c. R. Co., 124 N. Car. 574, 32 S. E. 960, 45 L. R. A. 164; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 114, 18 Atl. 759; State v. Murphy, 16 R. I. 528, 17 Atl. 998; Railroad v. Wyrick, 99 Tenn. 500, 42 S. W. 434; Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519; Gulf &c. R. Co. v. Pierce, 7 Tex. Civ. App. 597, 25 S. W. 1052; Piper v. Spokane, 22 Wash. 147, 60 Pac. 138; Sample v. Consolidated &c. R. Co., 50 W. Va. 472, 40 S. E. 597, 57 L. R. A. 186; Bridge v. Oshkosh, 71 Wis. 363, 37 N. W. 409; Robinson v. Superior Rapid Transit R. Co., 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205. Statements of a conductor to a passenger, who has become alarmed for her personal safety by the conduct of another passenger, as to the facts within the knowledge of the conductor tending to show that such other passenger was a madman, have been held part of the *res gestae* in an action against the company for the death of a third passenger killed by such insane passenger: St. Louis &c. R. Co. v. Greenthal, 77 Fed. 150, 40 U. S. App. 554. So in other cases admissions have been held competent and admissible when not so clearly part of the *res gestae* in the narrowest sense. See 1 Elliott Ev. §§ 252, 255, 264; 2 Elliott Ev. § 2510; Krogg v. Atlanta &c. R. Co., 77 Ga. 202, 4 Am. St. 79; Springfield R. Co. v. Welsch,

road;⁶⁶ but, in other cases, such records have been held inadmissible in favor of the company.⁶⁷ Under the rule admitting declarations and circumstances in evidence when a part of the *res gestae*, declarations of bystanders made at the time as a part of, and characterizing, the transaction, have been held admissible;⁶⁸ but it is otherwise where they are made afterwards and

155 Ill. 511, 40 N. E. 1034; *Lafayette &c. R. Co. v. Ehman*, 30 Ind. 83; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Missouri &c. R. Co. v. Vance* (Tex. Civ. App.), 41 S. W. 167; *Leach v. Oregon &c. R. Co.*, 29 Utah 285, 81 Pac. 90, 110 Am. St. 708. A declaration of intention to become a passenger has been held admissible. *Chicago &c. R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269. See also *Baltimore &c. R. Co. v. State*, 81 Md. 371, 32 Atl. 201. As to admissions against interest see *Helman v. Pittsburgh &c. R. Co.*, 58 Ohio St. 400, 50 N. E. 986, 41 L. R. A. 860; *Camden &c. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634; *Gulf &c. R. Co. v. Calvert*, 11 Tex. Civ. App. 297, 32 S. W. 246; 3 Elliott Ev. § 2510. See also *McDonough v. Boston &c. R. Co.*, 191 Mass. 509, 78 N. E. 141, note in 105 Am. St. 558.

⁶⁶ *St. Louis &c. R. Co. v. Sutton*, 169 Ala. 389, 55 So. 989, Ann. Cas. 1912B, 366; *Louisville &c. R. Co. v. Daniel*, 28 Ky. L. 1146, 91 S. W. 691, 3 L. R. A. (N. S.) 1190. See also *Firemen's Ins. Co. v. Seaboard Air Line R. Co.*, 138 N. Car. 42, 50 S. E. 452, 107 Am. St. 517; *Donovan v. Boston &c. R. Co.*, 158 Mass. 450, 33 N. E. 583; *Cathey v. Missouri &c. R. Co.* (Tex.), 124 S. W.

217; *Missouri &c. R. Co. v. Elliott*, 102 Fed. 96, aff'd in 184 U. S. 695, 22 Sup. Ct. 937, 46 L. ed. 763-766.

⁶⁷ *Cleveland &c. R. Co. v. Coffman*, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; *Pittsburgh &c. R. Co. v. Noel*, 77 Ind. 110; *Pittsburgh &c. R. Co. v. Cunningham*, 39 Ohio St. 327. But compare *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. 377. Held admissible against the company in *Mexican Nat. R. Co. v. Musette*, 7 Tex. Civ. App. 169, 24 S. W. 520. Reports made by railroad officials to state railroad commissioners concerning accidents to employes and passengers, made from statements of third parties have been held not admissible against the company or in actions against it by its employes for such personal injuries. *Cleveland &c. R. Co. v. Ullom*, 20 Ohio C. C. 512, 11 Ohio C. D. 321.

⁶⁸ *Kleiber v. People's R. Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; *St. Louis &c. R. Co. v. Murray*, 55 Ark. 248, 18 S. W. 50, 29 Am. St. 32, 16 L. R. A. 787; *Galena &c. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323. See also *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, and note; *Mobile &c. R. Co. v. Ashcraft*, 48 Ala. 15; *Indianapolis R. Co. v. Anthony*, 43

not as part of the transaction.⁶⁹ And, while exact coincidence of time of the declaration and the principal fact or transaction is not always necessary, yet time and place are important, and the declaration must be spontaneous and voluntary and must not be a mere narrative of a past transaction, nor bear the earmarks of afterthought and device.⁷⁰ Exclamations and declarations of present existing pain and suffering are admissible in a

Ind. 183; *Seawell v. Carolina Cent. R. Co.*, 133 N. Car. 55, 45 S. E. 850, 58 Cent. L. Jour. 158, 159; *Oliver v. Columbia &c. R. Co.*, 65 S. Car. 1, 43 S. E. 307; 1 Elliott Ev. § 550.

⁶⁹ *Felska v. New York &c. R. Co.*, 152 N. Y. 339, 46 N. E. 613; *Murray v. Salt Lake City R. Co.*, 16 Utah 356, 52 Pac. 596. See also *Senn v. Southern Pac. R. Co.*, 108 Mo. 142, 18 S. W. 1007; *Indianapolis St. R. Co. v. Whitaker*, 160 Ind. 125, 66 N. E. 433; *Nashville &c. R. v. Moore*, 148 Ala. 63, 41 So. 984.

⁷⁰ See *Vicksburg &c. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. ed. 299; *Alabama &c. R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *Louisville &c. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176; *St. Louis &c. R. Co. v. Kelley*, 61 Ark. 52, 31 S. W. 884; *Durkee v. Central &c. R. Co.*, 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562; *McCarriek v. Kealy*, 70 Conn. 642, 40 Atl. 603; *Metropolitan R. Co. v. Collins*, 1 App. (D. C.) 383; *Poole v. Tennessee &c. R. Co.*, 92 Ga. 337, 17 S. E. 267; *Chicago &c. R. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. 144; *Chicago &c. R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269, rev'g 60 Ill. App. 525; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169,

50 N. E. 713; *Ohio &c. R. Co. v. Cullison*, 40 Ill. App. 67; *Cleveland &c. R. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174; *Armil v. Chicago &c. R. Co.*, 70 Iowa 130, 30 N. W. 42; *Worden v. Humeston &c. R. Co.*, 72 Iowa 201, 33 N. W. 629; *Atchison &c. R. Co. v. Wilkinson*, 55 Kans. 83, 39 Pac. 1043; *Walker v. O'Connell*, 59 Kans. 306, 52 Pac. 894; *Louisville &c. R. Co. v. Ellis*, 97 Ky. 330, 17 Ky. L. 259, 30 S. W. 979; *Williamson v. Cambridge &c. R. Co.*, 144 Mass. 148, 10 N. E. 790; *Eastman v. Boston &c. R. Co.*, 165 Mass. 342, 43 N. E. 115; *Kelly v. Chicago &c. R. Co.*, 88 Mo. 534; *Farber v. Missouri Pac. R. Co.*, 139 Mo. 272, 40 S. W. 932, 7 Am. & Eng. R. Cas. (N. S.) 700; *Wengler v. Missouri &c. R. Co.*, 16 Mo. App. 493; *Keller v. Sioux City &c. R. Co.*, 27 Minn. 178, 6 N. W. 486; *Friend v. Burleigh*, 53 Nebr. 674, 74 N. W. 50; *Tinker v. New York &c. R. Co.*, 92 Hun 269, 36 N. Y. S. 672; *Martin v. New York &c. R. Co.*, 103 N. Y. 626, 9 N. E. 505; *Willis v. Atlantic &c. R. Co.*, 120 N. C. 508, 26 S. E. 784; *Johnson v. Oregon &c. Co.*, 23 Ore. 94, 31 Pac. 283; *Garrick v. Florida &c. R. Co.*, 53 S. Car. 448, 31 S. E. 334, 69 Am. St. 874; *Houston &c. R. Co. v. Ritter*, 16 Tex. Civ. App. 482, 41

proper case,⁷¹ and physicians or surgeons are generally allowed to testify in favor of the injured party as to his declarations and statements of existing pain and injury while being treated,⁷² but not as to the circumstances under which the injury was re-

S. W. 753; *Steinhofel v. Chicago &c. R. Co.*, 92 Wis. 123, 65 N. W. 852.

⁷¹ *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. ed. 977; *St. Louis &c. R. Co. v. Murray*, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. 32; *Cleveland &c. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836; *Chicago &c. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; *Cleveland &c. R. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367; *Jackson Co. v. Nichols*, 139 Ind. 611, 38 N. E. 526; *Louisville &c. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158; *Atchison &c. R. Co. v. Johns*, 36 Kans. 769, 14 Pac. 237, 59 Am. Rep. 609; *Girard v. Kalamazoo*, 92 Mich. 610; *Lewke v. Dry Dock &c. R. Co.*, 46 Hun 283, 11 N. Y. S. 510; *Geiler v. Manhattan R. Co.*, 11 Misc. 413, 65 N. Y. St. 437, 32 N. Y. S. 254; *Kelly v. Cohoes Knitting Co.*, 8 App. Div. 156, 40 N. Y. S. 477; *Hagenlocher v. Coney Island &c. R. Co.*, 99 N. Y. 136, 1 N. E. 536; *Smith v. Dittman*, 34 N. Y. St. 303, 11 N. Y. S. 769; *State v. Hargrave*, 97 N. C. 457, 1 S. E. 774; *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112, 49 N. W. 408, 13 L. R. A. 465; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. 701; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Missouri &c. R. Co. v. Zwiener*

(Tex. Civ. App.), 38 S. W. 375; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Bridge v. Oshkosh*, 67 Wis. 195, 29 N. W. 910. But for limits of this doctrine, at least in some jurisdictions, see *Roche v. Brooklyn City R. Co.*, 105 N. Y. 294, 11 N. E. 630, 59 Am. Rep. 506; *Kennedy v. Rochester &c. R. Co.*, 130 N. Y. 654, 29 N. E. 141; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800; *Boston &c. R. Co. v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. 830, 39 L. ed. 1006; *Firkins v. Chicago &c. R. Co.*, 61 Minn. 31, 63 N. W. 172. See generally 1 Elliott Ev. §§ 523, 524.

⁷² *Birmingham &c. R. Co. v. Hale*, 90 Ala. 8, 8 So. 142, 24 Am. St. 748; *Louisville &c. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Fleming v. Springfield*, 154 Mass. 520, 28 N. E. 910, 26 Am. St. 268; *Heddle v. City Electric R. Co.*, 112 Mich. 547, 70 N. W. 1096; *Wheeler v. Tyler &c. R. Co.*, 91 Tex. 356, 43 S. W. 876; *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. ed. 977, and many of the authorities cited in last preceding note. A few states seem to allow such evidence only from medical men, and in some states evidence of physicians as to past pain and suffering is admitted. See 1 Elliott Ev. § 527. But compare *O'Dea v. Michigan Cent. R. Co.*, 142 Mich. 265, 105 N. W. 746.

ceived.⁷³ So, competent witnesses, whether experts or not, may testify as to the state of health, apparent condition, and the like of the person injured both shortly before and after the injury, and in a recent case it is laid down in comprehensive terms that "opinions may be given by non-expert witnesses as to state of health, hearing, or eyesight of another, or the ability of another to work, or walk, or use his arms or legs naturally, or whether such one is suffering from pains or is unconscious or in possession of his or her mental faculties."⁷⁴ Other questions as to opinions or conclusions of ordinary witnesses,⁷⁵ and as to the

⁷³ Atchison &c. R. Co. v. Frazier, 27 Kans. 463. See also Carthage Turnp. Co. v. Andrews, 102 Ind. 138, 144, 1 N. E. 364; Illinois &c. R. Co. v. Sutton, 42 Ill. 438, 92 Am. Dec. 81; Downs v. New York &c. R. Co., 47 N. Y. 83; Poole v. East Tenn. &c. R. Co., 92 Ga. 337, 17 S. E. 267; Hall v. Cedar Rapids &c. R. Co., 115 Iowa 18, 87 N. W. 739; Steinhofel v. Minneapolis &c. R. Co., 92 Wis. 123; 65 N. W. 852. But compare Jack v. Mutual &c. Assn., 113 Fed. 49, and authorities cited. As to waiver of privileged communications to physician, see note in 48 L. R. A. (N. S.) 395; and as to privilege in regard to records of insane asylum or hospital see note in 51 L. R. A. (N. S.) 22. And see generally, 1 Elliott Ev. §§ 525, 527. Dying declarations are not admissible as such in civil cases and hence are not admissible concerning the circumstances under which the injury was inflicted when not part of the *res gestae*. Chicago &c. R. Co. v. Howard, 6 Ill. App. 569; Marshall v. Great Eastern R. Co., 48 Ill. 475, 95 Am. Dec. 539.

⁷⁴ West Chicago R. Co. v. Fishman, 169 Ill. 196, 48 N. E. 447. Quoted with approval in Davis v. Oregon &c. R. Co., 31 Utah 307, 88 Pac. 2, 6. See also Elliott Ev. §§ 278, 279; Chicago &c. R. Co. v. Randolph, 199 Ill. 126, 65 N. E. 142; Baltimore &c. R. Co. v. Rambo, 59 Fed. 75; Parker v. Steamboat Co., 109 Mass. 449; Robinson v. Exempt Co., 103 Cal. 1, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. 93. But a non-expert witness can not give an opinion that the injury will be permanent. Atlanta St. R. Co. v. Walker, 93 Ga. 462, 21 S. E. 48.

⁷⁵ See Little Rock Trac. &c. Co. v. Hicks, 79 Ark. 248, 96 S. W. 385; Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 108 N. W. 1081; Chicago City R. Co. v. Roher, 118 Ill. App. 322; Rietveid v. Wabash R. Co., 129 Iowa 249, 105 N. W. 515; Houston &c. R. Co. v. O'Donnell, 99 Tex. 636, 92 S. W. 409. Inadmissible: McCutchan v. Texas &c. R. Co. (Tex. Civ. App.), 96 S. W. 647; Verrone v. Rhode Island &c. R. Co., 27 R. I. 370, 62 Atl. 512, 114

competency of experts and the admissibility of their evidence, in particular cases,⁷⁶ have been, or will be, sufficiently treated elsewhere. This is also true in regard to questions relating to the relevancy of particular evidence, especially as to custom, habit, similar accidents and the like; but recent decisions⁷⁷ upon

Am. St. 41; Macon R. &c. Co. v. Mason, 123 Ga. 773, 51 S. E. 569; McFeat v. Philadelphia &c. R. Co., (5 Pen. Del. 52), 62 Atl. 898; Gulf &c. R. Co. v. Hays, 40 Tex. Civ. App. 162, 89 S. W. 29.

⁷⁶ See McDonald v. City Elec. Ry. Co., 144 Mich. 379, 108 N. W. 85; Gila Valley &c. R. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. ed. 276; Wallace v. North Ala. &c. Trac. Co., 145 Ala. 682, 40 So. 89; Pittsburgh &c. R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522; St. Louis &c. R. Co. v. Smith (Tex. Civ. App.), 90 S. W. 926; Houston &c. R. Co. v. Bath, 40 Tex. Civ. App. 270, 90 S. W. 55; Traver v. Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284. Inadmissible: Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915; McFeat v. Philadelphia &c. R. Co., 5 Pen. (Del.) 52, 62 Atl. 898; Cook v. Stimson Mill Co., 41 Wash. 314, 83 Pac. 419. It has been held error to permit a physician to testify to consequences that "might" result from the injury. Briggs v. New York Cent. R. Co., 177 N. Y. 59, 69 N. E. 223.

⁷⁷ Other accidents: Mayer v. Detroit &c. R. Co., 142 Mich. 459, 105 N. W. 888; Jenkins v. St. Paul &c. R. Co., 105 Minn. 504, 117 N. W. 928, 20 L. R. A. (N. S.) 401; Vicksburg &c. R. Co. v. Miles, 88

Miss. 204, 40 So. 748; St. Louis &c. R. Co. v. Parks, 40 Tex. Civ. App. 480, 90 S. W. 343; Texas &c. R. Co. v. Crowley, (Tex. Civ. App.), 86 S. W. 342 (custom); Thompson v. Boston &c. R. Co., 153 Mass. 391, 26 N. E. 1070; Southern Kans. R. Co. v. Robbins, 43 Kans. 145, 23 Pac. 113; Louisville &c. R. Co. v. McClish, 115 Fed. 268; Chase v. Maine &c. R. Co., 77 Maine 62, 52 Am. Rep. 744; Adams v. Chicago &c. R. Co., 93 Iowa 565, 61 N. W. 1059. In the last five cases it is held that a custom or habit is not admissible to show freedom from negligence, or contributory negligence, but, as elsewhere shown, evidence of custom is sometimes admissible on such subjects, and in some jurisdictions, especially in case of death where there are no eye-witnesses, evidence of habit is held admissible. See 1 Elliott Ev. §§ 187, 217; 3 Elliott Ev. § 2505. See also generally International &c. R. Co. v. Boykins, 99 Tex. 259, 89 S. W. 639, notes in 43 L. R. A. 311, 316; 3 Elliott Ev. §§ 2505, 2506; ante §§ 1647, 1790, 1836, 2115, 2117, 2122, 2124, 2289, 2290, 2297, 2516. Atlanta &c. R. Co. v. Smith, 94 Ga. 107, 20 S. E. 763 (evidence as to habit of plaintiff as to care or want of care held inadmissible either for or against him); French v. Sabin, 202 Mass.

the latter subjects are noted below, and so, also, are recent decisions relative to best and secondary evidence.⁷⁸

§ 2700. (1689j.) **Particular cases to be considered.**—In the preceding sections of this chapter we have stated general rules, and have shown something of their application in actions against railroad companies. In the following sections these general rules are further illustrated and considered with reference to particular kinds of actions, and the rules applicable to other actions that are not so common are also considered. It is not the purpose, in this chapter, however, to fully and specifically treat of actions against common carriers nor of actions against railroad companies by employes, passengers or strangers for damages for personal injuries. Such actions will be considered at length in the last four chapters of this work. The treatment of such actions in the following sections is more by way of illustration and development of rules and doctrines already stated.

240, 88 N. E. 845; **Casey v. Chicago Rys. Co.**, 269 Ill. 386, 109 N. E. 984, L. R. A. 1916B, 824 and note citing additional cases on the question as to admissibility of evidence of habits, custom or reputation of person injured or killed.

⁷⁸ Evidence held inadmissible as not the best: **St. Louis &c. R. Co. v. Kennedy** (Tex. Civ. App.) 96 S. W. 653; **Rollins v. Atlantic City R. Co.**, 73 N. J. L. 64, 62 Atl. 929; **Sterling v. St. Louis &c. R. Co.**, 38 Tex. Civ. App. 451, 86 S. W. 665. Secondary or parol evidence held admissible: **Manchester &c. Co. v. Oregon R. &c. Co.**, 46 Ore. 162, 79 Pac. 60, 69 L. R. A. 475; **Strawn v. Missouri &c. R. Co.**, 120 Mo. App. 135, 96 S. W. 488 (to contradict a receipt); **Atlantic Coast Line R. Co. v. Dexter**, 50 Fla. 180, 39 So. 634; **Keylen v.**

Missouri &c. R. Co., 114 Mo. App. 66, 89 S. W. 337; **Mauldin v. Seaboard Air Line R.**, 73 S. Car. 9, 52 S. E. 677. But see **Heubenthal v. Spokane R. Co.**, 43 Wash. 677, 86 Pac. 955. Carbon copy regarded as duplicate original in **Chesapeake &c. R. Co. v. F. W. Stock & Sons**, 104 Va. 97, 51 S. E. 161. But see **Texas &c. R. Co. v. Lynch**, 39 Tex. Civ. App. 96, 87 S. W. 884. Conversation through telephone admissible: **Harrison Co. v. Pennsylvania R. Co.**, 145 Mich. 712, 108 N. W. 1081; **St. Louis &c. R. Co. v. Kennedy** (Tex. Civ. App.), 96 S. W. 653. Photographs are admissible in a proper case: **McFeat v. Philadelphia &c. R. Co.**, 5 Pen. (Del.) 52, 62 Atl. 898; **New York &c. R. Co. v. Robbins**, 38 Ind. App. 172, 76 N. E. 804; see **Chicago &c. R. Co. v. Crose**, 214 Ill.

§ 2701. (1690.) **Remedy for breach of duty as a public or common carrier—Mandamus.**—The public nature of the duty of a railroad company to transport goods or passengers is such that performance thereof may in some instances be coerced by mandamus.⁷⁹ The duty to carry is a duty owing primarily to the public,⁸⁰ but there is a particular or specific right in every member of the public who makes a proper tender of goods or properly offers himself as a passenger, to enforce a performance of that duty. A violation of the duty may, of course, give to the person who properly demands its performance a private right of action, but because there may be a private right of action it does not necessarily follow that mandamus may not in some instances be an appropriate remedy. It is true that mandamus is an extraordinary remedy and can not be resorted to where an ordinary remedy will afford complete relief, but a private action for damages by a person who properly demands transportation for goods or passengers may not always afford adequate relief,

602, 73 N. E. 865, 105 Am. St. 135, note 75 Am. St. 468-479. See also note in 51 L. R. A. (N. S.) 843, 849, 853, 855.

⁷⁹ *Chicago &c. R. Co. v. Burlington R. Co.*, 34 Fed. 481; *Blumenthal v. Railway Co.*, 84 Fed. 920 (mandatory injunction); *Southern Exp. Co. v. Rose*, 124 Ga. 581, 53 S. E. 185; *Chicago &c. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *State v. Delaware &c. R. Co.*, 48 N. J. L. 55, 57 Am. Rep. 543; *People v. New York &c. R. Co.*, 28 Hun. (N. Y.) 543, 9 Am. & Eng. R. Cas. 1. See also *Union Pac. R. Co. v. Hall*, 91 U. S. 843; *Abbott v. Johnstown &c. R. Co.*, 80 N. Y. 31, 36 Am. Rep. 572. But see *People v. New York &c. R. Co.*, 22 Hun (N. Y.) 533; *Robins, Ex parte*, 3 Jur. 103; *People v. Babcock*, 16 Hun (N. Y.) 313.

⁸⁰ The company is, as to such a duty, in a restricted sense, a public agent. *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457. Mandamus will lie in a proper case at the suit of the state. *State v. Hartford &c. R. Co.*, 29 Conn. 538; *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555; *Lorraine v. Pittsburgh &c. R. Co.*, 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502. Mandamus will lie, it is held, at the suit of a municipality to compel the company to perform the conditions of the contract granting its franchise. *Ross Twp. v. Michigan United Rys. Co.*, 165 Mich. 28, 130 N. W. 358, Ann. Cas. 1912C, 885. See also *State v. Marion Light &c. Co.*, 174 Ind. 622, 92 N. E. 731.

and hence there are instances in which an individual may successfully invoke the extraordinary remedy. We do not mean to be understood as asserting that where there is simply a question affecting the private right of the parties in the particular case mandamus will lie, as, for instance, where the refusal to carry is placed solely upon the ground that the offer or tender of goods was not made as the reasonable regulations of the company require; on the contrary, our opinion is that mandamus will not lie unless there is some element of a public nature, as, for instance, where there is favoritism or unjust discrimination, or some such violation of a public duty.⁸¹ We believe, however, that mandamus is an appropriate remedy where there is a general and continuous refusal to carry, although we do not believe, as we have indicated, that where the refusal to carry is based upon reasons peculiar to the particular case, and only incidentally involves matters concerning the public duty, that mandamus will lie.⁸² Some of the cases seem to hold that mandamus

⁸¹ See *United States v. Norfolk &c. R. Co.*, 109 Fed. 831, 138 Fed. 848, 143 Fed. 266.

⁸² We think the principles declared in such cases as *Central &c. Co. v. State*, 123 Ind. 113, 24 N. E. 215; *Central &c. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. 114; *State v. Nebraska &c. Co.*, 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404; *Vincent v. Chicago &c. R. Co.*, 49 Ill. 33; *People v. Manhattan &c. Co.*, 45 Barb. (N. Y.) 136, govern cases of the class referred to in the text. Analogous cases may also be cited, as, *Mobile &c. R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125; *Haugen v. Albina &c. Co.*, 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424; *Price v. Riverside &c. Co.*, 56 Cal. 431; *People v. Rome &c. R. Co.*, 103 N. Y. 95, 8 N. E. 369; *People v. Albany &c.*

R. Co., 24 N. Y. 261, 82 Am. Dec. 295; *Cumberland Tel. &c. Co. v. Texas &c. R. Co.*, 52 La. Ann. 1850, 28 So. 284. Mandamus has been held proper at the suit of the injured shipper or carrier in many cases. *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387; *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 74 Kans. 808, 88 Pac. 72; *Rogers Locomotive Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Lorraine v. Pittsburgh &c. R. Co.*, 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502; *Laffing on Mandamus*, 28, *Clark v. Canal Co.*, 6 Ad. & Ell. (N. S.) 898, 1 Chit. 700. Mandatory injunction may also be granted in proper cases. *Chicago &c. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320; *Gulf &c. R. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am.

will not lie except where the duty is created by statute, but in our opinion mandamus will lie where there is a specific duty created by law whether the law be embodied in a statute or not.⁸³

§ 2702. (1691.) Remedy for refusal to carry—Action for damages.—An action for damages is the ordinary remedy for a wrongful refusal to carry,⁸⁴ but, as we have seen, mandamus to compel the performance of the duty, will lie in some instances.⁸⁵ It has been held that the right of action for a mere refusal to carry does not accrue to the consignee.⁸⁶ A wrongful refusal by the railroad company will not justify the shipper in abandoning the property or in leaving it exposed to the ravages of

St. 926. Mandatory injunction will not be granted when there is a refusal to carry a single shipment and an adequate remedy at law for damages. *Northern Pac. R. Co. v. Vandusen & Co.*, 245 Fed. 454, L. R. A. 1918C, 883 and n.

⁸³ *Price v. Riverside & Co.*, 56 Cal. 431; *Mobile & R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125; *Durham v. Monumental & Co.*, 9 Ore. 41; *People v. Green*, 64 N. Y. 499; *Biggs v. McBride*, 17 Ore. 640, 21 Pac. 878, 5 L. R. A. 115. See also note to *Koehler, Ex parte*, 29 Am. & Eng. R. Cas. 44, 53, and ante, §§ 735-741; *Cumberland Tel. Co. v. Morgan's & R. Co.*, 51 La. Ann. 29, 24 So. 803, 72 Am. St. 442; *McGrew v. Missouri & R.*, 8 Int. C. C. 630; *Parsons v. Chicago & R. Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. ed. 231, (actions for damages for unreasonable rates and discrimination under interstate commerce law).

⁸⁴ *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Inman & Co. v. Seaboard & R.*

Co., 159 Fed. 960; *Fish v. Chapman*, 2 Ga. 349; *Southern R. Co. v. Moore*, 133 Ga. 806, 67 S. E. 85, 26 L. R. A. (N. S.) 851; *People v. New York & R. Co.*, 22 Hun (N. Y.) 533; *Piedmont Mfg. Co. v. Columbia & R. Railroad*, 19 S. Car. 353; *Doty v. Strong*, 1 Pinney (Wis.), 313, 40 Am. Dec. 773; *Nugent v. Smith*, L. R. 1 C. P. Div. 19, 423. It has been held that the action may be brought in the county where refusal occurred. *Chase v. South & R. Co.*, 83 Cal. 468, 23 Pac. 532, 42 Am. & Eng. R. Cas. 424.

⁸⁵ *Chicago R. Co. v. Burlington R. Co.*, 34 Fed. 481; ante, § 2701. As to election of mandamus or action for damages, see note in 1 A. L. R. 1698.

⁸⁶ *Lafaye v. Harris*, 13 La. Ann. 553. The action should be brought by the party who offers the goods for shipment and is injured by the refusal. *Cobb v. Iowa Cent. R. Co.*, 38 Iowa 601; *Pittsburgh & R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853.

the weather at the carrier's expense. It would still be the shipper's duty to preserve the property, and it would be his right to recover the reasonable expense therefor from the carrier, together with the damages proximately caused by its breach of duty in refusing to carry.⁸⁷ It has been held that in an action for damages for the continual withholding of facilities, it is not necessary to state the points to which the goods were to be carried and to allege a tender of the freight.⁸⁸ But there is no duty resting upon a railroad company to have cars standing at all times at all of its stations, ready to receive freight, and a reasonable notice or demand in advance of the time of the proposed shipment, as well as a tender of the goods for transportation, must usually be shown as a condition precedent to a right of re-

⁸⁷ *St. Louis &c. R. Co. v. Neel*, 56 Ark. 279, 19 S. W. 963, 55 Am. & Eng. R. Cas. 428; *Houston &c. Co. v. Smith*, 63 Texas 322. The shipper cannot, at his leisure, send the refused goods forward in parcels, and hold the carrier liable for the difference in freight. *Ward's Cen. &c. Co. v. Elkins*, 34 Mich. 439. Special damages should be particularly averred. *Roberts v. Graham*, 6 Wall. (U. S.) 578; *Vanderslice v. Newton*, 4 N. Y. 130; *Chicago v. O'Brennan*, 65 Ill. 160. If there are other carriers it may also be the duty of the shipper to ship by them, and the difference in the cost of transportation may be the measure of the damages. *Grund v. Pendergast*, 58 Barb. (N. Y.) 216; *Crouch v. Great Northern R. Co.*, 11 Exch. 742.

⁸⁸ *Central &c. R. Co. v. Morris*, 68 Texas 49, 3 S. W. 457, 28 Am. & Eng. R. Cas. 50. See also *Pittsburgh &c. R. Co. v. Wood*, 45 Ind. App. 1, 84 N. E. 1009, 88 N. E. 709. A readiness to pay has been held

to be as good an averment as a tender. *Pickford v. Grand Junction Railway*, 8 M. & W. 372. It would be safer, however, to aver payment or a tender of freight, and there must at least be ability and readiness to pay. *Wyld v. Pickford*, 8 M. & W. 443; *Batson v. Donovan*, 4 B. & Ald. 21; *Knight v. Providence &c. R. Co.*, 13 R. I. 572, 9 Am. & Eng. R. Cas. 90; *Galena &c. R. Co. v. Rae*, 18 Ill. 488. So, as the measure of the damages usually depends upon the value of the goods at the place of shipment or destination it would seem material to name that point, at least in the case of a special shipment and not a general refusal to carry. *Michigan &c. R. Co. v. Caster*, 13 Ind. 164. Basis for damages must be alleged. *St. Louis &c. R. Co. v. Wynne Hoop &c. Co.*, 81 Ark. 373, 99 S. W. 375. So it would seem material in order to show a breach of duty, for it might not be on the line of the road or the like.

covery.⁸⁹ As we have elsewhere seen, an unusual and extraordinary press of business may justify a carrier in failing or refusing to furnish cars and carry freight of a particular shipper at the time it is offered, when to do so would jeopardize its other business and prevent it from fulfilling its duties as to prior shipments, and so may extraordinary floods or the like, which render it impossible to carry the goods at the time; but it has been held that, if the carrier is unable to furnish cars at the time and in the numbers required without undue interference with its other business, it is a matter of defense and must be shown by the carrier.⁹⁰

§ 2703. (1692.) **Actions against common carriers—Parties.**—As a general rule, it is presumed, in the absence of any special contract, that a carrier is employed by the person at whose risk the goods are carried, that is, the owner or person who would suffer, if they were lost or injured.⁹¹ It will be presumed, in

⁸⁹ *Ayres v. Chicago &c. R. Co.*, 71 Wis. 372, 37 N. W. 432, 5 Am. St. 226; *Richardson v. Chicago &c. R. Co.*, 61 Wis. 596, 21 N. W. 49; *Huston v. Wabash R. Co.*, 2 Mo. App. 941. See also *Mulberry Hill Coal Co. v. Illinois Cent. R. Co.*, 161 Ill. App. 272; *St. Louis &c. R. Co. v. Lee*, 69 Ark. 584, 65 S. W. 99; *Pittsburgh &c. R. Co. v. Morton*, 61 Ind. 539, 576, 28 Am. Rep. 682; *Louisville &c. R. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163; *Louisville &c. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674; *Corso v. New Orleans &c. R. Co.*, 48 La. Ann. 1286, 20 So. 752; *Kansas City &c. R. Co. v. Lilly (Miss.)*, 8 So. 644; *Palmer v. London &c. R. Co.*, L. R. 1 C. P. 588; *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *Lane v. Cotton*, 1 Ld. Raym. 652.

⁹⁰ *Chicago &c. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320. See also *Allen v. Texas &c. R. Co.*, 100 Tex. 525, 101 S. W. 792, 11 L. R. A. (N. S.) 981.

⁹¹ *Mobile &c. R. Co. v. Williams*, 54 Ala. 168. See also *Law v. Hatcher*, 4 Blkf. (Ind.) 364; *Congar v. Galena &c. R. Co.*, 17 Wis. 477; *Harvey v. Terre Haute &c. R. Co.*, 74 Mo. 538, 6 Am. & Eng. R. Co. 293; *Miami &c. Co. v. Port Royal &c. R. Co.*, 38 S. Car. 78, 16 S. E. 339, 21 L. R. A. 123; *Ames v. First Div. St. Paul &c. R. Co.*, 12 Minn. 412. As to when joint owners may maintain a joint action, see *Day v. Ridley*, 16 Vt. 48, 42 Am. Dec. 489; *Missouri Pac. R. Co. v. Rushin*, 3 Tex. App. (Civil Cas.) 385; *Metcalf v. London &c. R. Co.*, 4 C. B. N. S. 307, and compare *Mis-*

the absence of anything to the contrary, that the consignee is the owner of goods shipped over a railroad, and the real party in interest, and, for this reason, he is usually the proper plaintiff, in an action to recovery for their loss, injury, or delay.⁹² But, if he has no property in the goods, either general or special and incurs no risk, he is not, ordinarily at least, the proper plaintiff.⁹³ If the consignor is the real owner, and especially if he makes the contract for himself, he is the proper plaintiff,⁹⁴ and the better

souri Pac. R. Co. v. Smith, 84 Tex. 348, 19 S. W. 509. See also Wood v. Erie R. Co., 72 N. Y. 196, 28 Am. Rep. 125, ante, § 2525.

⁹² Lawrence v. Minturn, 17 How. (U. S.) 100; Robinson v. Memphis &c. R. Co. 9 Fed. 129; Southern Exp. Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118; Southern Exp. Co. v. Armstead, 50 Ala. 350; South &c. R. Co. v. Wood, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634; Madison &c. R. Co. v. Whitesel, 11 Ind. 55; Pennsylvania Co. v. Poor, 103 Ind. 553, 3 N. E. 253; United States &c. Co. v. Manufacturing Co., 101 Ky. 658, 42 S. W. 342; Dyer v. Great Northern R. Co., 51 Minn. 345, 53 N. W. 714, 38 Am. St. 506; Bonner v. Marsh, 10 Smedes & M. (Miss.) 376; Kirkpatrick v. Kansas City &c. R. Co., 86 Mo. 341; Ober v. Indianapolis &c. R. Co., 13 Mo. App. 81; Arnold v. Prout, 51 N. H. 587, 589; Potter v. Lansing, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310; Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Thompson v. Fargo, 49 N. Y. 188; Gwyn v. Richmond &c. R. Co., 85 N. Car. 429, 39 Am. Rep. 708, 6 Am. & Eng. R. Cas. 452; Arbuckle v. Thompson, 37 Pa. St. 170; Bacharach v. Chester Freight

Line, 133 Pa. St. 414, 19 Atl. 409; Dunlop v. Lambert, 6 Cl. & Fin. 600.

⁹³ Alabama &c. R. Co. v. Mount Vernon &c. Co., 84 Ala. 173, 4 So. 286; Southern Ry. Co. v. Miko, 136 Ga. 272, 71 S. E. 241, 36 L. R. A. (N. S.) 68, 72 (citing text); Ogden v. Coddington, 2 E. D. Smith (N. Y.), 317; Coombs v. Bristol &c. Co., 3 Hurlst. & N. 510; Coats v. Chaplin, L. R. 3 Q. B. 483; Swain v. Shepherd, 1 Moody & R. 223. But consignee may sue when he is the party to the contract. Mead v. Railway Co., 18 W. R. 735. And agreement of the seller to indemnify the consignee does not prevent him from maintaining the action if he is the real owner. Deaver-Jeter Co. v. Southern Ry., 91 S. Car. 503, 74 S. E. 1071, Ann. Cas. 1914A, 230.

⁹⁴ The Merrimack, 8 Cranch (U. S.) 317, 3 L. ed. 575; Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586; Finn v. Western R. Co., 112 Mass. 524, 17 Am. Rep. 128; Hance v. Wabash &c R. Co., 1 Mo. App. 719; Hays v. Stone, 7 Hill (N. Y.) 128; Krulder v. Ellison, 47 N. Y. 36; O'Neill v. New York &c. R. Co., 60 N. Y. 138; Bernstein v. Express Co., 40 Ohio St.

rule seems to be that he may also maintain an action upon the contract in his own name if the contract is directly with him, although he has not, in reality, retained any property in the goods;⁹⁵ but in the latter case, if the property in the goods has passed to the consignee, the recovery by the consignor would be

451; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; *Wilson v. Wilson*, 26 Pa. St. 393; *Western &c. R. Co. v. Kelly*, 1 Head (Tenn.) 158; *Turney v. Wilson*, 7 Yerger (Tenn.) 340, 27 Am. Dec. 515; *Spence v. Norfolk &c. R. Co.*, 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578; *Coombs v. Bristol &c. R. Co.*, 3 H. & N. 510; *Hoare v. Great Western R. Co.*, 25 W. R. 631; *Swain v. Shepherd*, 1 Moody & R. 23; *Brill v. Grand Trunk R. Co.*, 20 U. C. C. P. 440.

⁹⁵ *Cantwell v. Pacific Exp. Co.*, 58 Ark. 487, 25 S. W. 503; *Carter v. Southern R. Co.*, 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354; *Southern Ry. Co. v. Miko*, 136 Ga. 272, 71 S. E. 241, 36 L. R. A. (N. S.) 68, 71 (citing text); *Chicago &c. R. Co. v. Shea*, 66 Ill. 471; *Illinois &c. R. Co. v. Schwartz*, 13 Ill. App. 490; *Ohio &c. R. Co. v. Emerich*, 24 Ill. App. 245; *Blanchard v. Page*, 8 Gray (Mass.) 281; *Finn v. Western R. Co.*, 112 Mass. 524; *Atchison v. Chicago &c. Co.*, 80 Mo. 213; *Reynolds v. Chicago &c. Co.*, 85 Mo. 90; *Ross v. Chicago &c. R. Co.*, 119 Mo. App. 290, 95 S. W. 977; note to *Ramsey &c. Co. v. Kelsea* (55 N. J. L. 320), 22 L. R. A. 415, 428; *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509, 510; *Southern Kans. R. Co. v. Morris*, 100 Tex.

611, 102 S. W. 396, 123 Am. St. 834; *Hooper v. Chicago &c. R. Co.*, 27 Wis. 81, 9 Am. Rep. 439; note to *Swift v. Pacific Mail &c. Co.*, 30 Am. & Eng. R. Cas. 105; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Contra, Blum, Frank & Co. v. The Caddo*, 1 Woods (U. S. C. C.) 64; *McLaughlin v. Martin*, 12 Colo. App. 268, 55 Pac. 195; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Green v. Clark*, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Griffith v. Ingledew*, 6 Serg. & R. (Pa.) 429, (but see strong dissenting opinion of Gibson, J.); *Dawes v. Peck*, 8 Term R. 330; *Sargent v. Morris*, 3 Barn. & Ald. 277. See also *Davis v. Jacksonville &c. Line*, 126 Mo. 69, 28 S. W. 965; *Wetzel v. Power*, 5 Mont. 214; *Gaskins v. Southern R. Co.*, 151 N. Car. 18, 65 S. E. 518; *Butler v. Pittsburgh R. Co.*, 18 Ind. App. 656, 46 N. E. 92. In *Shellenberg v. Fremont &c. R. Co.*, 45 Nebr. 487, 63 N. W. 859, it is held that the company is liable for conversion if it refuses to surrender the goods to the real owner, although he is not a party to the contract. And in a late Arkansas case it is held that the consignee, and not the consignor, is the only party who can sue where the title has passed to the consignee. *Warren &c. R. Co. v. Southern Lum-*

for the benefit of the consignee.⁹⁶ The question as to the proper party defendant can seldom arise, except where there are connecting carriers, and that subject has already been fully considered.⁹⁷ It may be well to add, however, that in a very recent case in Illinois it is held that the initial carrier can be sued where the Carmack amendment applies, even though the loss or injury was not on its own line, and that a connecting carrier can not be held liable as an initial carrier in such a case even though such connecting carrier issues a bill of lading.⁹⁸

§ 2704. (1693.) Actions against common carriers—Form of action.—The abolition of forms of action in the code states and

ber Co., 115 Ark. 221, 170 S. W. 998. But in several of these cases the action was not on a special contract which the consignor had himself made with the carrier.

⁹⁶ Ohio &c. R. Co. v. Emrich, 24 Ill. App. 245; Illinois &c. R. Co. v. Schwartz, 13 Ill. App. 490; Missouri Pac. R. Co. v. Smith, 84 Tex. 348, 19 S. W. 509; Southern Exp. Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4; Snider v. Adams Exp. Co., 77 Mo. 523, 16 Am. & Eng. R. Cas. 261. See also Southern Ry. Co. v. Miko, 136 Ga. 272, 71 S. E. 241, 36 L. R. A. (N. S.) 68. As a general rule either the general owner of the goods or one who has a special property in them may sue, but a recovery by one will usually bar a subsequent action by the other. New Jersey &c. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Steamboat Farmer v. McCraw, 26 Ala. 189, 62 Am. Dec. 718; Denver &c. R. Co. v. Frame, 6 Colo. 382; Pratt v. Northern Pac. Exp. Co., 13 Idaho 373, 90 Pac. 341, 10 L. R. A. (N. S.) 499, 121 Am. St. 268; Illinois Cent.

R. Co. v. Miller, 32 Ill. App. 259; Elkins v. Boston &c. R. Co., 19 N. H. 337, 51 Am. Dec. 184; Green v. Clark, 13 Barb. (N. Y.) 57; Green v. Clark, 12 N. Y. 343; Swift v. Pacific Mail &c. Co., 106 N. Y. 206, 12 N. E. 583, 30 Am. & Eng. R. Cas. 105; Houston &c. R. Co. v. Stewart, 1 Tex. App. (Civ. Cas.) 718; Freeman v. Birch, 3 Q. B. 492, note. As to the proper parties where loss has been paid by insurance company, see ante, § 2267.

⁹⁷ Ante, chapters LXVII, LXVIII. See also Holsapple v. Rome &c. R. Co., 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487; Baker v. Michigan &c. R. Co., 42 Ill. 73.

⁹⁸ Looney v. Oregon &c. R. Co., 271 Ill. 538, 111 N. E. 509, citing Hudson v. Chicago &c. R. Co., 226 Fed. 38. See, however, ante § 2186, and Erisman v. Chicago &c. R. Co., 180 Iowa 759, 163 N. W. 627; Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. ed. 948; Texas &c. Ry. Co. v. West Bros., (Tex. Civ. App.) 207 S. W. 918.

the modification of the strict common-law rules in most of the other states have rendered the old rules and distinctions between the different forms of action of comparatively little importance. But the inherent distinctions in matters of substance are still recognized, and there still remains, in many cases, the right to make an election of remedies, which, where once exercised, may have an important influence upon the right to recover or the amount of the recovery. As a general rule, where there is a breach both of contract and of duty imposed by law, as in case of loss or injury by a common carrier, the plaintiff may elect to sue either in contract or in tort.⁹⁹ But it has been held in Indiana that where the plaintiff elects to sue in tort, or for a breach of the duty imposed by law, he can not recover if the evidence shows a special contract.¹ This may be correct where the plaintiff sues on an implied contract, but where he sues in tort for

⁹⁹ *Emigh v. Pittsburgh &c. R. Co.*, 4 Biss. (U. S. C. C.) 114; *Whittenton &c. Co. v. Memphis &c. Packet Co.*, 21 Fed. 896; *Central Trust Co. v. East Tenn. &c. R. Co.*, 70 Fed. 764; *St. Louis &c. R. Co. v. Heath*, 41 Ark. 476; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688, 11 Am. & Eng. R. Cas. 92, and note; *Baltimore &c. R. Co. v. Pumphrey*, 59 Md. 390, 9 Am. & Eng. R. Cas. 331; *Mississippi Cent. R. Co. v. Fort*, 44 Miss. 423; *Orange Bank v. Brown*, 3 Wend. (N. Y.) 158; *Catlin v. Adirondack' Co.*, 11 Ab. N. Cas. (N. Y.) 377; *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537; *Tattan v. Great Western R. Co.*, 2 Ell. & Ell. 844; 1 Elliott's Gen. Pr. 300. See also *Goddard v. Grand Trunk R. Co.*, 57 Maine 202, 2 Am. Rep. 39. As shown by these authorities, the common-law form of action on the contract was *assumpsit* and in tort it was usually

case. But *trover* was the appropriate action in many instances, as where there was a conversion by the carrier. *Central R. &c. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Illinois Cent. R. Co. v. Parks*, 54 Ill. 294; *Packard v. Getman*, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166.

¹ *Lake Shore &c. R. Co. v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459. The court regarded this as a fatal variance. See also *Snow v. Indiana &c. R. Co.*, 109 Ind. 422, 9 N. E. 702; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. ed. 290; *Camp v. Hartford &c. R. Co.*, 43 Conn. 333, 340; *Chicago &c. R. Co. v. Hale*, 2 Ill. App. 150; *Indianapolis &c. R. Co. v. Remmy*, 13 Ind. 518; *Indianapolis &c. R. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138; *Kimball v. Railroad Co.*, 26 Vt. 247, 62 Am. Dec. 567.

negligence, it seems to us that it can not be good law, for it would do away with the doctrine of election of remedies.² The election of the plaintiff to sue in tort, however, does not prevent the carrier from setting up a special contract as a defense, if it is not invalid and by its terms relieves the carrier from liability.³ Generally the rules of law and the measure of damages will be the same in either form of action,⁴ but this is not always true in all respects. In some jurisdictions, if the contract is a joint one by several defendants they must all be joined in an action on the contract, while if sued in tort, any one or more of them may be sued and the plaintiff will not be defeated because he fails to join all who are liable or fails to make out a case against all whom he has joined as defendants.⁵ So, in some cases, punitive or exemplary damages may be recovered in tort, while only compensatory damages can be recovered in an action *ex contractu*.⁶

² See *Saltonstall v. Stockton*, Taney's Dec. 11; *Clark v. St. Louis &c. R. Co.*, 64 Mo. 440; *Arnold v. Railroad Co.*, 83 Ill. 273, 25 Am. Rep. 383; *Wabash &c. R. Co. v. Pratt*, 15 Ill. App. 177; *Clark v. Richards*, 1 Conn. 53, 59, and authorities cited in the first note to this section. See also *Central Trust Co. v. East Tenn. &c. R. Co.*, 70 Fed. 764, 767; *Pittsburgh &c. R. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 302 (citing text and distinguishing several of the Indiana cases cited in the last preceding note).

³ *Clark v. St. Louis &c. R. Co.*, 64 Mo. 440; *Oxley v. St. Louis &c. R. Co.*, 65 Mo. 629; *Boaz v. Central &c. R. Co.*, 87 Ga. 463, 13 S. E. 711.

⁴ *Baltimore &c. R. Co. v. Pumphrey*, 59 Md. 390, 9 Am. & Eng. R. Cas. 331; *St. Louis &c. R. Co. v. Heath*, 41 Ark. 476, 18 Am. & Eng. R. Cas. 557.

⁵ *Frink v. Potter*, 17 Ill. 406;

Smith v. Seward, 3 Pa. St. 342; *Bretherton v. Wood*, 3 Brod. & B. 54; *Pozzi v. Shipton*, 8 Ad. & E. 963; *Ansell v. Waterhouse*, 6 M. & S. 385; *Marshall v. York &c. R. Co.*, 11 Com. B. 655, 7 Eng. L. & Eq. 519. See also *Holsapple v. Rome &c. R. Co.*, 86 N. Y. 275.

⁶ *New Orleans &c. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Walsh v. Chicago &c. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Hamlin v. Great Northern, R. Co.*, 1 H. & N. 408. See also *Baylis v. Lintott*, L. R. 8 C. P. 345; *Wyld v. Pickford*, 8 M. & W. 443, as to the advantage gained by suing in tort. It has also been held that the one secondarily liable may have a judgment over against the one primarily liable. *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 534, 115 S. W. 315, 319; *Stanley v. Union &c. R. Co.*, 114 Mo. 606, 21 S. W. 832; *Pullman Co. v. Norton* (Tex. Civ. App.), 91 S. W. 843.

And another advantage gained by suing in case at common law is that it may not be necessary to state the facts with as much particularity as in assumpsit, and a variance is less likely to be fatal.⁷ On the other hand, the statute of limitations may bar an action in tort when it would not bar an action in contract,⁸ and it may be desirable to join the common counts in assumpsit, or, in the absence of a statute, the cause of action in tort will not survive, while it may do so in contract. In a majority of cases it will make no difference whether the action is for breach of contract or for breach of the duty imposed by law; but it will frequently be found, if there is any choice, that an action for breach of duty is preferable, especially if the duty is greater and broader than the contract.⁹

§ 2705. (1694.) Actions against common carriers—Pleading.—In order to determine whether the action is brought on the contract or in tort the courts will look to the nature of the cause of action stated in the complaint or declaration, and if no special contract is set out they will generally construe the pleading as founded on the tort.¹⁰ Counts in tort and counts in contract can not be joined in the same action.¹¹ If the action is brought on a special contract of affreightment the contract should be set out or stated correctly, for if a different contract is proved the

⁷ Wyld v. Pickford, 8 M. & W. 443; Weed v. Saratoga &c. R. Co., 19 Wend (N. Y.) 534.

⁸ The period of limitation, under most of the statutes, is shorter in actions for tort than in actions on contract.

⁹ Thus, if there is a special contract limiting the duty and liability of the carrier, it is generally better to put the burden upon the carrier to show it, unless, as seems to be the case in Indiana, the existence of such a contract would be considered as a variance.

¹⁰ Atlanta R. Co. v. Laird, 58

Fed. 760; Frink v. Potter, 17 Ill. 406; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588, and note; New Orleans &c. R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; Heil v. St. Louis &c. R. Co., 16 Mo. App. 363; Cregin v. Brooklyn &c. R. Co., 75 N. Y. 192, 31 Am. Rep. 459. But see School Dist. v. Boston &c. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Pittsburgh &c. R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299, 302 (citing text).

¹¹ Norfolk &c. R. Co. v. Wysor, 82 Va. 250; Contra, Central Vermont R. Co. v. Soper, 59 Fed. 879.

variance may be fatal.¹² Thus if the complaint counts upon the breach of an oral contract, and it appears that the goods were shipped under a written contract differing from the alleged oral contract, there can be no recovery in such action.¹³ But it has been held that a complaint averring that the defendant, for a valuable consideration, undertook to transport the plaintiff's goods from one place to another on its road and deliver them to the plaintiff within a reasonable time, and that it failed to do so within a reasonable time, is sufficient as against a general demurrer without alleging what was a reasonable time.¹⁴ It has been held that where the action is founded on a special contract and a breach thereof, and resulting damage to the plaintiff, it is unnecessary to allege that the defendant is a common carrier;¹⁵ but where the action is *ex delicto* for breach of duty it is generally necessary to aver that the defendant is a common carrier or facts equivalent thereto.¹⁶ Facts must be alleged, where the

¹² *Atlanta &c. R. Co. v. Texas &c. Co.*, 81 Ga. 602, 9 S. E. 600; *Fairchild v. Slocum*, 19 Wend. (N. Y.) 329; *Weed v. Saratoga &c. R. Co.*, 19 Wend. (N. Y.) 534; *Hughes v. Great Western R. Co.*, 14 Com. B. 637; *Latham v. Rutley*, 2 Barn. & C. 20; *Shaw v. York &c. R. Co.*, 13 Q. B. 347. See also *Louisville &c. R. Co. v. Cody*, 119 Ga. 371, 46 S. E. 429; *Baxter v. Railway*, 165 Ill. 78, 45 N. E. 1003; *Baltimore &c. R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664; *Lucas v. Southern R. Co.*, 122 Ala. 529, 25 So. 219. But see *Hill v. Georgia &c. R. Co.*, 43 S. Car. 461, 21 S. E. 337; *Clark v. St. Louis &c. R. Co.*, 64 Mo. 440; *Indianapolis &c. R. Co. v. Remmy*, 13 Ind. 518.

¹³ *Waters v. Richmond &c. R. Co.*, 110 N. Car. 338, 14 S. E. 802, 16 L. R. A. 834; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Snow v.*

Indiana &c. R. Co., 109 Ind. 422, 9 N. E. 702. But see *Guillaume v. General Transp. Co.*, 100 N. Y. 491, 3 N. E. 489; *Patterson v. Keystone &c. Co.*, 30 Cal. 360, 364. And compare *Seaboard &c. Ry. v. Friedman*, 128 Ga. 316, 57 S. E. 778.

¹⁴ *Palmer v. Atchison &c. R. Co.*, 101 Cal. 187, 35 Pac. 630, 61 Am. & Eng. R. Cas. 235. But compare *Freeman v. Louisville &c. R. Co.*, 32 Fla. 420, 13 So. 893; *Jeffersonville &c. R. Co. v. Gent*, 35 Ind. 39.

¹⁵ *Dunbar v. Port Royal &c. R. Co.*, 36 S. Car. 110, 15 S. E. 357, 31 Am. St. 860. See also *Mershon v. Hobensack*, 22 N. J. L. 372.

¹⁶ *Louisville &c. R. Co. v. Gerson*, 102 Ala. 409, 14 So. 873; *Toledo &c. R. Co. v. Roberts*, 71 Ill. 540; *Bristol v. Rensselaer &c. R. Co.*, 9 Barb. (N. Y.) 158; *Southern Exp.*

action sounds in tort, sufficient to show the duty and the breach thereof.¹⁷ The plaintiff's right to maintain the action, as owner or otherwise, must be shown,¹⁸ and so, generally, must delivery to the carrier if the action is for loss or injury to the goods.¹⁹ The recovery will be limited to the issues, and it has been held that where the complaint counts entirely upon a non-delivery of the goods there can be no recovery thereunder for injury to the goods where the proof shows that they were delivered by the carrier.²⁰ At common law, whether the action was in assumpsit or in tort, it was generally sufficient for the carrier to plead the general issue,²¹ and a general denial will often be sufficient in the code states, but as "new matter" must be specially pleaded under the codes it will sometimes be necessary, or at least ad-

Co. v. McVeigh, 20 Gratt. (Va.) 264; Baltimore &c. R. Co. v. Morehead, 5 W. Va. 293; Marshall v. York &c. R. Co., 11 Com. B. 655; Pozzi v. Shipton, 8 Ad. & El. 963.

¹⁷ Baltimore &c. R. Co. v. Wilson, 31 Ohio St. 555. As to the sufficiency of allegations of negligence, see Ruben v. Ludgate &c. Co., 49 Hun 608, 17 N. Y. S. 17. And compare Bowers v. Richmond &c. R. Co., 107 N. Car. 721, 12 S. E. 452.

¹⁸ Pennsylvania Co. v. Poor, 103 Ind. 553, 3 N. E. 253; Montgomery &c. R. Co. v. Edmonds, 41 Ala. 667; Pennsylvania Co. v. Holderman, 69 Ind. 18; as to allegations held sufficient in this respect see Falk v. Great Northern R. Co., 98 Minn. 65, 107 N. W. 814; Texas Cent. R. Co. v. Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575.

¹⁹ Jordan v. Hazard, 10 Ala. 221; Missouri Pac. R. Co. v. Douglas, 2 Tex. App. (Civ. Cas.) 32, 16 Am.

& Eng. R. Cas. 98. See also McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721.

²⁰ South and North Ala. R. Co. v. Wilson, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41; Alabama &c. R. Co. v. Grabfelder, 83 Ala. 200, 3 So. 432; Nudd v. Wells, 11 Wis. 407. See also Cane Hill &c. Orchard Co. v. San Antonio &c. R. Co. (Tex.) 95 S. W. 751.

²¹ Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Ortt v. Minneapolis &c. R. Co., 36 Minn. 396, 31 N. W. 519; Brown v. Dunlap, 3 S. Car. 101; St. Louis &c. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077. A mere denial by the carrier that it ever received the goods has been held insufficient to require the plaintiff to show a non-delivery to the consignee. Hot Springs &c. R. Co. v. Hudgins, 42 Ark. 485, 18 Am. & Eng. R. Cas. 643.

visible, to answer specially, as, for instance, in some cases where there is a contract limiting the liability of the carrier.²²

§ 2706. (1695.) Actions against common carriers—Evidence.—No matter whether the plaintiff sues on the contract or upon the breach of duty, in order to recover damages for loss or injury to his goods by the carrier, he must prove, in general, a delivery to the carrier, an undertaking or contract, on its part either express or implied, to carry the goods, and its failure to perform the same according to its undertaking or duty.²³ In other words, he must show a duty owing to him by the defendant, which arises, either out of contract or is imposed by law, a breach of that duty by the defendant, and damage caused thereby to himself. We have elsewhere fully considered what is sufficient evidence of the delivery, what evidence is admissible to prove the contract, what must be shown where there are connecting carriers, what presumptions arise in such cases, and upon whom rests the burden of proof, so that little remains to be said upon the subject of the plaintiff's evidence.²⁴ The evidence must be

²² See *Missouri Pac. R. Co. v. Wichita &c. Co.*, 55 Kans. 525, 40 Pac. 899; *Atchison &c. R. Co. v. Bryan* (Tex.) 28 S. W. 98; *Atchison &c. R. Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833; ante, § 2167. See also *Southern Exp. Co. v. Fox*, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270, 133 Am. St. 241 (estoppel); *McGregor v. Oregon R. & Nav. Co.*, 50 Ore. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668; *Houston &c. R. Co. v. Harn*, 44 Tex. 628; *Southern R. Co. v. Mooresville Cotton Mills*, 187 Fed. 72.

²³ *Louisville &c. R. Co. v. Echols*, 97 Ala. 556, 12 So. 304; *Bonfiglio v. Lake Shore &c. R. Co.*, 125 Mich. 476, 84 N. W. 722; *Morris v. Minneapolis &c. R. Co.*, 25 N. Dak. 136, 141 N. W. 204. Where

the action is for breach of the common-law duty, it must be shown that the defendant is a common carrier. *Ringgold v. Haven*, 1 Cal. 108; *Louisville R. Co. v. Gerson*, 102 Ala. 409, 14 So. 873. See generally *Missouri Pac. R. Co. v. Douglas*, 2 Tex. App. (Civ. Cas.) 32, 16 Am. & Eng. R. Cas. 98; *Houston &c. R. Co. v. McGlosson*, 1 Tex. App. (Civ. Cas.) 89; *Northwestern &c. Co. v. Burlington &c. R. Co.*, 20 Fed. 712 (action for failing to receive and carry); *Little Rock &c. R. Co. v. Conatser*, 61 Ark. 560, 33 S. W. 1057 (same); *Corso v. New Orleans &c. R. Co.*, 48 La. Ann. 1286, 20 So. 752.

²⁴ See ante, §§ 2190, 2285, 2290, 2311. See also *St. Louis R. Co. v. Coolidge*, 73 Ark. 112, 83 S. W.

responsive to the issues,²⁵ and the general rules governing the admissibility of evidence are substantially the same as in other cases.²⁶ As we have elsewhere shown, the carrier may defend by showing that the loss or injury was caused by the act of God, the public enemy, public authority, the fault of the plaintiff, or the inherent nature of the goods. So, it may show, where there is a special contract exempting it from liability for loss or injury for certain causes, that the injury or loss was the result of one of the causes for which it is not responsible under its contract. Evidence that the conductor in charge of a train at the time goods were lost was skillful and competent,²⁷ or that goods lost from the carrier's depot were taken care of just as other goods of the same kind had always been taken care of by it, and

333, 67 L. R. A. 555, 108 Am. St. 21; *Burwell v. Railroad Co.*, 94 N. Car. 455; *Morgantown Mfg. Co. v. Ohio &c. R.*, 121 N. Car. 514, 28 S. E. 474, 61 Am. St. 679; *Hirsch v. New York &c. R. Co.*, 50 Misc. 568, 99 N. Y. S. 431.

²⁵ *Chicago &c. R. Co. v. Hoeffner*, 44 Ill. App. 137; *Kyle v. Buffalo &c. R. Co.*, 16 U. C. C. P. 76. See also *New England &c. Co. v. Starin*, 60 Conn. 369, 22 Atl. 953; *Spurlock v. Missouri Pac. R. Co.*, 93 Mo. 530, 6 S. W. 349; *Stanard Milling Co. v. White Line Cent. &c. Co.*, 122 Mo. 258, 26 S. W. 704; *Missouri Pac. R. Co. v. Barnes*, 2 Tex. App. (Civ. Cas.) 507; *Oregon &c. R. Co. v. Blyth*, 19 Wyo. 410, 118 Pac. 649, 119 Pac. 875, Ann. Cas. 1913E, 288; *Wabash &c. R. Co. v. Jaggerman*, 115 Ill. 407, 4 N. E. 641.

²⁶ As to opinion evidence see *Louisville &c. R. Co. v. Natchez &c. R. Co.*, 67 Miss. 399, 7 So. 350; *Houston &c. R. Co. v. Bath*, 40 Tex. Civ. App. 270, 90 S. W. 55;

Gulf &c. R. Co. v. Frank Co. (Tex. Civ. App.), 48 S. W. 210. As to when admissions and declarations of agents and employes are admissible against the carrier, see *Union R. &c. Co. v. Riegel*, 73 Pa. St. 72; *Green v. Boston &c. R. Co.*, 128 Mass. 221, 35 Am. Rep. 370; *Bennett v. Northern Pac. R. Co.*, 12 Ore. 49, 6 Pac. 160; *Missouri Pac. R. Co. v. Gernan*, 84 Tex. 141, 19 S. W. 461; *St. Louis &c. R. Co. v. Watkins*, 45 Tex. Civ. App. 321, 100 S. W. 162; *Queen v. Peters*, 16 New Bruns. 77. And compare *Bordentown &c. Co. v. Flanagan*, 41 N. J. L. 115; *Bachant v. Boston &c. R. Co.*, 187 Mass. 392, 73 N. E. 642, 105 Am. St. 408; *Boston &c. R. Co. v. Ordway*, 140 Mass. 510, 512, 5 N. E. 627.

²⁷ *Montgomery &c. R. Co. v. Edmonds*, 41 Ala. 667. But see as to evidence by plaintiff that carrier's servant was unfit, *Galveston &c. R. Co. v. Johnson* (Tex.), 19 S. W. 867.

that none had ever before been lost.²⁸ is inadmissible. But evidence that there was not room in the company's warehouse to store the plaintiff's goods at the particular time, that the warehouse was sufficient for the company's ordinary business, and that the defendant immediately notified the plaintiff to that effect, was held admissible in a comparatively recent case, in an action against the carrier for negligence in failing to safely store the goods.²⁹

§ 2707. (1696.) Actions for injuries to passengers.—In actions for injuries to passengers, the gist of the action is the same as in actions against common carriers for loss or injury to freight, that is, a breach of duty owing to the plaintiff by the defendant, and, as it may arise either out of the contract or be imposed by law on account of the relation of carrier and passenger, there may be the same election to sue either in contract or in tort. In a recent case in Nevada it is held that an action for damages for ejection is an action founded on the contract to carry as evidenced by the ticket.³⁰ Ordinarily, however, such actions are founded on the tort or breach of duty imposed by law. In order to recover for a breach of the high duty due a passenger, the plaintiff must aver and prove the existence of the duty, that is, the relation of carrier and passenger, the negligence or breach of duty on the part of the defendant, and the resulting injury and damages to him. In many jurisdictions he must also allege and prove that he was free from contributory negligence. A general allegation of damages may permit proof of such as are the usual and natural consequence of the wrong complained of, or, in other words, such as naturally and proximately result therefrom; but in order to recover special damages he must allege and prove them.³¹ He can only recover

²⁸ *Lane v. Boston &c. R. Co.*, 112 Mass. 455. Evidence of losses by other persons of other goods has also been held inadmissible. *Ragsdale v. Southern R. Co.*, 69 S. Car. 429, 48 S. E. 466.

²⁹ *Stowe v. New York &c. R. Co.*, 113 Mass. 521. As to how long

liability of carrier continues under uniform bill of lading, see *Michigan Cent. R. Co. v. Owen & Co.* (U. S.), 41 Sup. Ct. 554.

³⁰ *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 Pac. 753, 48 L. R. A. (N. S.) 1.

³¹ *Hunter v. Stewart*, 47 Maine

secundum allegata et probata, and while in most jurisdictions negligence may be averred somewhat generally,⁸² he can not charge negligence in one respect and recover for negligence in another and entirely different respect.⁸³ Unless the complaint shows that the passenger agreed to assume the risk, or that the liability of the company is limited by special contract, the carrier,

419; *Baldwin v. Western R. Co.*, 4 Gray (Mass.) 333; *Smith v. St. Paul &c. R. Co.*, 30 Minn. 169, 14 N. W. 797, 9 Am. & Eng. R. Cas. 262, and note; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533; *Kinney v. Crocker*, 18 Wis. 74. See also *Railway Co. v. Hall*, 100 Fed. 760; *Louisville &c. R. Co. v. Barnwell*, 131 Ga. 791, 63 S. E. 501; *Cleveland &c. R. Co. v. Case*, 174 Ind. 369, 91 N. E. 238; *Louisville &c. R. Co. v. Mason*, 24 Ky. L. 1623, 72 S. W. 27; *Norfolk &c. R. Co. v. Spears*, 110 Va. 110, 65 S. E. 482; 6 Thomp. Neg. (2d ed.) § 7159. In *Gulf &c. R. Co. v. Warlick*, 1 Ind. Ter. 10, 35 S. W. 235, it was held that evidence of permanent injuries was not admissible when not alleged. But see *Ohio &c. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Gurley v. Missouri &c. R. Co.*, 122 Mo. 141, 26 S. W. 953; *West Chicago R. Co. v. Levy*, 82 Ill. App. 202; *Croco v. Oregon &c. R. Co.*, 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

⁸² See for examples of general averments held sufficient in actions by passengers, *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Chattanooga &c. R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848; *Pittsburgh &c. R. Co. v. Theobald*, 51 Ind. 246; *Winter v. Central*

Iowa R. Co., 80 Iowa 443, 45 N. W. 737; *Carmanty v. Mexican &c. R. Co.*, 5 La. Ann. 703; *Coudy v. St. Louis &c. R. Co.*, 85 Mo. 79, 27 Am. & Eng. R. Cas. 282; *Gulf &c. R. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104; ante, § 2693.

⁸³ *Toledo &c. R. Co. v. Beggs*, 85 Ill. 80; *Cincinnati &c. R. Co. v. McClain*, 148 Ind. 188; 44 N. E. 306; *Louisville &c. R. Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. 1047; *Waldhier v. Hannibal &c. R. Co.*, 71 Mo. 514; *Price v. St. Louis &c. R. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; *Chitty v. St. Louis &c. R. Co.*, 148 Mo. 64, 49 S. W. 868; *Breese v. Trenton R. Co.*, 52 N. J. L. 250, 19 Atl. 254; *Mayor v. Humphries*, 1 C. & P. 251. See also *Birmingham &c. R. Co. v. Clay*, 108 Ala. 233, 19 So. 309; *South &c. R. Co. v. Schaufler*, 75 Ala. 136; *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360, 18 Am. St. 105, 2 Am. Neg. Cas. 43; *Denver &c. R. Co. v. Sips*, 23 Colo. 226, 47 Pac. 287; *Fitzgibbon v. Railway*, 108 Iowa 614, 79 N. W. 477; *Memphis &c. R. Co. v. Chastine*, 54 Miss. 503; *Singleton v. Pacific R. Co.*, 41 Mo. 465; *McManamee v. Missouri Pac. R. Co.*, 135 Mo. 440, 37 S. W. 119; *Gulf &c. R. Co. v. Scott* (Tex. Civ. App.) 27 S. W. 827; ante §§ 2471, 2472.

if it relies upon such an agreement, must specially plead it.³⁴ So, if it relies upon a release by the plaintiff.³⁵ It has also been held that if the plaintiff has violated the rules of the carrier that is a matter of defense to be asserted by it.³⁶ In a recent case in a federal court it is held that the decision of the highest court of a state that a railroad company, because of non-compliance with requirements of the state constitution or statute, was not entitled to plead the statute of limitations, is conclusive on the federal courts in an action for injuries sustained by a passenger in such state;³⁷ but in another federal case, decided about the same time, it is held that, in an action in a federal court, a contract between a sleeping car company and one of its conductors, releasing it and the railroad company from liability, is valid and binding notwithstanding the state court has taken a different view of such contracts.³⁸ As carriers of passengers are not insurers, like common carriers of goods, the plaintiff must show some negligence, or willfulness in a proper case, on the part of the carrier or its employes, which proximately caused his injury;³⁹ but,

³⁴ *Citizens' St. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55; *Louisville &c. R. Co. v. Orr*, 84 Ind. 50; *Pittsburgh &c. R. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 302 (citing text).

³⁵ *Horton v. Horton*, 83 Hun 213, 31 N. Y. S. 588; *Johnson v. Kerr*, 1 Serg. & R. (Pa.) 25; *Corbett v. Lucas*, 4 McCord (S. Car.) 323. But see *Papke v. G. H. Hammond Co.*, 192 Ill. 631, 61 N. E. 910. And compare *Louisville &c. R. Co. v. Burke* (Ala.), 66 So. 885; *Coltrell v. Michigan &c. Trac. Co.*, 184 Mich. 221, 150 N. W. 857. See as to effect of release of one joint tort feisor and as to distinction between release and covenant not to sue, *Parry Mfg. Co. v. Crull*, 56 Ind. App. 77, 101 N. E. 756; *Lacy v. Kinnaston*, Holt 178, 3

Salk 298; *Matheson v. O'Kane*, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475, Ann. Cas. 1913B, 267, and note; *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883, L. R. A. 1915E, 800n, Ann. Cas. 1918D, 270; *McDonald v. Goddard &c. Co.*, 184 Mo. App. 432, 171 S. W. 650, and many authorities there reviewed.

³⁶ *Whitehead v. St. Louis &c. R. Co.*, 99 Mo. 263, 11 S. W. 751; *Hicks v. Hannibal &c. R. Co.*, 68 Mo. 329. Compare also *Louisville &c. R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

³⁷ *Quinette v. Pullman Co.*, 229 Fed. 333.

³⁸ *Fowler v. Pennsylvania Co.*, 229 Fed. 373.

³⁹ *Chicago &c. R. Co. v. Felton*, 125 Ill. 458, 17 N. E. 765; *Wabash*

as we have elsewhere shown, a presumption of negligence on its part frequently arises against it in favor of a passenger sufficient to make a prima facie case so far as the negligence of the defendant is concerned, upon proof of the happening of an accident (so-called) under certain circumstances, and owing to the high duty which a carrier owes to its passengers, slight evidences of negligence may often be sufficient. But a mere scintilla of evidence, conjecture or surmise that it may have been negligent will not justify a verdict against it.⁴⁰ In many jurisdictions, as we have

&c. R. Co. v. Koenigsam, 13 Ill. App. 505 (bridge down owing to unusual rain and no evidence of negligence); St. Louis &c. R. Co. v. Moore, 14 Ill. App. 510 (hidden defect in material); Ohio &c. R. Co. v. Allender, 59 Ill. App. 620 (ice on platform); Gulf &c. R. Co. v. Warlick, 1 Ind. Ter. 10, 35 S. W. 235 (platform); Pershing v. Chicago &c. R. Co., 71 Iowa 561, 32 N. W. 488 (same); Moore v. Edison &c. Co., 43 La. Ann. 792, 9 So. 433; Libby v. Maine &c. R. Co., 85 Maine 34, 26 Atl. 943, 20 L. R. A. 812, 58 Am. & Eng. R. Cas. 81 (extraordinary flood); Sawyer v. Hannibal &c. R. Co., 37 Mo. 240, 90 Am. Dec. 382 (bridge destroyed by public enemy); Henry v. St. Louis &c. R. Co., 76 Mo. 288, 43 Am. Rep. 762 (not proximate cause); Sullivan v. Jefferson &c. R. Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167 (passenger injured by match lighted by another passenger); Morris v. New York &c. R. Co., 106 N. Y. 678, 13 N. E. 455 (fall of parcel in car); Pennsylvania R. Co. v. MacKinney, 124 Pa. St. 462, 17 Atl. 14, 2 L. R. A. 820, and note; 10 Am. St. 601 (passenger struck

by missile); Sutton v. Pennsylvania R. Co., 230 Pa. St. 523, 79 Atl. 719 (ice on steps); Sickles v. Missouri &c. Co., 13 Tex. Civ. App. 434, 35 S. W. 493 (failure to heat car); Galveston &c. R. Co. v. Long, 13 Tex. Civ. App. 664, 36 S. W. 485 (injury of one passenger by another); Davis v. Chicago &c. R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. 935; note to Ingalls v. Bills, 43 Am. Dec. 346, note in 2 L. R. A. 252. See also Georgia R. &c. Co. v. McAllister, 126 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177.

⁴⁰ LeBarron v. East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. Dec. 717, and note; Joy v. Winnisimmet Co., 114 Mass. 63; Stern v. Michigan R. Co., 76 Mich. 591, 43 N. W. 587; Curtis v. Rochester &c. R. Co., 18 N. Y. 534, 75 Am. Dec. 258, and note; Edgerton v. New York &c. R. Co., 39 N. Y. 227; Babcock v. Fitchburg R. Co., 140 N. Y. 308, 35 N. E. 596; Stager v. Ridge &c. Co., 119 Pa. St. 70, 12 Atl. 821; Sherman v. Menominee &c. Co., 77 Wis. 14, 45 N. W. 1079; Toomey v. London &c. R. Co., 3 Com. B. N. S. 146; Cotton v. Wood, 8 Com. B. N. S. 568.

said, the burden is upon the plaintiff to prove his own freedom from contributory negligence, as well as the negligence of the defendant, and in all, he will be defeated, where negligence only is charged; if it is shown that his own negligence proximately contributed to his injury. It has also been held that his own fraud may defeat a recovery, as, for instance, where he rides upon another's non-transferable ticket or induces the conductor to carry him without paying any fare, in known violation of the rules of the company.⁴¹

§ 2708. (1697.) Actions for injuries to employes.—In an action by an employe against a railroad company for damages for personal injuries claimed to have been caused by its negligence, he must allege and prove such negligence as the proximate cause of his injury,⁴² and, in many jurisdictions, the burden is also upon him to allege and prove freedom from contributory negli-

See also *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 66; *Toledo &c. R. Co. v. Brannagan*, 75 Ind. 490; ante, § 2696. It is not liable for a pure accident. *Hardwick v. Georgia &c. R. Co.*, 85 Ga. 507, 11 S. E. 832; *Lewis v. Flint &c. R. Co.*, 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790.

⁴¹ *Way v. Chicago &c. R. Co.*, 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431; *Toledo &c. R. Co. v. Brooks*, 81 Ill. 245, 292; *Toledo &c. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Brevig v. Chicago &c. R. Co.*, 64 Minn. 168, 66 N. W. 401; *Janny v. Great Northern R. Co.*, 63 Minn. 380, 65 N. W. 450. See also *Fitzmaurice v. New York &c. R. Co.*, 192 Mass. 159, 78 N. E. 418, 116, Am. St. 236, 6 L. R. A. (N. S.) 1146, 7 Ann Cas. 586, and notes; ante §§ 2392, 2393, 2437.

⁴² *Hayes v. Mich. Cent. R. Co.*,

111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410; *Crew v. St. Louis &c. R. Co.*, 20 Fed. 87; *Alabama &c. R. Co. v. Bailey*, 112 Ala. 167, 20 So. 313; *Sappenfield v. Main St. &c. R. Co.*, 91 Cal. 48, 27 Pac. 590; *Murray v. Denver &c. R. Co.*, 11 Colo. 124, 17 Pac. 484; *Indianapolis &c. R. Co. v. Love*, 10 Ind. 554; *Louisville &c. R. Co. v. Orr*, 84 Ind. 50, 8 Am. & Eng. R. Cas. 94; *Dowell v. Burlington &c. R. Co.*, 62 Iowa 629, 17 N. W. 901; *Wheelan v. Chicago &c. R. Co.*, 85 Iowa 167, 52 N. W. 119, 49 Am. & Eng. R. Cas. 693; *Hanrathy v. Northern &c. R. Co.*, 46 Md. 280; *Philadelphia &c. R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; *Henry v. Lake Shore &c. R. Co.*, 49 Mich. 495, 13 N. W. 832; *Fraker v. St. Paul &c. R. Co.*, 32 Minn. 54, 19 N. W. 349; *Dunphy v. St. Joseph &c. Co.*, 118 Mo. App. 506,

gence on his part.⁴³ The liability or right of action is ordinarily determined by the law of the place where the injury was inflicted.⁴⁴ The fact that an accident occurred, and that it was possible to prevent it, if the company had anticipated it, is not the legal test of negligence on the part of the company,⁴⁵ and, as a general rule, no presumption of the negligence on the part of the company arises in his favor,⁴⁶ such as often arises where

95 S. W. 301; *Fenderson v. Atlantic City R. Co.*, 56 N. J. L. 708, 31 Atl. 767; *Hudson v. Charleston &c. R. Co.*, 104 N. Car. 491, 10 S. E. 669, 41 Am. & Eng. R. Cas. 348; *East Tenn. &c. R. Co. v. Stewart*, 13 Lea (Tenn.) 432; *Texas &c. R. Co. v. Crowder*, 76 Tex. 499, 13 S. W. 381; *Gulf &c. R. Co. v. Knott*, 14 Tex. Civ. App. 158, 36 S. W. 491; *Johnson v. Chesapeake &c. R. Co.*, 36 W. Va. 73, 14 S. E. 432; 6 *Thomp. Neg.* (2d ed.) § 7695. The company is not liable for a pure accident. *Wabash &c. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. 193; *Armour v. Ryan*, 61 Ill. App. 314; *Handelun v. Burlington &c. R. Co.*, 72 Iowa 709, 32 N. W. 4.

⁴³ A general averment to this effect is held sufficient in many jurisdictions, but if the specific averments show that he was guilty of contributory negligence they will control. *Spencer v. Ohio &c. R. Co.*, 130 Ind. 181, 29 N. E. 915; *Stewart v. Pennsylvania Co.*, 130 Ind. 242, 29 N. E. 916; *Ivens v. Cincinnati &c. R. Co.*, 103 Ind. 27, 2 N. E. 134.

⁴⁴ *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620. See also *Cuba Ry. Co. v. Crosby*, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. ed. 274, 38

L. R. A. (N. S.) 40, and note; *Burns v. Grand Rapids &c. R. Co.*, 113 Ind. 169, 15 N. E. 230.

⁴⁵ *Augerstein v. Jones*, 139 Pa. St. 183, 21 Atl. 24, 23 Am. St. 174, and note; *Beatty v. Central &c. R. Co.*, 58 Iowa 242, 12 N. W. 332, 8 Am. & Eng. R. Cas. 210; *Chicago &c. R. Co. v. Stumps*, 55 Ill. 367; *Muirhead v. Hannibal &c. R. Co.*, 19 Mo. App. 634; *Chicago &c. R. Co. v. Armstrong*, 62 Ill. App. 228.

⁴⁶ *Patton v. Texas &c. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361; *Midland Val. R. Co. v. Fulgham*, 181 Fed. 91; *St. Louis &c. R. Co. v. Andrews*, 79 Ark. 437, 96 S. W. 183; *Brymer v. Southern Pac. R. Co.*, 90 Cal. 496, 27 Pac. 371; *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350; *Minty v. Union Pac. R. Co.*, 2 Idaho, 437, 21 Pac. 660, 4 L. R. A. 409; *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. 1108; *Wabash &c. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. 193; *Henry v. Brackenridge &c. Co.*, 48 La. 950, 20 So. 221; *Baltimore &c. R. Co. v. Wilson*, 117 Md. 198, 83 Atl. 248; *Fuller v. Ann Arbor R. Co.*, 141 Mich. 66, 104 N. W. 414; *Puffer v. Chicago &c. R. Co.*, 65 Minn. 350, 68 N. W. 39; *Short v. New Orleans &c. R. Co.*, 69 Miss.

a passenger is injured, from the mere happening of an accident and injury to the employee. Negligence may be pleaded somewhat generally,⁴⁷ and a complaint is not bad as against a demurrer, because it alleges that the defendant, or the defendant by its servants and agents, performed the negligent act complained of, without stating the name of the servant or agent.⁴⁸

848, 13 So. 826; *Bohn v. Chicago &c. R. Co.*, 105 Mo. 429, 17 S. W. 580; *Oglesby v. Missouri Pac. R. Co.*, 177 Mo. 272, 76 S. W. 623; *Smith v. Boston &c. R. Co.*, 73 N. H. 325, 61 Atl. 359; *De Vau v. Pennsylvania &c. R. Co.*, 130 N. Y. 632, 28 N. E. 532; *Kincaid v. Oregon &c. R. Co.*, 22 Ore. 35, 29 Pac. 3, 53 Am. & Eng. R. Cas. 218; *Christensen v. Oregon &c. R. Co.*, 35 Utah 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159. But see *Fitzgerald v. Southern R. Co.*, 141 N. Car. 530, 54 S. E. 391, and see ante § 2697 for reference to cases reviewing conflicting authorities as to when, if at all, the *res ipsa loquitur* doctrine applies to such cases. See also notes in 113 Am. St. 986, 6 L. R. A. (N. S.) 337; and 13 Case and Comment 118, for review of conflicting authorities; also note in Ann Cas. 1914D, 94.

⁴⁷ See, for instance, *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567, 17 Am. & Eng. R. Cas. 583; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. 252, 25 Am. St. 47; *Harper v. Norfolk &c. R. Co.*, 36 Fed. 102; *Johnston v. Canadian Pac. R. Co.*, 50 Fed. 886; *Wilson v. Denver &c. R. Co.*, 7 Colo. 101, 2 Pac. 1; *Cleveland &c. R. Co. v. Wynant*, 100 Ind. 160; *Carey v.*

Chicago &c. R. Co., 67 Wis. 608, 31 N. W. 163. In an action for damages for injury caused by a fellow-servant on the ground that the company knew that he was incompetent it is not necessary to name the particular officers having notice thereof. *Lake Shore &c. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246. Nor to set out the particulars constituting the incompetency. *Johnson v. Canadian Pac. R. Co.*, 50 Fed. 886.

⁴⁸ *Ohio &c. R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Wabash R. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85; *Louisville &c. R. Co. v. Kendall*, 138 Ind. 313, 36 N. E. 415; *Cramer v. Union Pac. R. Co.*, 3 Utah 504, 24 Pac. 911; *Lesard v. Northern Pac. R. Co.*, 81 Wis. 189, 51 N. W. 321. See *Wild v. Oregon &c. R. Co.*, 21 Ore. 159, 27 Pac. 954, 29 L. R. A. 297. The text is quoted in *Burch v. Southern Pac. Co.*, 140 Fed. 270, 272. But see *Burns v. Chicago &c. R. Co.*, 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227; and note; *Southern R. Co. v. Cunningham*, 112 Ala. 496, 20 So. 639. A motion to make more specific might be proper in some cases of this kind. And a complaint is bad which does not allege that the company was negligent or that the servant was act-

But the complaint should show in what respect the defendant was negligent,⁴⁹ and the plaintiff's evidence and right to recover will usually be limited to the negligence charged in his complaint.⁵⁰ Thus, where the complaint counts upon negligence in allowing the track to become defective, evidence is usually inadmissible to show negligence in the management of the train or the incompetency of a fellow-servant, and there can be no recovery upon the latter ground.⁵¹ So, if the complaint merely

ing within the scope or line of his duty. *Cincinnati &c. R. Co. v. Voght*, 26 Ind. App. 665, 60 N. E. 797; *Cleveland &c. R. Co. v. Pierce*, 34 Ind. App. 188, 72 N. E. 604.

⁴⁹ *Knahlta v. Oregon &c. R. Co.*, 21 Ore. 136, 27 Pac. 91; *Omaha &c. R. Co. v. Wright*, 47 Nebr. 886, 66 N. W. 842; *Batterson v. Chicago &c. R. Co.*, 49 Mich. 184, 13 N. W. 508; *Chall v. Detroit &c. Co.*, 140 Mich. 68, 103 N. W. 513. See also *Heinzle v. Metropolitan St. R. Co.*, 182 Mo. 528, 529, 81 S. W. 848; *Briscoe v. Metropolitan St. R. Co.*, 118 Mo. App. 668, 95 S. W. 276.

⁵⁰ *Wilkinson v. Pensacola &c. R. Co.*, 35 Fla. 83, 17 So. 71; *Florida Cent. R. Co. v. Williams*, 37 Fla. 406, 20 So. 558; *Thomas v. Louisville &c. R. Co.*, 18 Ky. L. 164, 35 S. W. 910; *Mueller v. Lake Shore &c. R. Co.*, 105 Mich. 487, 63 N. W. 416; *Mitchell v. Prange*, 110 Mich. 78, 67 N. W. 1096, 34 L. R. A. 182, 64 Am. St. 329; *Ely v. Railroad Co.*, 77 Mo. 34; *Harty v. St. Louis &c. R. Co.*, 95 Mo. 368, 8 S. W. 562; *Eckles v. Norfolk &c. R. Co.*, 96 Va. 69, 25 S. E. 545; ante, § 2707, note 101. If there is no right to recover on one charge of negligence, error in submitting

that question to the jury is not cured because they might have found negligence in another respect also charged. *Northern Pac. R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. ed. 999. So, where a complaint is based upon the theory that it takes several defects or acts of negligence to make the cause of action relied on, it may be necessary to prove all in order to entitle the plaintiff to recover thereunder. *Terre Haute &c. R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62; *Wormsdorf v. Detroit &c. R. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. 453.

⁵¹ *Chicago &c. R. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206, and note. See also *De Bolt v. Kansas City &c. R. Co.*, 123 Mo. 496, 27 S. W. 575; *Houston &c. R. Co. v. Farrell* (Tex. Civ. App.) 27 S. W. 942. But it has been held that the incompetency of a servant managing machinery may be shown where the complaint charges gross negligence in the operation of such machinery. *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872. One can not sue as an employe and recover as a passenger. *Evansville &c. R. Co. v. Barnes*, 137 Ind.

charges that the negligence was that of an employe of the company, it should show that he was such an employe, or that his duties were such, as that his negligence in the respect complained of should be deemed to be the negligence of the company,⁵² and if it shows on its face that he was a fellow-servant of the plaintiff it may be held bad on demurrer.⁵³ It is frequently necessary where the injury is caused by some defect in machinery, appliances, or the like, to aver that the defendant had knowledge thereof, or to state facts showing that, in the exercise of ordinary and reasonable care with respect to a duty due from it to the plaintiff it ought to have had such knowledge, and the plaintiff did not have knowledge thereof.⁵⁴ Knowledge and lack

306, 36 N. E. 1092. See also *Mexican &c. R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126; *Galveston &c. R. Co. v. Herring* (Tex.), 36 S. W. 129; *Becker v. Baumgartner*, 5 Ind. App. 576, 32 N. E. 786; *Chicago &c. R. Co. v. Mehlsack*, 44 Ill. App. 124. But compare *McCaslin v. Lake Shore &c. R. Co.*, 93 Mich. 553, 53 N. W. 724; *Georgia &c. R. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939; *New York &c. R. Co. v. Green* (Tex. Civ. App.), 36 S. W. 812.

⁵² *Helfrich v. Williams*, 84 Ind. 553. See also *Texas &c. R. Co. v. Harrington*, 62 Tex. 597, 21 Am. & Eng. R. Cas. 571; *Cincinnati &c. R. Co. v. Voght*, 26 Ind. App. 665, 60 N. E. 797; *Pittsburgh &c. R. Co. v. Adams*, 25 Ind. App. 164, 56 N. E. 101.

⁵³ *East St. Louis &c. R. Co. v. Dwyer*, 41 Ill. App. 522; *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569, holding that where the complaint charges negligence of other servants it must allege that they were not fellow-servants.

⁵⁴ *Chicago &c. R. Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Indiana &c. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Louisville &c. R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Chicago &c. R. Co. v. Fry*, 131 Ind. 319, 28 N. E. 989; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *Current v. Missouri Pac. R. Co.*, 86 Mo. 62; *Norfolk &c. R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370; *Klochinski v. Shores &c. Co.*, 93 Wis. 417, 67 N. W. 934; *Griffiths v. London &c. R. Co.*, L. R. 13 Q. B. Div. 259, 33 W. R. 35; ante, § 1878. See also *O'Connor v. Atchison &c. R. Co.*, 137 Fed. 503; *Crouse v. Chicago &c. R. Co.*, 102 Wis. 196, 78 N. W. 446, 778; 3 Elliott Ev. § 2519, ante, § 1878. But see *Warner v. Western R. Co.*, 94 N. Car. 250, 25 Am. & Eng. R. Cas. 432; *Branch v. Port Royal &c. R. Co.*, 35 S. Car. 405, 14 S. E. 808; *Chicago &c. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. 515; *O'Connor v. Illinois Cent. R. Co.*, 83 Iowa 105,

of knowledge may usually be averred in general terms,⁵⁵ and embraces constructive as well as actual knowledge;⁵⁶ but an allegation that the plaintiff exercised due care is not equivalent to an allegation that he had no knowledge.⁵⁷ It has also been held that if the injury results from an obvious defect and the plaintiff alleges that the company promised to remedy it, but failed to do so, he must also aver that he was injured within such time after the promise as would have been reasonable, under the circumstances, to allow for its performance.⁵⁸ As we have elsewhere shown, evidence of subsequent repairs or increased precautions after an accident is inadmissible to show antecedent negligence.⁵⁹ So, on the other hand, evidence that the plaintiff

48 N. W. 1002; *Cole v. Chicago &c. R. Co.*, 67 Wis. 272, 30 N. W. 600; *Gulf &c. R. Co. v. Royall*, 18 Tex. Civ. App. 86, 43 S. W. 815. In *Mayes v. Chicago &c. R. Co.*, 63 Iowa 562, 14 N. W. 340, it is held that if the company seeks to defend on the ground that the employe remained in its service after knowing of the defects and thus waived its negligence it must plead such defense affirmatively. Mere knowledge might not necessarily show contributory negligence, but we think it would usually show an assumption of the risk.

⁵⁵ *Columbian Enameling Co. v. Burke*, 37 Ind. App. 518, 77 N. E. 409, 117 Am. St. 337; *Galveston &c. R. Co. v. Udalle*, (Tex. Civ. App.), 91 S. W. 330. But general allegations of want of knowledge will be overcome if specific facts are alleged showing knowledge. *Cleveland &c. R. Co. v. Morrey*, 172 Ind. 513, 88 N. E. 932; *Cleveland &c. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.

⁵⁶ *Zeller v. Vinardi*, 42 Ind. App. 232, 85 N. E. 378; *Cleveland &c. R. Co. v. Bossert*, 44 Ind. App. 245, 87 N. E. 158, ante §§ 1878, 1879.

⁵⁷ *Pette's Admr. v. Old English Slate Quarry*, 90 Vt. 87, 96 Atl. 596, citing *Louisville &c. Ry. Co. v. Corps*, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636n, and *Chicago &c. Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857. See also *Bowden v. Philadelphia &c. R. Co.*, 5 Boyces (Del.) 146, 91 Atl. 209; *Aultman v. Atlantic &c. R. Co.*, 71 Fla. 276, 71 So. 283.

⁵⁸ *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337, 9 Am. St. 806. See generally *Andrecsik v. New Jersey &c. Co.*, 73 N. J. L. 664, 63 Atl. 719, 4 L. R. A. (N. S.) 913, 9 Ann. Cas. 1006; *Cicalese v. Lehigh Val. R. Co.*, 75 N. J. L. 897, 69 Atl. 166, note in 47 L. R. A. (N. S.) 1220, ante § 1857.

⁵⁹ *Columbia &c. R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. ed. 405; *Atchison &c. R. Co. v. Parker*, 55 Fed. 595; *Motey v. Pickle &c. Co.*, 74 Fed. 155;

was negligent at some other time is inadmissible to show that he was guilty of contributory negligence at the time he received the injury of which he complains.⁶⁰ As a general rule, at least, the defendant will not be permitted to escape liability in an action for not furnishing reasonably safe machinery by showing that it is the custom of other companies to furnish similar unsafe machinery or appliances.⁶¹ But, as bearing on the question

Sappenfield v. Main St. &c. R. Co., 91 Cal. 48, 27 Pac. 590; *Shinners v. Proprietors &c.*, 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554, and note; 26 Am. St. 226; *Morse v. Minneapolis &c. R. Co.*, 30 Minn. 465, 16 N. W. 358; *Lang v. Sanger*, 76 Wis. 71, 44 N. W. 1095; ante, § 1674. So, as to similar accidents. *Dye v. Delaware &c. R. Co.*, 130 N. Y. 671, 29 N. E. 320, 53 Am. & Eng. R. Cas. 286. See also *Buckalew v. Tennessee &c. Co.*, 112 Ala. 146, 20 So. 606; *Sullivan v. Salt Lake City*, 13 Utah 122, 44 Pac. 1039. Compare also *Fontaine v. Wampanoag Mills*, 189 Mass. 498, 75 N. E. 738; *Carr v. American Locomotive Co.*, 31 R. I. 234, 77 Atl. 104, Ann. Cas. 1912B, 131. But see *Alabama Consol. &c. Coal Co. v. Heald*, 154 Ala. 580, 45 So. 686; *Chesapeake &c. Ry. Co. v. Kelly's Admx.*, 160 Ky. 296, 161 Ky. 655, 169 S. W. 736, 171 S. W. 185.

⁶⁰ *Atlanta &c. R. Co. v. Johnson*, 66 Ga. 259; *Kaillen v. Northwestern &c. Co.*, 46 Minn. 187, 48 N. W. 779; *Missouri &c. R. Co. v. Johnson*, 92 Tex. 380, 48 S. W. 568. See also *Grebenstein v. Stone &c. Corp.*, 205 Mass. 431, 91 N. E. 411; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 9 N. W. 243. So, as to evidence of his habits as to so-

briety and carefulness, *Illinois Cent. R. Co. v. Borders*, 61 Ill. App. 55. And see generally, note in L. R. A. 1916B, 827. But where negligence in knowingly retaining an incompetent servant is charged, his general reputation for incompetency on the road may be shown. *Baltimore &c. R. Co. v. Henthorne*, 73 Fed. 634; *Lake Shore &c. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Texas &c. R. Co. v. Johnson*, 89 Tex. 519, 35 S. W. 1042; *El Paso &c. R. Co. v. Smith*, 50 Tex. Civ. App. 10, 108 S. W. 988; *Gulf &c. R. Co. v. Hays*, 40 Tex. Civ. App. 162, 89 S. W. 29. See also *Northern Pac. R. Co. v. Lundberg*, 176 Fed. 847.

⁶¹ *Lake Erie &c. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Allen v. Burlington &c. R. Co.*, 64 Iowa 94, 19 N. W. 870; *Jenkins v. Hooper &c. Co.*, 13 Utah 100, 44 Pac. 829. See also *Central R. Co. v. De Bray*, 71 Ga. 406; *Union Wire Mattress Co. v. Wiegref*, 133 Ill. App. 506; *Thompson v. Boston &c. R. Co.*, 153 Mass. 391, 26 N. E. 1070; *Effendorf v. Brooklyn City &c. R. Co.*, 69 N. Y. 195, 25 Am. Rep. 171; *Douglas v. Chicago &c. R. Co.*, 100 Wis. 405, 76 N. W. 356, 69 Am. St. 930. As to admissibility of custom or usual practice in doing an

of negligence, it may show that other well-regulated and prudently managed companies use similar machinery or appliances.⁶² The company is not estopped from denying its liability to the employe by proof that it paid his surgeon's bill.⁶³ We have elsewhere considered the effect of a release of liability by the employe,⁶⁴ and additional rules and illustrations showing what the servant must allege and prove and what the master should or may show in defense will be found in a subsequent chapter.⁶⁵

§ 2709. (1698.) Pleading ordinances.—It is laid down as a

act, see *Hissong v. Richmond &c. R. Co.*, 91 Ala. 514, 8 So. 776; *Wyman v. Lehigh Val. R. Co.*, 158 Fed. 957; *Jeffrey v. Keokuk &c. R. Co.*, 56 Iowa 546, 9 N. W. 884; *Whitsett v. Chicago &c. R. Co.*, 67 Iowa 150, 25 N. W. 104; *Spaulding v. Chicago &c. R. Co.*, 98 Iowa 205, 67 N. W. 227; *Schroeder v. Chicago &c. R. Co.*, 128 Iowa 365, 103 N. W. 985; *Hamilton v. Chicago &c. R. Co.*, 145 Iowa 431, 124 N. W. 363; *Duffey v. Consolidated Block Coal Co.*, 147 Iowa 225, 124 N. W. 609, 30 L. R. A. (N. S.) 1067; *Southern Kansas R. Co. v. Robbins*, 43 Kans. 145, 23 Pac. 113, 41 Am. & Eng. R. Cas. 316; *Thompson v. Boston &c. R. Co.*, 153 Mass. 391, 26 N. E. 1070; *Missouri &c. R. Co. v. Crane*, 13 Tex. Civ. App. 426, 35 S. W. 797. See also as to custom of same company. *Graham v. Minneapolis &c. R. Co.*, 95 Minn. 49, 103 N. W. 714, and compare *Southern R. Co. v. Blanford's Admx.*, 105 Va. 373, 54 S. E. 1.

⁶² *Holland v. Tennessee &c. R. Co.*, 91 Ala. 444, 8 So. 524, 12 L. R. A. 232. See also *Pennsylvania*

Co. v. Hankey, 93 Ill. 580; *Kolsti v. Minneapolis &c. R. Co.*, 32 Minn. 133, 19 N. W. 655; *Hoover v. Chicago &c. R. Co.*, 40 Tex. Civ. App. 820, 89 S. W. 1084. And see generally as to evidence of precautions taken or appliances used by others. *Wagner v. Standard &c. Mfg. Co.*, 244 Pa. St. 310, 91 Atl. 353; *Norfolk &c. R. Co. v. Bell*, 104 Va. 836, 52 S. E. 700.

⁶³ *Weeks v. New Orleans &c. R. Co.*, 32 La. Ann. 615.

⁶⁴ Ante, §§ 2064-2065, 2066. See also as to when and how it may be set aside and whether a tender is necessary the following recent cases: *Randall v. Port Huron &c. R. Co.* (Mich.), 184 N. W. 435; *Och v. Missouri &c. R. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Drohan v. Lake Shore &c. R. Co.*, 162 Mass. 435, 38 N. E. 1116; *Plews v. Burrage*, 274 Fed. 881; *Barker v. Northern Pac. R. Co.*, 65 Fed. 460, with which compare *Stewart v. Chicago &c. R. Co.*, 141 Ind. 55, 40 N. E. 67.

⁶⁵ See Post § 2800, et seq. As to sufficiency of complaint under Federal Employer's Liability Act, see note in 47 L. R. A. (N. S.) 74.

general rule by many courts and text-writers that courts other than the local municipal courts will not take judicial knowledge of ordinances and that they must be pleaded in order to be admitted in evidence.⁶⁶ Most of the cases, however, in which the rule was thus stated were actions or prosecutions upon or for the violation of ordinances, or in which they were directly sought to be enforced. In some of the cases it was held that the section of the ordinance involved should be set out in *haec verba*, in others that its substance at least must be stated, while in a few others it was held sufficient to refer to the ordinance by its title and date of passage. In many of the states that latter mode of pleading an ordinance is authorized by statute. We think that, while there may not be so much reason for requiring an ordinance to be set out where it is relied upon to charge a railroad company with negligence, yet it ought to be in some way pleaded and identified. To admit an ordinance in evidence without pleading it would, we think, not only be in violation of the general rule that judicial notice will not be taken of ordinances and private statutes, and that they must be pleaded and proved, but would also violate the elementary rule that the complaint must proceed on a single definite theory and that the evidence must correspond with the allegations and be confined to the point in

⁶⁶ *Greeley v. Hamman*, 12 Colo. 94, 20 Pac. 1; *Whitson v. Franklin*, 34 Ind. 392; *Huntington v. Pease*, 56 Ind. 305; *Goodrich v. Brown*, 30 Iowa 291; *McPherson v. Nichols*, 48 Kans. 430, 29 Pac. 679; *Lucker v. Commonwealth*, 4 Bush (Ky.) 440; *Lewiston v. Fairfield*, 47 Maine 481; *Central Sav. Bank v. Mayor*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283; *Winona v. Burke*, 23 Minn. 254; *Keeler v. Milledge*, 24 N. J. L. 142; *Porter v. Waring*, 69 N. Y. 250; *Pittsburgh &c. R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543; *Pomeroy v. Lappens*, 9 Ore. 363; *City Council v. Ashley &c. Co.*, 34

S. Car. 541, 13 S. E. 845; *State v. Soragan*, 40 Vt. 450; *Fink v. Milwaukee*, 17 Wis. 26; Note in *Ann. Cas.* 1914C, 1232. In *Mulderig v. St. Louis &c. R. Co.*, 116 Mo. App. 665, 94 S. W. 801, 804, this was said to be the rule if the ordinance is the basis of the action, but that it may be admissible in evidence, when not the basis of the action, to show negligence. In *Robinson v. Denver City Tramway Co.*, 164 Fed. 174, 176 (citing text), it is said that it must be pleaded to be admissible in evidence to establish charge of negligence.

issue. It is also but just that the defendant should have notice of the plaintiff's claim. If no ordinance is pleaded in any way the defendant might well assume that the plaintiff relied solely on its breach of a common-law duty, and if the plaintiff does rely on an ordinance of which the courts will not take judicial notice it would be unfair to require the defendant to take notice of it unless it is in some way pointed out. So, if the violation of an ordinance is relied upon as negligence per se, or even prima facie evidence of negligence, especially where there is nothing in the case which would constitute negligence in the absence of an ordinance, it is difficult to see why the ordinance is not just as much the foundation of the action as where suit is brought directly for the penalty of its violation. There are authorities holding that it must be pleaded in either case. Thus, in a recent action for damages to the plaintiff's building by a fire which the defendant had set in a pile of rubbish in close proximity thereto the judgment of the trial court was reversed on appeal because an ordinance prohibiting the setting of fires within the city limits was admitted in evidence without being pleaded.⁶⁷ The court said: "It is true that it was not claimed that the violation of the ordinance was negligence per se, but it was claimed that it was evidence which the jury might take into account as to the negligence of the defendants. The defendants were entitled to notice of this claim."⁶⁸ This was quoted with approval and followed in a recent case in action against a street railway company.⁶⁹ Other decisions in similar cases are to the same effect.⁷⁰ and the rule is thus stated by a careful text-writ-

⁶⁷ Richter v. Harper, 95 Mich. 221, 227, 54 N. W. 768, 770.

⁶⁸ Citing 1 Dill. Mun. Corp. § 83.

⁶⁹ Gardner v. Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49, 4 Am. Neg. Cas. 163, 167. And in Robinson v. Denver City Tramway Co., 164 Fed. 174, 176 (also citing text).

⁷⁰ Illinois Cent. R. Co. v. Godfred, 71 Ill. 500, 22 Am. Rep. 112, 117; Chicago &c. R. Co. v. Klauber,

9 Ill. App. 613; Blanchard v. Lake Shore &c. R. Co., 126 Ill. 416, 425, 18 N. E. 799, 9 Am. St. 630; Chicago &c. R. Co. v. Cobler, 39 Ind. App. 506, 80 N. E. 162; Dale v. Denver City Tramway Co., 173 Fed. 787, 19 Ann. Cas. 1223. See also Shanfelter v. Mayor, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 648; Fay v. Ft. Collins, 40 Colo. 262, 90 Pac. 512.

er.⁷¹ "Although a valid statute or ordinance limiting the rate of speed is admissible in evidence its existence and violation should first be pleaded, and an averment that the car was running at a high rate of speed, contrary to law or to the provisions of a statute or ordinance, is not an allegation of the existence of the ordinance." But it has been held, on the other hand, that the averment of the existence of the ordinance is sufficient in such a case without setting out a copy thereof in the complaint,⁷² and in another recent case it is intimated that an allegation that the plaintiff's injury was caused by running a train at a designated speed, in violation of the ordinance of the city, is sufficient, although the point actually decided was that it was sufficient after verdict and judgment and the defendant had waived the question by not objecting on that ground at the time the ordinance was offered in evidence.⁷³ It is difficult to lay down any general rule which would be applicable in all jurisdictions, but we think that when an ordinance is relied on it should be pleaded in some way, so as to give the defendant notice of the plaintiff's claim and justify the admission of the ordinance as within the theory of the complaint, and that it should at least be identified by its title and date of passage or by pleading its substance or tenor and effect, although it is probably unnecessary in many jurisdictions to set it out in haec verba.⁷⁴ But it has been held that where the statute provides that evidence of contributory negligence may be given under the general denial, even though the burden of proof is upon the defendant, an ordinance and evidence of its violation may be shown to establish contributory negligence without such ordinance being specially

⁷¹ Booth Street Railways, § 359.

⁷² Lake Erie &c. Co. v. Hancock, 15 Ind. App. 104, 43 N. E. 659, citing Madison &c. R. Co. v. Taffe, 37 Ind. 361; St. Louis &c. R. Co. v. Mathias, 50 Ind. 65. See also Winter v. Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737; Faber v. St. Paul &c. R. Co., 29 Minn. 465, 13 N.

W. 902. But compare Chicago &c. R. Co. v. Cobler, 39 Ind. App. 506, 80 N. E. 162.

⁷³ St. Louis &c. R. Co. v. Eggmann, 161 Ill. 155, 43 N. E. 620.

⁷⁴ In nearly all cities of any size there are hundreds of ordinances, many of them, perhaps, on the same general subject, and it is manifestly unjust to require the de-

pleaded.^{74a} Where a complaint merely alleged that the act in question was negligently done by the defendant "and in violation of the ordinance of said city in such case made and provided," and the date of approval was stated, the court in a comparatively recent case in Illinois, held that it was not properly pleaded as its substance, at least should be set out, but that as there was no demurrer the ordinance was properly admitted in evidence.⁷⁵ It has also been held that the statement of the mayor to the railroad company that an ordinance as to speed would not be enforced if the street was not obstructed is no defense in an action against the company for personal injuries alleged to have been caused by its violation of such ordinance.⁷⁶

§ 2710. (1699.) **Inspection and physical examination of party.**—It is well settled that, in an action for damages for personal injuries, the plaintiff may be permitted, while testifying as a witness in his own behalf, to exhibit the injured part to the jury.⁷⁷ It is also held, in many jurisdictions, that the plaintiff

defendant to take notice of them and single out the particular one relied on where the courts take no judicial notice of them and the one relied upon is in no way identified. To allege that the act of the defendant was contrary to the laws and ordinances of the city is a mere conclusion which adds little, if anything to the complaint, gives the defendant no notice of any particular ordinance, and is not equivalent to an averment of the existence and violation of any particular ordinance. *Chicago &c. R. Co. v. Cobler*, 39 Ind. App. 506, 80 N. E. 162. As to manner of proving ordinance, see 2 Elliott Ev. § 1304.

^{74a} *Central Indiana R. Co. v. Wishard*, 186 Ind. 262, 114 N. E. 970; *Horace F. Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718.

⁷⁵ *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521. But the court also said that if there had been no attempt to plead the ordinance it would have been error to admit it in evidence.

⁷⁶ *Angell v. Chicago &c. P. Co.*, 97 Kans. 688, 156 Pac. 763, citing *Garber v. St. Louis &c. R. Co.* (Tex. Civ. App.), 118 S. W. 857.

⁷⁷ *Townsend v. Briggs*, 99 Cal. 481, 32 Pac. 307; *Chicago &c. R. Co. v. Clausen*, 70 Ill. App. 550, 173 Ill. 100, 50 N. E. 680; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. 355; *Barker v. Perry*, 67 Iowa 146, 25 N. W. 100; *Newport News &c. Co. v. Carroll*, 17 Ky. L. 374, 31 S. W. 132; *Langworthy v. Green*, 95 Mich. 93, 54 N. W. 697; *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370.

may be compelled to exhibit it or submit to a surgical examination before trial,⁷⁸ but there are nearly as many authorities to the contrary,⁷⁹ and, even where it is ordinarily allowed, circumstances may justify the court in refusing it, as, for instance,

But compare *French v. Wilkinson*, 93 Mich. 322, 53 N. W. 530. Physician may exhibit plaintiff to jury in testifying as to the nature and effect of the injury. *Citizens' St. R. Co. v. Willoeby*, 134 Ind. 563, 33 N. E. 627, 58 Am. & Eng. R. Cas. 485; *Cunningham v. Union Pac. R. Co.*, 4 Utah 206, 7 Pac. 795; *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892. And it has been held that the defendant may have an examination of the injured part by experts in open court, where the plaintiff has already exhibited it to the jury. *Haynes v. Trenton*, 123 Mo. 326, 27 S. W. 622. See also *Houston &c. R. Co. v. Anglin*, 99 Tex. 349, 89 S. W. 966, 2 L. R. A. (N. S.) 386; *Chicago &c. R. Co. v. Langston*, 92 Tex. 709, 50 S. W. 574, 51 S. W. 331.

⁷⁸ *Alabama &c. R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 24 Am. St. 764, 9 L. R. A. 442; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *St. Louis &c. R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887; *Denver City Tramway Co. v. Roberts*, 43 Colo. 522, 96 Pac. 186 (in discretion of court); *Richmond &c. R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. 189; *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. 212; *Schroeder v. Chicago &c. R. Co.*, 47 Iowa 375; *Atchison &c. R. Co. v. Thul*, 29 Kans. 466, 44 Am. Rep. 659; *Dickinson v. Kan-*

sas City El. R. Co., 74 Kans. 863, 86 Pac. 150; *Louisville &c. R. Co. v. Simpson*, 111 Ky. 754, 64 S. W. 733; *Illinois Cent. R. Co. v. Beeler*, 142 Ky. 772, 135 S. W. 305; *United Rys. &c. Co. v. Cloman*, 107 Md. 681, 69 Atl. 379 (in discretion of court); *Graves v. Battle Creek*, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. 561; *Hatfield v. St. Paul &c. R. Co.*, 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14; *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Brown v. Chicago &c. R. Co.*, 12 N. Dak. 61, 95 N. W. 153, 102 Am. St. 564; *Lane v. Spokane Falls &c. R. Co.*, 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. 821; *White v. Milwaukee City R. Co.*, 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154, and note. Note to *Larson v. Salt Lake City*, 34 Utah 318, 97 Pac. 483, in 23 L. R. A. (N. S.) 462, 463, et seq., and articles by Judge Thompson in 25 Cent. L. J. 3. In *Chadron v. Glover*, 43 Nebr. 732, 62 N. W. 62, it is said that it has been intimated in several cases in Nebraska that the court has power to order an examination before trial, but has never been expressly decided in that state.

⁷⁹ *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. ed. 734 (but see, when a state statute provides for it, *Camden &c. R. Co. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. ed. 721);

where it involves serious pain.⁸⁰ The mere fact that a surgeon examined the plaintiff out of court, and in the absence of the defendant, will not render his evidence inadmissible, if it is otherwise competent.⁸¹ It has also been held that the plaintiff may be asked on cross-examination whether he is willing to submit to an examination by a reputable physician or surgeon appointed by the court.⁸²

§ 2711. (1700.) Experiments and practical tests—Real evidence.—The clothing of one who is killed by the alleged negligence of a railroad company may, it seems, be exhibited in evidence where it tends to establish such negligence as the cause of his death.⁸³ And other “real evidence” such as defective ma-

Peoria &c. R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; Pronskevitch v. Chicago &c. R. Co., 232 Ill. 136, 83 N. E. 545; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; Cole v. Fall Brook &c. Co., 87 Hun 584, 34 N. Y. S. 572; McQuigan v. Delaware &c. R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. 507; Newman v. Third Ave. R. Co., 50 N. Y. Super. Ct. 412; Brackett v. Southern R. Co., 88 S. Car. 447, 70 S. E. 1026, Ann. Cas. 1912C, 1212. In Loyd v. Hannibal &c. R. Co., 53 Mo. 509, 4 Am. Neg. Cas. 481, it is said a physical examination of the plaintiff by surgeons during the trial is a proceeding unknown to the law, and that the court has no power to enforce an order therefor. See also Southern Bell Tel. Co. v. Lynch, 95 Ga. 529, 20 S. E. 500; Mills v. Wilmington City R. Co., 1 Marv. (Del.) 269, 40 Atl. 1114; Stack v. New York &c. R. Co., 177 Mass. 155, 58 N. E. 865, 52 L. R. A. 328, 83 Am. St. 269; Lyon v. Manhattan R. Co., 142 N. Y. 298, 37 N.

E. 113; Austin &c. R. Co. v. Cluck, 97 Tex. 172, 77 S. W. 403, 64 L. R. A. 494, 104 Am. St. 863; Gulf &c. R. Co. v. Nelson, 5 Tex. Civ. App. 387, 24 S. W. 588.

⁸⁰ Kokomo &c. Trac. Co. v. Walsh, 58 Ind. App. 182, 108 N. E. 19; Atchison &c. R. Co. v. Palmore, 68 Kans. 545, 75 Pac. 509, 64 L. R. A. 90. And see as to X-ray examination, State ex rel. Carter v. Call, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071, and note.

⁸¹ Louisville &c. R. Co. v. Falvey, 104 Ind. 409, 417, 3 N. E. 389, 4 N. E. 908.

⁸² Chicago &c. R. Co. v. Hill, 36 Okla. 540, 129 Pac. 13, 43 L. R. A. (N. S.) 622; Missouri &c. R. Co. v. Mitchell, 40 Tex. Civ. App. 633, 90 S. W. 716; Austin &c. R. Co. v. Cluck, 97 Tex. 172, 77 S. W. 403, 64 L. R. A. 494, 104 Am. St. 863, 1 Ann. Cas. 261; Gulf &c. R. Co. v. Booth (Tex. Civ. App.), 97 S. W. 128. But see Chicago &c. R. Co. v. McNally, 227 Ill. 14, 81 N. E. 23.

⁸³ Senn v. Southern R. Co., 108

chinery, iron rails, and the like, may be introduced and exhibited to the jury in a proper case.⁸⁴ So, experiments may sometimes be made in court, or evidence of such experiments, or practical tests, outside of court, may be given if they are shown to have been made under the same or precisely similar conditions to those shown to have existed in the case at bar.⁸⁵ Thus, where the question was as to whether a scar upon the bottom flange of a rail was made by a locomotive wheel as the rail lay across the track, and the defendant had exhibited the scarred rail in court, it was held proper for the plaintiff to introduce a similar wheel and section of rail, and, by experimenting or illustrating with them, to show the jury that the wheel could not strike the lower flange of the rail as claimed by the defendant.⁸⁶ So, where the

Mo. 142, 18 S. W. 1007. See also *Tudor Iron Works v. Weber*, 31 Ill. App. 306; note in *Ann. Cas.* 1912B, 775. But compare *Louisville &c. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176.

⁸⁴ *King v. New York Cent. &c. R. Co.*, 72 N. Y. 607. But see *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955; *Warren v. City Electric R. Co.*, 141 Mich. 298, 104 N. W. 613.

⁸⁵ *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938; *Chicago &c. R. Co. v. Legg*, 32 Ill. App. 218; *Chicago &c. R. Co. v. Champion (Ind.)*, 36 Cent. L. Jour. 280, and note (but see decision in the same case by the appellate court in 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. 357, and note); *Lincoln v. Taunton &c. Co.*, 9 Allen (Mass.) 181; *Williams v. Taunton*, 125 Mass. 34; *Dryer v. Brown*, 52 Hun (N. Y.) 321; *Smith v. State*, 2 Ohio St. 511; *Leonard v. Southern Pac. R. Co.*, 21 Ore. 555,

28 Pac. 887, 15 L. R. A. 221, and note; *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *Hayes v. Southern Pac. Co.*, 17 Utah 99, 53 Pac. 1001. See also *Southern R. Co. v. Brock*, 132 Ga. 858, 64 S. E. 1083; *St. Louis &c. R. Co. v. Ewing (Tex.)*, 126 S. W. 625; *Benson v. Superior Mfg. Co.*, 147 Wis. 20, 132 N. W. 633. And in a recent case of tables prepared by a manufacturer of air brakes showing their power to control trains were held admissible in evidence to corroborate an expert witness that a train could have been stopped before a collision by using them. *Lynes v. Northern Pac. R. Co.*, 43 Mont. 317, 117 Pac. 81, *Ann. Cas.* 1912C, 183.

⁸⁶ *Leonard v. Southern Pac. R. Co.*, 21 Ore. 555, 28 Pac. 887, 15 L. R. A. 221. See also *Osborne v. Detroit*, 32 Fed. 36; *National Cash &c. Co. v. Blumenthal*, 85 Mich. 464, 48 N. W. 622; *Farmers' &c. Bank v. Young*, 36 Iowa 44; *State v. Linkhaw*, 69 N. Car. 214, 12 Am. Rep. 645.

point in issue was whether a car moving slowly down an inclined plane with brakes set would, when the brakes were suddenly loosed, jump or spring suddenly forward, it was held error to exclude evidence of the result of an experiment made, at the same place and under the same conditions.⁸⁷ And a like ruling was made where the question was as to whether a traveler could and ought to have seen.⁸⁸ In another case evidence of an experiment showing that the plaintiff's foot could have been caught in a switch as claimed was held competent,⁸⁹ and in still other cases evidence of experiments was admitted to show how long it would take a team to walk a certain distance between tracks at a crossing.⁹⁰ and in what direction a person would fall while standing on the step of a car if it were suddenly started.⁹¹ But in all such cases, in order to render evidence of the experiments admissible they must usually be made under circumstances and conditions practically the same as those of the case on trial,⁹²

⁸⁷ *Chicago &c. R. Co. v. Champion* (Ind.), 32 N. E. 874, 36 Cent. L. Jour. 280, and note. (But see decision in the same case by the appellate court in 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. 357, and note.)

⁸⁸ *Harrison v. Southern Ry. Co.*, 93 Miss. 40, 46 So. 408.

⁸⁹ *Brooke v. Chicago &c. R. Co.*, 81 Iowa 504, 47 N. W. 74. But compare *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279, 31 N. W. 275.

⁹⁰ *Nosler v. Chicago &c. R. Co.*, 73 Iowa 268, 34 N. W. 850. And whether a person could be seen or how soon the train could have been stopped. *Burg v. Chicago &c. R. Co.*, 90 Iowa 106, 57 N. W. 680, 48 Am. St. 419; *Missouri &c. R. Co. v. Moffatt*, 56 Kans. 667, 44 Pac. 607; *Byers v. Nashville &c. R. Co.*, 94 Tenn. 345, 29 S. W. 128. See also *Young v. Clark*, 16 Utah 42, 50 Pac. 832.

⁹¹ *Gilbert v. Third Ave. R. Co.*, 22 J. & S. (N. Y.) 270, 8 N. Y. S. 152.

⁹² *Lake Erie &c. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Commonwealth v. Piper*, 120 Mass. 185; *Eidt v. Cutter*, 127 Mass. 522; *State v. Justus*, 11 Ore. 178, 8 Pac. 337, 50 Am. Rep. 470; *State v. Fletcher*, 24 Ore. 295, 33 Pac. 575, and note to *Chicago &c. R. Co. v. Champion*, 36 Cent. L. Jour. 280, 283. See also *State v. Lindoen*, 87 Iowa 702, 54 N. W. 1076; *United States v. Ried*, 42 Fed. 134; *Ulrich v. People*, 39 Mich. 245; *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711; *Sullivan v. Commonwealth*, 93 Pa. St. 284; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 189, 191, and note; *Zimmer v. Fox River &c. R. Co.*, 123 Wis. 643, 101 N. W. 1099. But compare *Illinois Cent. R. Co. v. Burns*, 32 Ill. App. 196; *Schweinfurth v. Cleveland &c. R. Co.*, 60

and the whole matter is largely within the discretion of the court.⁹³

§ 2712. (1701.) **Presumptions.**—"A presumption," it has been said, "like a fact proved, remains available to the party in whose favor it arises, until overcome by opposing evidence,"⁹⁴ and it usually has the force and effect of a *prima facie* case in so far as it applies.⁹⁵ But presumptions will not always supply proof of substantive facts,⁹⁶ for there must be something upon which to base them, and a presumption can not be based upon a presumption.⁹⁷ The burden of proof, in the sense elsewhere ex-

Ohio St. 215, 54 N. E. 89. And the jury should not make experiments out of court. *Harrington v. Worcester &c. R. Co.*, 157 Mass. 579, 32 N. E. 955. But it is not always reversible error. *Higgins v. Los Angeles Gas &c. Co.*, 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717, and note.

⁹³ *Spires v. State*, 50 Fla. 121, 39 So. 181, 7 Ann. Cas. 214, and note citing other authorities; *Ide v. Boston &c. R. Co.*, 83 Vt. 66, 74 Atl. 401. See further upon the general subject, 2 Elliott Ev. §§ 1245-1253. In *Langdon-Creasy Co. v. Rouse*, 139 Ky. 647, 72 S. W. 1113, Ann. Cas. 1912B, 292, it was held not to be error for the court to refuse to permit an experiment with a lamp to be made in the presence of the jury where the witness had been in possession of it for several hours before the proposed experiment, and it might not have been in the same condition as when the accident occurred, so, in *Chicago Tel. &c. Co. v. Marne &c. Tel. Co.*, 134 Iowa 252, 111 N. W. 935, it was held that the appellate court would

not interfere with the discretion of the trial court in refusing to permit an experiment.

⁹⁴ *Bates v. Prickett*, 5 Ind. 22.

⁹⁵ 1 Elliott Gen. Pr. § 127; *Montgomery v. Wasem*, 116 Ind. 343, 355, 15 N. E. 795, 19 N. E. 184; *Cleveland &c. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Justice v. Lang*, 52 N. Y. 323.

⁹⁶ *United States v. Ross*, 92 U. S. 281, 23 L. ed. 707; *Looney v. Metropolitan Ry. Co.*, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. ed. 564. See also *Ruppert v. Brooklyn Heights R. Co.*, 154 N. Y. 90, 47 N. E. 971; *Chicago &c. R. Co. v. Rhoades*, 64 Kans. 553, 68 Pac. 58.

⁹⁷ *Atchison &c. Ry. Co. v. De Sedillo*, 219 Fed. 686; *Manning v. Insurance Co.*, 100 U. S. 693, 698, 25 L. ed. 761; 1 Elliott's Gen. Pr. § 127. See also *Philadelphia &c. R. Co. v. Henrice*, 92 Pa. St. 431, 37 Am. Rep. 699, and note, 4 Am. & Eng. R. Cas. 544; *Cleveland &c. R. Co. v. Wynant*, 144 Ind. 525, 17 N. E. 118, 5 Am. St. 644; *Duncan v. Chicago &c. R. Co.*, 82 Kans. 230, 108 Pac. 101; *Ruppert v.*

plained, is frequently shifted by reason of some presumption, and presumptions may, as we have said, make out a *prima facie* case either for the plaintiff or for the defendant. Indeed, in many cases, especially in railroad litigation, the contest has been said to be largely a battle of presumptions.⁹⁵ We have elsewhere called attention to many of the most important presumptions that arise in railroad litigation. Thus, we have considered the presumption as to the authority of agents or employes acting for the company,⁹⁶ the presumption that a corporation has power to hold land conveyed to it,¹ the presumption of payment,² the presumption that a person approaching or on a railroad track is in full possession of his senses and will take care of himself,³ the presumption that one injured at a crossing where he could have seen and heard an approaching train, either did not look, or, if he did look, did not heed what he saw;⁴ the presumption where a fire is set by a locomotive;⁵ the presumption of competency of an employe;⁶ the presumption as to the law of another state;⁷

Brooklyn Heights R. Co., 154 N. Y. 90, 47 N. E. 971; 1 Elliott Ev. § 89.

⁹⁸ Louisville &c. R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357.

⁹⁹ See ante, §§ 257, et seq. 339, 345, 1793, 1805, 2118, et seq. A presumption, it has been held, may also arise from the uniform and acts of one in the capacity of a particular employe that he is employed by the company in the capacity in which he acts. Hughes v. New York &c. R. Co., 36 N. Y. Super. Ct. (4 J. & S.) 222; Hoffman v. New York &c. R. Co., 12 J. & S. (N. Y.) 1; Lampkins v. Vicksburg &c. R. Co., 42 La Ann. 997, 8 So. 530, 47 Am. & Eng. R. Cas. 622; Baltimore &c. R. Co. v. Kane, 69 Md. 11, 13 Atl. 387. But see Sachrowitz v. Atchison &c. R. Co., 37 Kans. 212, 15 Pac. 242, 34 Am. & Eng. R. Cas. 382.

¹ See ante, § 484.

² See ante, § 1284.

³ See ante, §§ 1646, 1791, 1795.

⁴ See ante, §§ 1658, 1660.

⁵ See ante, § 1766, also Louisville &c. R. Co. v. Marbury &c. Co., 132 Ala. 520, 32 So. 745, 90 Am. St. 917; Great Northern R. Co. v. Coats, 115 Fed. 452; American Strawboard Co. v. Chicago &c. R. Co., 177 Ill. 513, 53 N. E. 97.

⁶ See ante, §§ 1846, 1854. See also Mobile &c. R. Co. v. Godfrey, 155 Ill. 78, 39 N. E. 590. Presumption that employe has knowledge of master's rules. Louisville &c. R. Co. v. Bowcock, 21 Ky. L. 383, 51 S. W. 580; Pilkinton v. Gulf &c. R. Co., 70 Tex. 226, 7 S. W. 805; Galveston &c. R. Co. v. Gormby, 91 Tex. 393, 43 S. W. 877, 66 Am. St. 894.

⁷ See ante, § 2051; also Hester v. East St. Louis &c. R. Co., 53 Mo.

the presumption as to loss or injury where there are connecting carriers;⁸ the presumption from loss or injury to freight,⁹ or live stock;¹⁰ the presumption that persons on passenger trains are passengers,¹¹ and the presumption from collisions,¹² derailment,¹³ or other accidents.¹⁴ It has also been held that where it is admitted that a certain company owns a railroad, the presumption arises, in the absence of anything to the contrary, that it is operated by such company,¹⁵ and that an engine bearing the initials of a certain company is owned and operated by it;¹⁶ but the use of a railway track in a city by a switch engine raises no presumption that the owner of the engine owns and operates the track and sidings.¹⁷ The presumption, in the absence of anything to the contrary, is that the company and its employes did their duty and complied with the law.¹⁸ In some jurisdictions

App. 331, and note in L. R. A. 1916A, 1167.

⁸ See ante, § 2190.

⁹ See ante, § 2276.

¹⁰ See ante, § 2333, et seq.

¹¹ See ante, § 2387.

¹² See ante, § 2483.

¹³ See ante, § 2482.

¹⁴ See ante, §§ 2498, 2708. See also as to the conclusive presumption from physical facts and the operation of the laws of nature. Post, §§ 2714, 2715.

¹⁵ Peabody v. Oregon &c. R. Co., 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823, and note; Walsh v. Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; Gulf &c. Railway Co. v. Miller, 98 Tex. 270, 83 S. W. 182; Chicago &c. Ry. Co. v. Porter (Tex. Civ. App.), 166 S. W. 37; Ferguson v. Wisconsin &c. R. Co., 63 Wis. 145, 23 N. W. 123, 19 Am. & Eng. R. Cas. 285. See also Blair v. St. Louis &c. R. Co., 27 Fed. 176; Ayles v. Southeastern R. Co., L. R. 3 Exch. 146.

¹⁶ Ryan v. Baltimore &c. R. Co., 60 Ill. App. 612. See also East St. Louis &c. R. Co. v. Altgen, 210 Ill. 213, 71 N. E. 377.

¹⁷ Calhoun v. Gulf &c. R. Co., 84 Tex. 226, 19 S. W. 341.

¹⁸ Joyner v. South Carolina R. Co., 26 S. Car. 49, 1 S. E. 52; Jewett v. Kansas City &c. R. Co., 50 Mo. App. 547; Reynolds v. Chicago &c. R. Co., 85 Mo. 90; Rafferty v. Missouri Pac. R. Co., 91 Mo. 33, 3 S. W. 393; Uline v. New York &c. R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661. See also Cleveland &c. R. Co. v. Schneider, 40 Ind. App. 38, 80 N. E. 985; ante, § 1864, and many other sections, stating that the burden of proof is upon the plaintiff, for the reason that negligence will not be presumed. As to the right of an employe, a stranger or a passenger, to rely on this presumption, see ante, §§ 1646, 1882, 2471, 2472; Lake Erie &c. R. Co. v. Brafford, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551.

a presumption based on the instinct of self-preservation is indulged, and it is held that this presumption that one will exercise at least ordinary and reasonable care to avoid danger to himself is sufficient, in the absence of anything to the contrary, to cast the burden on the defendant to prove contributory negligence,¹⁹ and that it may even be presumed that a traveler, who was injured at a crossing, stopped, looked and listened.²⁰ But even where this is held, it is also held that if the train by which he was injured was plainly visible from a point at which it was his duty to stop, look and listen, the presumption that he exer-

That one is found dead under a railroad car raises no presumption that he was killed by the negligence of the company. *Spears v. Chicago &c. R. Co.*, 43 Nebr. 720, 62 N. W. 68; *St. Louis &c. R. Co. v. Parks*, 60 Ark. 187, 29 S. W. 464; *Johnston v. East Tenn. &c. R. Co.*, 17 Ky. L. 67, 30 S. W. 415.

¹⁹ *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401, 21 L. ed. 114; *Continental &c. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403; *Thomas v. Delaware &c. R. Co.*, 8 Fed. 729; *Rothe v. Pennsylvania Co.*, 195 Fed. 21; *Williams v. San Francisco &c. R. Co.*, 6 Cal. App. 715, 93 Pac. 122; *Thompson v. Central R. &c. Co.*, 54 Ga. 509 (but see *Prather v. Richmond &c. R. Co.*, 80 Ga. 427, 9 S. E. 530, 12 Am. St. 263; *Northern Cent. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270, 18 Am. St. 441, and note; *Flynn v. Kansas City &c. R. Co.*, 78 Mo. 195, 47 Am. Rep. 99, 18 Am. & Eng. R. Cas. 23; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 6 S. W. 464; *Lyman v. Boston &c. R. Co.*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; *Lehigh Valley R. Co. v. Hall*, 61 Pa.

St. 361; *Cleveland &c. R. Co. v. Rowan*, 66 Pa. St. 393; *Weiss v. Pennsylvania R. Co.*, 79 Pa. St. 387; *Baltimore &c. R. Co. v. McKenzie*, 81 Va. 71, 24 Am. & Eng. R. Cas. 395. See ante, § 1658; *Chicago &c. R. Co. v. Ginther*, 48 Ind. App. 12, 90 N. E. 911; also *Korab v. Chicago &c. R. Co.*, 149 Iowa 711, 128 N. W. 529, 41 L. R. A. (N. S.) 32; *Wilson v. Illinois Cent. R. Co.*, 150 Iowa 33, 129 N. W. 340, 34 L. R. A. (N. S.) 687; *Cameron v. Great Northern R. Co.*, 8 N. Dak. 124, 77 N. W. 1016; *Hanna v. Philadelphia &c. R. Co.*, 213 Pa. St. 157, 62 Atl. 643, 4 L. R. A. (N. S.) 344, and note; *Baltimore &c. R. Co. v. Landrigan*, 191 U. S. 462, 24 Sup. Ct. 137, 48 L. ed. 262.

²⁰ *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157, 18 Am. Rep. 407; *Chicago &c. R. Co. v. Hinds*, 56 Kans. 758, 44 Pac. 993; *Baltimore &c. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. 137; *Kansas City &c. R. Co. v. Gallagher*, 68 Kans. 424, 75 Pac. 469, 64 L. R. A. 344; *Weller v. Chicago &c. R. Co.*, 120 Mo. 653, 23 S. W. 1061, 25 S. W. 532, 164 Mo. 180, 64 S. W. 141, 86 Am. St. 592. See also *Whitford v.*

cised due care is overcome.²¹ In most of those jurisdictions in which it is held that the burden is upon the plaintiff to allege and prove freedom from contributory negligence, no presumption is indulged.²² Thus, where one is killed at a crossing, or the like, and there is no evidence as to what he was doing at the time, so as to show freedom from contributory negligence, it has been held that his administrator can not recover, because there is a total failure of proof of an essential element in his case, and that it should be taken from the jury.²³ As we have

Southbridge, 119 Mass. 564; McBride v. Northern Pac. R. Co., 19 Ore. 64, 23 Pac. 814. But compare Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014. And see Cleveland &c. R. Co. v. Lynn, 177 Ind. 311, 98 N. E. 67.

²¹ Sullivan v. New York &c. R. Co., 175 Pa. St. 361, 34 Atl. 798; Seamans v. Delaware &c. R. Co., 174 Pa. St. 421, 34 Atl. 568; Wilcox v. Rome &c. R. Co., 39 N. Y. 358, 100 Am. Dec. 440. See also Philadelphia &c. R. Co. v. Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; Wabash R. Co. v. De Tar, 141 Fed. 932, 4 L. R. A. (N. S.) 352; Chicago &c. R. Co. v. Batsel, 100 Ark. 526, 140 S. W. 726; Dunlavy v. Chicago &c. R. Co., 66 Iowa 435, 23 N. W. 911; Crawford v. Chicago &c. R. Co., 109 Iowa 433, 80 N. W. 519; Golivau v. Burlington &c. R. Co., 125 Iowa 652, 101 N. W. 465; Carlson v. Chicago &c. R. Co., 96 Minn. 504, 105 N. W. 555, 4 L. R. A. (N. S.) 349, 113 Am. St. 655.

²² Toledo &c. R. Co. v. Brannagan, 75 Ind. 490; Indiana &c. R. Co. v. Greene, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736; Chase v. Maine Cent. R. Co., 77 Maine 62, 52

Am. Rep. 744, 19 Am. & Eng. R. Cas. 356; Hinckley v. Cape Cod R. Co., 120 Mass. 257; Warner v. New York &c. R. Co., 44 N. Y. 465; Cordell v. New York &c. R. Co., 75 N. Y. 330; Wiwirowski v. Lake Shore &c. R. Co., 124 N. Y. 420, 26 N. E. 1023; Rodrian v. New York &c. R. Co., 125 N. Y. 526, 26 N. E. 741; 6 Thomp. Neg. (2d ed.) § 7140. That the presumption is against the plaintiff, see Hathaway v. Toledo &c. R. Co., 46 Ind. 25; Engrer v. Ohio &c. R. Co., 142 Ind. 618, 42 N. E. 217, 219; Cincinnati &c. R. Co. v. Duncan, 143 Ind. 524, 42 N. E. 37; Cincinnati &c. R. Co. v. Butler, 103 Ind. 31, 2 N. E. 138. See ante, § 1658. That there is no presumption even where burden is on defendant, see Indiana Un. Trac. Co. v. Myers, 47 Ind. App. 646, 93 N. E. 888, and cases there cited; also Harmon v. Foran, 48 Ind. App. 262, 94 N. E. 1050.

²³ Toledo &c. R. Co. v. Brannagan, 75 Ind. 490; Kauffman v. Cleveland &c. R. Co., 144 Ind. 456, 43 N. E. 446; Corcoran v. Boston &c. R. Co., 133 Mass. 507, 12 Am. & Eng. R. Cas. 226; Riley v. Connecticut River R. Co., 135 Mass. 292; Tyndale v. Old Colony R. Co.,

elsewhere said,²⁴ we think this is the better rule. An examination of the reported cases will show that in a large majority of them, especially in crossing cases, the plaintiff was guilty of contributory negligence, and it is a well-known fact that most men fail to exercise reasonable care in some matter and take risks that they could easily avoid by the exercise of such care, and which they know that they are negligent in taking, nearly every day. The instinct of self-preservation exerts little, if any, influence until the danger is perceived to be imminent. Thousands cross railroad tracks in safety where one is injured. It is almost impossible, under ordinary circumstances, for a traveler to be injured at a crossing if he exercises due care, and this is true in a majority of cases wherever he has means of knowing the danger and full control over his own actions. These considerations, and the fact that an individual can control his own actions so much more readily than a locomotive can be controlled, lead us to the conclusion that, on principle, the presumption ought to be against rather than in favor of one who is injured at a crossing, or the like, and that, in any event, no presumption of freedom from contributory negligence based solely on the instinct of self-preservation should be indulged in his favor. To indulge such a presumption upon that basis seems to us very much like basing a presumption upon a presumption, and a very weak one at that.²⁵ But as already shown, the weight of authority is probably to the contrary, at least where there are no eye-witnesses.²⁶

156 Mass. 503, 31 N. E. 655; Reynolds v. New York Central &c. R. Co., 58 N. Y. 248; Bond v. Smith, 113 N. Y. 378, 21 N. E. 128; Wiwirovski v. Lake Shore &c. R. Co., 124 N. Y. 420, 26 N. E. 1023. Contra, Longenecker v. Pennsylvania R. Co., 105 Pa. St. 328; Phillips v. Milwaukee &c. R. Co., 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521; and see Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358; Hendrick-

son v. Great Northern R. Co., 49 Minn. 245, 51 N. W. 1044, 16 L. R. A. 261, and note; 32 Am. St. 540; and see Johnson v. Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375, and note, and *infra* note 32, 86.

²⁴ Ante, §§ 1658, 1660.

²⁵ 1 Thomp. Neg. (2d ed.) § 296, et seq.

²⁶ See also post, § 2827, and notes in 11 L. R. A. (N. S.) 844, and 4 L. R. A. (N. S.) 344.

§ 2713. (1702.) **Withdrawing the case from the jury.**—It is frequently of the utmost importance to railroad companies which are defendants in damage cases to get them taken away from the jury, if possible, and it is, perhaps, equally important for the plaintiff in most of such cases to have them left to the jury, although there may be exceptionally strong cases, of course, which the plaintiff may desire to have taken from the jury. Where the facts are undisputed and but one reasonable inference can legitimately be drawn from them, the question becomes one of law and the case may be taken away from the jury.²⁷ So, it is held in most jurisdictions that if the evidence is so conclusive that the court would, under the law, be compelled to set aside a verdict returned in opposition to it, the case should be withdrawn from the jury upon proper application.²⁸ A mere scintilla of evi-

²⁷ *Goodlett v. Louisville &c. R. Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. ed. 1230; *Hathaway v. East Tenn. &c. R. Co.*, 29 Fed. 489; *People v. People's Ins. Exch.*, 126 Ill. 466, 18 N. E. 774, 2 L. R. A. 340, and note; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261; *Oleson v. Lake Shore &c. R. Co.*, 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149 (citing 2 Elliott's Gen. Pr. § 889); *McMurtry v. Louisville &c. R. Co.*, 67 Miss. 601, 7 So. 401, 4 Am. Neg. Cas. 308; *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; *Johnson's Admr. v. Chesapeake &c. R. Co.*, 91 Va. 171, 21 S. E. 238; *Toomey v. London &c. R. Co.*, 3 C. B. N. S. 146. See also *Pittsburgh &c. R. Co. v. Seivers*, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485; *Kern v. Kansas City &c. R. Co.*, 125 Ga. 496, 54 S. E. 355;

Hewes v. Chicago &c. R. Co., 119 Ill. App. 393, affirmed in 217 Ill. 500, 75 N. E. 515; *Chicago &c. R. Co. v. Schwanfeldt*, 75 Nebr. 80, 105 N. W. 1101; *Kelly &c. Co. v. Central R. Co.*, 70 N. J. L. 190, 56 Atl. 145; *O'Brien v. Chicago &c. R. Co.*, 102 Wis. 628, 78 N. W. 1084.

²⁸ *Pleasants v. Fant*, 22 Wall. (U. S.) 116, 22 L. ed. 780; *Randall v. Baltimore &c. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. ed. 1003; *Schofield v. Chicago &c. R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. ed. 224; *Elliott v. Chicago &c. R. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. ed. 1068; *Bagley v. Cleveland &c. Co.*, 21 Fed. 159; *Horn v. Baltimore &c. R. Co.*, 54 Fed. 301; *Glasscock v. Cent. Pac. R. Co.*, 73 Cal. 137, 14 Pac. 518; *Oleson v. Lake Shore &c. R. Co.*, 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149, citing 2 Elliott's Gen. Pr. § 889; *Beckman v. Consolidated Coal Co.*, 90 Iowa 252, 57, N. W. 889; *Allyn v. Boston &c. R. Co.*, 105 Mass. 77; *Mynning v.*

dence is not sufficient to require the case to be submitted to the jury.²⁹ and if the plaintiff fails to prove the cause of action stated in his complaint,³⁰ or a single vital and essential element there-

Detroit &c. R. Co., 64 Mich. 93, 31 N. W. 147, 8 Am. St. 804; Grube v. Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736, 4 L. R. A. 776, and note, 14 Am. St. 645; O'Malley v. Missouri Pac. R. Co., 113 Mo. 319, 20 S. W. 1079; Chicago &c. R. Co. v. Landauer, 36 Nebr. 642, 54 N. W. 976; Aycrigg's Exrs. v. New York &c. R. Co., 30 N. J. L. 460; Lutz v. Atlantic &c. R. Co., 6 N. Mex. 496, 30 Pac. 912, 16 L. R. A. 819; Linkauf v. Lombard, 137 N. Y. 417, 33 N. E. 472, 20 L. R. A. 48, 33 Am. St. 743, 749; Hemmens v. Nelson, 138 N. Y. 517, 529, 34 N. E. 342, 20 L. R. A. 440; Fouhy v. Pennsylvania R. Co. (Pa.), 2 Atl. 536, 1 Sad. 377; McEwen v. Hoopes, 175 Pa. 237, 34 Atl. 623; Overby v. Chesapeake &c. R. Co., 37 W. Va. 524, 16 S. E. 813. "It would be an idle proceeding to submit the evidence to the jury when they could justly find in only one way." North Penn. R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287; ante, § 1676. But the statement of the rule in this form is not, perhaps, as accurate as the one first given in the text and has been criticised. McDonald v. Metropolitan St. Ry. Co., 167 N. Y. 66, 60 N. E. 282. See also Haughton v. Aetna Life Ins. Co., 165 Ind. 32, 40-42, 73 N. E. 592, 74 N. E. 613.

²⁹ Hathaway v. East Tenn. &c. Co., 29 Fed. 489; Cincinnati &c. R. Co. v. Wood, 82 Ind. 593; Meyer

v. Manhattan &c. Co., 144 Ind. 439, 43 N. E. 448 (citing 2 Elliott's Gen. Pr. §§ 854, 887, 889); Sunnyside &c. Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; Connor v. Giles, 76 Maine 132; Wilds v. Hudson River R. Co., 24 N. Y. 430; Corning v. Troy &c., 44 N. Y. 577; Culhane v. New York Cent. &c. R. Co., 60 N. Y. 133; Linkauf v. Lombard, 137 N. Y. 417, 33 N. E. 743, 748, 749, 20 L. R. A. 48, 33 Am. St. 743; Morris v. Lake Shore &c. R. Co., 148 N. Y. 182, 42 N. E. 579; Hauser v. Central R. Co., 147 Pa. St. 440, 23 Atl. 766. The cases cited in the last preceding note also affirm this doctrine. See also Lake Erie &c. R. Co. v. Stick, 143 Ind. 449, 41 N. E. 365; Metropolitan Co. v. Moore, 121 U. S. 558, 5 Sup. Ct. 1334, 30 L. ed. 1022; Cleveland &c. R. Co. v. Wynant, 134 Ind. 681, 34 N. E. 569; Babcock v. Fitchburg &c. R. Co., 140 N. Y. 308, 35 N. E. 596; Hudson v. Rome &c. R. Co., 145 N. Y. 408, 40 N. E. 8; Gunn v. Union R. Co., 27 R. I. 320, 62 Atl. 118.

³⁰ Cotter v. Alabama &c. R. Co., 61 Fed. 747; Louisville &c. R. Co. v. Dancy, 97 Ala. 338, 11 So. 796; Palmer v. Chicago &c. R. Co., 112 Ind. 250, 14 N. E. 70; Memphis &c. R. Co. v. Chastine, 54 Miss. 503; Waldhier v. Hannibal &c. R. Co., 71 Mo. 514; Marcum v. Smith, 26 Mo. App. 460; 2 Elliott's Gen. Pr. §§ 854, 889.

of,⁸¹ the case should be taken from the jury upon the application of the defendant. But if the facts are disputed and the evidence conflicting, or if more than one reasonable inference can legitimately be drawn therefrom, the case must usually be left to the jury.⁸² As shown in the preceding section, however, pre-

⁸¹ 2 Elliott's Gen. Pr. § 889; *Cordell v. New York &c. R. Co.*, 75 N. Y. 330; *Meyer v. Manhattan &c. Co.*, 144 Ind. 439, 43 N. E. 448; *Harrigan v. Chicago &c. R. Co.*, 53 Ill. App. 344. See also *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Toledo &c. R. Co. v. Brannegan*, 75 Ind. 490; *Rush v. Coal &c. Mining Co.*, 131 Ind. 135, 30 N. E. 904; *Cleveland &c. R. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569; *Terre Haute &c. R. Co. v. McCorkle*, 140 Ind. 613, 623, 40 N. E. 62; *City of Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029, 1031; *Huntingburg v. First*, 15 Ind. App. 552, 43 N. E. 17, 19; *Stager v. Bridge Ave. &c. R. Co.*, 119 Pa. St. 70, 12 Atl. 821; *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48.

⁸² *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657, 21 L. ed. 745; *Richmond &c. R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. ed. 642; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. ed. 1107; *Kansas City &c. R. Co. v. Kirksey*, 60 Fed. 999, 1002; *Beatty v. Mutual &c. Assn.*, 75 Fed. 65, 68, and authorities there cited; *Pullman &c. Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Neubacher v. Indianapolis &c. R. Co.*, 134 Ind. 25, 33 N. E. 25; *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308; *Indianapolis St. R. Co. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E.

721; *Harter v. Atchison &c. R. Co.*, 55 Kans. 250, 38 Pac. 778; *Chesapeake &c. R. Co. v. Ford*, 158 Ky. 800, 166 S. W. 605; *Evans v. Lake Shore &c. R. Co.*, 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223; *Illinois Cent. R. Co. v. Turner*, 71 Miss. 402, 14 So. 450; *Johnson v. Missouri Pac. R. Co.*, 18 Nebr. 690, 26 N. W. 347; *Central R. Co. v. Moore*, 24 N. J. L. 824; *Anderson v. North Pac. R. Co.*, 21 Ore. 281, 28 Pac. 5; *Smith v. Easton &c. Co.*, 167 Pa. St. 209, 31 Atl. 557; *Avinger v. South Car. R. Co.*, 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716; *Hangen v. Chicago &c. R. Co.*, 3 S. Dak. 394, 53 N. W. 769; *Bates v. Fremont &c. R. Co.*, 4 S. Dak. 394, 57 N. W. 72, 61 Am. & Eng. R. Cas. 392; *O'Brien v. Chicago &c. R. Co.*, 92 Wis. 340, 66 N. W. 363. See also *St. Louis &c. R. Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070; *St. Louis &c. R. Co. v. Leftwich*, 117 Fed. 127; *Moulton v. Louisville &c. R. Co.*, 128 Ala. 537, 29 So. 602; *Central R. Co. v. Thompson*, 76 Ga. 770; *Atchison &c. R. Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036; *Hartung v. North Chicago St. R. Co.*, 102 Ill. App. 470; *Barnhart v. Chicago &c. R. Co.*, 97 Iowa 654, 66 N. W. 902; *Arenschield v. Chicago &c. R. Co.*, 128 Iowa 677, 105 N. W. 200; *Gratiot v. Missouri &c. R. Co.*, 116 Mo. 450, 21 S. W. 1094,

sumptions may make a prima facie case, and when they do, unless there is evidence to the contrary, they will justify the withdrawal of the case from the jury.⁸³ Thus, where the plaintiff has the burden of proving that his own negligence did not proximately contribute to his injury and the presumption is against him, the case should be taken from the jury if he fails to introduce evidence to overcome the presumption.⁸⁴ A case may be withdrawn from the jury by demurrer to the evidence,⁸⁵ compulsory nonsuit,⁸⁶ or a peremptory instruction directing a

16 L. R. A. 189; *Campbell v. St. Louis &c. R. Co.*, 175 Mo. 161, 75 S. W. 86; *Holmes v. Missouri &c. R. Co.*, 190 Mo. 98, 88 S. W. 623; *Guthrie v. Missouri Pac. R. Co.*, 51 Nebr. 746, 71 N. W. 722; *Gulf &c. R. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129; *Crawford v. Houston &c. R. Co.*, 89 Tex. 89, 33 S. W. 534; *Saunders v. Southern Pac. Co.*, 13 Utah 275, 44 Pac. 932.

⁸³ *Talkington v. Parish*, 89 Ind. 202; *De Wald v. Kansas City &c. Co.*, 44 Kans. 586, 24 Pac. 1101; *Ohio &c. R. Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702.

⁸⁴ And, on the other hand, it is held in a number of cases that the presumption in favor of self preservation may make a prima facie case or justify the inference of freedom from contributory negligence on the part of the deceased in case of death and prevent the case being taken from the jury on that ground. *Adams v. Bunker Hill &c. Co.*, 12 Idaho 637, 89 Pac. 624, 11 L. R. A. (N. S.) 844, and note citing many other cases to same effect and some to the contrary.

⁸⁵ As to the rules and practice on demurrer to the evidence, see 2 *Elliott's Gen. Pr.* §§ 855-871; *Suy-*

dam v. Williamson, 20 How. (U. S.) 427; *Atlantic Coast Line R. Co. v. Dexter*, 50 Fla. 180, 39 So. 634, 111 Am. St. 116; *Joliet &c. R. Co. v. Veile*, 140 Ill. 59, 29 N. E. 706; *Lake Shore &c. R. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. R. 319; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136, and note; *Chicago &c. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. 696; *Gilpin v. Missouri &c. R. Co.*, 197 Mo. 319, 94 S. W. 869; *Hopkins v. Nashville &c. R. Co.*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354; *Summers v. Louisville &c. R.*, 96 Tenn. 459, 35 S. W. 210; *Illinois Cent. R. Co. v. Brown*, 96 Tenn. 559, 35 S. W. 560 (both cases citing 2 *Elliott's Gen. Pr.* §§ 855, 856); *Pendleton v. Richmond &c. R. Co.*, 104 Va. 813, 52 S. E. 574; *Kelley v. Ohio River R. Co.*, 58 W. Va. 216, 52 S. E. 520.

⁸⁶ As to the practice on motion for nonsuit, see 2 *Elliott's Gen. Pr.* §§ 876-882; *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; *Vinson v. Los Angeles &c. R. Co.*, 147 Cal. 479, 82 Pac. 53; *Rochat v. North Hudson &c. R. Co.*, 49 N. J. L. 445, 9 Atl. 688, 10 Atl. 710; *McNally v. Phoe-*

verdict.³⁷ The practice of demurring to the evidence does not seem to obtain in all jurisdictions, nor does that of moving for a nonsuit, but it is believed that a peremptory instruction may be requested and a verdict directed, in a proper case, in all jurisdictions. This is the most common mode of withdrawing a case from the jury, and it is error for the court to refuse to direct a verdict upon proper application when it is its duty to do so, under the rules already stated.³⁸ The motion may be made by the defendant either at the close of the plaintiff's evidence or after the evidence on both sides has been heard.³⁹ But if the defendant makes his motion at the close of the plaintiff's case, and subsequently introduces evidence in his own behalf, he will, according to the weight of authority and the better reason, be deemed to have waived his motion, and any exception he may have taken to the ruling of the

nix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Quinlan v. Welch, 141 N. Y. 158, 36 N. E. 12; note to French v. Smith, 24 Am. Dec. 622; Kearns v. Southern R. Co., 139 N. Car. 470, 52 S. E. 131; Biles v. Seaboard & C. R. Co., 139 N. Car. 528, 52 S. E. 129. As shown in the text-book cited this practice does not prevail in all jurisdictions, and even where it does it differs largely in detail and sometimes in effect.

³⁷ "This practice," says Mr. Justice Swayne, "is a wise one. It saves time and costs. It gives the certainty of applied science to the results of judicial investigations. It draws clearly the line which separates the province of the judge and jury, and fixes where it belongs the responsibility which should be assumed by the courts." *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 637, 19 L. ed. 1008. See

also *McGuire v. Blount*, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. ed. 125.

³⁸ *Baltimore & C. R. Co. v. Stricker*, 51 Md. 47, 34 Am. R. 291; *Mynning v. Detroit & C. R. Co.*, 64 Mich. 93, 31 N. W. 147, 8 Am. St. 804; *Carroll v. Interstate & C. Co.*, 107 Mo. 653, 17 S. W. 889; *Atchison & C. R. Co. v. Loree*, 4 Nebr. 446; *Wilson v. Groelle*, 83 Wis. 530, 53 N. W. 900, and cases cited in the first two notes to this section; 2 Elliott's Gen. Pr. § 887.

³⁹ 2 Elliott's Gen. Pr. § 888, and numerous authorities there cited; note to *People v. People's Ins. Exch.*, 2 L. R. A. 340; *Wilsey v. Louisville & C. R. Co.*, 83 Ky. 511; *Bartelott v. International Bank*, 119 Ill. 259, 9 N. E. 898. In a proper case a verdict may be directed in favor of one of two or more defendants. *Capital Trac. Co. v. Vawter*, 37 App. (D. C.) 29, Ann. Cas. 1912D, 1059, and note.

court thereon, unless he thereafter renews it.⁴⁰ The plaintiff can not, of course, successfully move to direct a verdict until after the defendant has introduced his evidence.⁴¹

§ 2714 (1703). Physical facts.—It is an old saying that “actions speak louder than words,” and so there are sometimes physical facts present in a case sufficient in strength to overcome the evidence of witnesses. Well-established laws of nature and similar well-known scientific and physical facts of which the courts will take judicial knowledge may not only justify a trial court in directing a verdict or in setting aside a verdict and granting a new trial, but may also be sufficient to cause the appellate court to reverse the action of the trial court where it fails to give effect to such facts by directing a verdict or granting a new trial. Notwithstanding the general rule, which prevails in most jurisdictions, that the court, on appeal, will

⁴⁰ *Northern &c. R. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. ed. 296; *Columbia &c. R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. ed. 405; *Northern Pac. R. Co. v. Charless*, 51 Fed. 562; *Joliet &c. R. Co. v. Shields*, 134 Ill. 209, 25 N. E. 569; *Chicago &c. R. Co. v. Van Vleck*, 143 Ill. 480, 32 N. E. 262; *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215. But see *Weber v. Kansas City &c. R. Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. 541; *Rochat v. North Hudson &c. R. Co.*, 49 N. J. L. 445, 9 Atl. 688; *Wadlington v. Newport News &c. R. Co.*, 14 Ky. L. 559, 20 S. W. 783. And after both parties have moved for the direction of a verdict and the court has announced its decision, a party cannot demand a submission of the cause to the jury. *Insurance Co. v. Wisconsin Cent. R. Co.*, 134 Fed. 794. But it is held that where each

party asked a peremptory instruction at the close of all the evidence and at the same time asks and tenders special charges in the event of refusal of the peremptory instruction, this does not affirm that there are no disputed questions of fact for the jury. *Charlotte Nat. Bank v. Southern Ry. Co.*, 179 Fed. 769, and see *Empire State Cattle Co. v. Atchison &c. Ry. Co.*, 210 U. S. 1, 28 Sup. Ct. 607, 609, 52 L. ed. 931.

⁴¹ *Kingsford v. Hood*, 105 Mass. 495. See as to where it may be granted to plaintiff or refused as to defendant. *Indianapolis St. R. Co. v. Coyner*, 39 Ind. App. 510, 80 N. E. 168; *Cleveland &c. R. Co. v. Henry* (Ind. App.), 80 N. E. 636; *Wamsley v. Cleveland &c. R. Co.*, 41 Ind. App. 147, 155, 82 N. E. 490, 83 N. E. 640. As to right of court to declare defendant guilty of negligence, see note in 47 L. R. A. (N. S.) 1199, 1201.

not weigh the evidence, neither the appellate court nor the trial court should stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, where the physical facts are such as to demonstrate that such evidence is untrue and the verdict unjust and unsupported in law and in fact.^{41a} In a recent case the plaintiff testified that he stopped and looked and listened when about six feet from a railroad crossing and saw no engine, and that as soon as he stepped inside the first rail of the track an engine noiselessly approached and struck him; that his sense of hearing was perfect, and that there was nothing to obstruct sound or prevent him from hearing. There was also undisputed evidence that the engine and tender weighed eighty tons, had fourteen wheels and was running at the rate of at least twenty-five miles an hour. The supreme court held that it was a physical impossibility that the engine could move at that rate without making any noise, and that the plaintiff must have heard it if he had looked and listened, as he testified that he did and the judgment of the trial court on the verdict for the plaintiff was reversed.⁴² In another

^{41a} Text is quoted in *Louisville &c. R. Co. v. Chambers*, 165 Ky. 703, 178 S. W. 1041, Ann. Cas. 1917B, 471, 472, and many other cases on the general subject are reviewed in note to the case as last reported.

⁴² *Lake Erie &c. R. Co. v. Stick*, 143 Ind. 449, 41 N. E. 365. The court said that, excluding all evidence except that of the plaintiff as to the exercise of due care on his part, and "considering alone his testimony on that point, and the matters of general notoriety and every day observation, and our knowledge of the laws of nature, we must and do know that the engine going at the rate of speed of from twenty-five to thirty-five miles an hour, the appellee must have heard and did hear it." The court also laid down

the rules that should govern trial judges in such cases and severely rebuked those who have not the courage to promptly set aside unjust verdicts. See also *Miller v. Terre Haute &c. R. Co.*, 144 Ind. 323, 44 N. E. 257; *Mann v. Belt R. &c. Co.*, 128 Ind. 138, 144, 26 N. E. 819; *Oleson v. Lake Shore &c. R. Co.*, 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; *Tillson v. Maine Cent. R. Co.*, 102 Maine 463, 67 Atl. 407; *Myers v. Baltimore &c. R. Co.*, 150 Pa. St. 386, 24 Atl. 747; *Chybowski v. Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357n; ante, § 1676. But compare *Dupuis v. Saginaw Val. Trac. Co.*, 146 Mich. 151, 109 N. W. 413; *Fleming v. Northern Tissue Paper Co.*, 135 Wis. 157, 114 N. W. 841, 15 L. R. A.

recent case the appellate court said that while it had no power to weigh the evidence, yet "where the evidence which appears to be in conflict is nothing more than a mere scintilla, or where it is met by well-known and scientific facts, about which there is no dispute, this court will still exercise jurisdiction to review and reverse."⁴³ So, where it was necessary to assume, in order to support the verdict, that the plaintiff was fully nine feet high the appellate court reversed the judgment and granted a new trial.⁴⁴ In another case a verdict was set aside because the court knew that if the plaintiff had been exercising ordinary care and occupying the position he claimed he was occupying, he could not have been injured in the manner in which the undisputed evidence showed that he was injured.⁴⁵ And in many other cases verdicts have been set aside because they could only be supported by assuming or believing something contrary to human experience or the laws of nature.⁴⁶ There

(N. S.) 701n. Yet, notwithstanding the rule in force in many jurisdictions, that a party is presumed to have seen or heard what he could have seen or heard if he had looked and listened or to have failed to properly look and listen, it is not every case in which the court can say as a matter of law that the plaintiff was guilty of contributory negligence merely because it was possible to have seen or heard an approaching train merely because someone else did so, especially where there are obstructions. *New York &c. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804; *Massoth v. Delaware &c. Co.*, 64 N. Y. 524; *St. Louis &c. R. Co. v. Wyatt*, 79 Ark. 241, 96 S. W. 376; *St. Louis &c. R. Co. v. Evans*, 80 Ark. 19, 96 S. W. 616. See also *Birmingham &c. R. Co. v. Lintner*, 141 Ala. 420, 38 So. 363;

Greenwaldt v. Lake Shore &c. R. Co., 165 Ind. 219, 73 N. E. 910, 74 N. E. 1081.

⁴³ *Hudson v. Rome &c. R. Co.*, 145 N. Y. 408, 40 N. E. 8. In this case it was held that a crown sheet could not have been stretched from ten to fourteen inches without a crack or flaw, while it was cool and under water.

⁴⁴ *Hunter v. New York &c. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246. See also *Chesapeake &c. R. Co. v. Anderson*, 93 Va. 650, 25 S. E. 947.

⁴⁵ *Brennan v. Brooklyn Heights &c. R. Co.*, 12 Misc. 570, 33 N. Y. S. 852.

⁴⁶ *Southern R. Co. v. Smith*, 86 Fed. 292, 296; *Rollins v. Chicago &c. R. Co.*, 139 Fed. 639; *Artz v. Railroad Co.*, 34 Iowa 153; *Northern Cent. R. Co. v. McMahon*, 97 Md. 483, 55 Atl. 627, 628; *Medcalf*

are many facts of which courts *ex officio* take notice, and neither averment nor proof will prevail against matters which are judicially known to the court.⁴⁷ The courts will not allow the verdicts of juries to stand when they rest on evidence which the courts judicially know to be incredible.⁴⁸ It is of the utmost importance, therefore, in many railroad cases, for the defendant to show the physical facts, and it is equally important to the plaintiff to show, by some evidence at least, that the physical facts are not as claimed by the defendant or are not such as to conclude the plaintiff in the particular case.

§ 2715. Physical facts—Suction of trains.—In several cases the question has arisen as to whether alleged suction of the plaintiff, or his or her clothing, into danger, caused by a passing train, was a tenable theory, or contrary to physical facts and scientific laws, or so improbable or unusual that it is not negligence to fail to anticipate it, and some difference of opinion on the subject seems to exist. In a Missouri case in which there was considerable difference of opinion among the members of the court, the majority of the court held that testimony of

v. St. Paul City R. Co., 82 Minn. 18, 84 N. W. 633, 634; *Schmidt v. Great Northern R. Co.*, 83 Minn. 105, 85 N. W. 935; *Payne v. Chicago &c. R. Co.*, 136 Mo. 562, 38 S. W. 308, 314 (citing text); *Cauley v. Pittsburgh &c. R. Co.*, 98 Pa. St. 498; *San Antonio &c. R. Co. v. Choate* (Tex. Civ. App.), 35 S. W. 180. See *Johns v. Northwestern &c. Asso.*, 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587; *Marshall v. Green Bay &c. R. Co.*, 125 Wis. 96, 103 N. W. 249; 1 Elliott on Ev. §§ 35, 39.

⁴⁷ *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. ed. 691; *Frese v. State*, 23 Fla. 267, 2 So. 1; *Jameson v. Indiana &c. Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A.

652; *Garth v. Caldwell*, 72 Mo. 622; *Nagel v. Missouri &c. R. Co.*, 75 Mo. 653, 42 Am. R. 418; *State v. Hayes*, 78 Mo. 307; *Lanigan v. New York &c. R. Co.*, 71 N. Y. 29; *Udderzook's Case*, 76 Pa. St. 340; 1 Elliott Ev. §§ 39, 40; ante, § 2698. But compare *Sheppard v. Wichita Ice &c. Storage Co.*, 82 Kans. 509, 108 Pac. 819, 28 L. R. A. (N. S.) 648n; *Smith v. Chicago &c. R. Co.*, 82 Kans. 136, 107 Pac. 635, 28 L. R. A. (N. S.) 1255n. So, it has been held that expert evidence will not be allowed to overcome physical facts. *Louisville &c. R. Co. v. Jolly*, 28 Ky. L. 989, 90 S. W. 977.

⁴⁸ *Missouri &c. Ry. Co. v. Collier*, 157 Fed. 347, and cases there cited and in preceding notes herein.

alleged experts without special knowledge or experience that a boy standing within two feet of a train passing at the rate of twenty or twenty-five miles an hour would be likely to be thrown down and sucked under the train was not required to be believed by either court or jury, and that even if it were possible it was a result so doubtful and unusual that the company was not bound to anticipate it and the company was held not liable for injury to a boy standing at a street crossing waiting for the train to pass, when the only liability claimed arose from the failure to anticipate such result and the running of the train at a speed of twenty miles an hour.⁴⁹ This case is followed in a recent decision in Kentucky.⁵⁰ But in several recent cases in New Jersey, where there was evidence that a passenger while on a station platform was drawn under or thrown against a train running past the station at the rate of about a mile a minute, without warning or notice of any kind, the company was held liable.⁵¹

§ 2716. Mode of submitting cause to jury—Special verdict—Federal Courts.—In some jurisdictions provision is made for a special verdict in which all the facts are required to be found, and in most of the same jurisdictions and others as well special interrogations may be asked and findings of fact required to be returned in answer thereto in addition to the general verdict. Different rules as to the construction and effect of these two kinds of verdicts prevail in many jurisdictions, and the practice is not always the same. It is not proposed to discuss them here, but merely to call attention to the rule in the federal courts as to whether they are governed by the local law and practice in such matters. The rule is that the federal courts

⁴⁹ *Graney v. St. Louis &c. R. Co.*, 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153n.

⁵⁰ *Louisville &c. R. Co. v. Lawson*, 161 Ky. 39, 170 S. W. 198, L. R. A. 1917B, 1161n.

⁵¹ *Munroe v. Pennsylvania R. Co.*, 85 N. J. L. 688, 90 Atl. 254, Ann. Cas. 1916A, 140n; *Crotshin v.*

Pennsylvania R. Co., 87 N. J. L. 11, 93 Atl. 110; *Schultz v. New York &c. R. Co.*, 87 N. J. L. 659, 94 Atl. 579. See also *Richardson v. Detroit &c. R. Co.*, 176 Mich. 413, 142 N. W. 832. But see *Kozlowski v. Rochester &c. R. Co.*, 142 App. Div. 245, 126 N. Y. S. 609.

are not governed by the local law in regard to the mode of submitting causes to the jury, nor in regard to the rules for interpreting special verdicts.⁵²

§ 2717 (1704). **Misconduct of counsel.**—In actions against railroad companies for damages, more than in almost any other class of cases, perhaps, counsel are prone to make improper remarks in their arguments or address to the jury. The attorney for the company does not often indulge in anything of the kind, because, as a rule, good policy, if nothing else, prevents him from being too aggressive; but there are numerous cases in which the subject of misconduct of counsel for the plaintiff, in argument, has been considered on appeal. Proper objection must, however, be made at the time, and an exception duly taken and saved to the ruling of the court or refusal of the court to stop counsel and caution the jury not to consider the improper remarks.⁵³ If the court does so, it seems that the improper remarks can not be made ground for reversal, ordinarily at least, unless a motion is made to set aside the jury or the like and the question duly saved.⁵⁴ Among the matters held suffi-

⁵² *Spokane &c. R. Co. v. Campbell*, 217 Fed. 518; *Toledo &c. R. Co. v. Reardon*, 159 Fed. 366; *Indianapolis &c. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898.

⁵³ *Louisville &c. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130; *St. Louis &c. R. Co. v. Myrtle*, 51 Ind. 566; *Buscher v. Scully*, 107 Ind. 246, 8 N. E. 37; *Coble v. Eltzroth*, 125 Ind. 429, 25 N. E. 544; *Vannetta v. Duffy*, 4 Ind. App. 168, 30 N. E. 807; *St. Louis &c. R. Co. v. Irwin*, 37 Kans. 701, 16 Pac. 146, 1 Am. St. 266; *Skidekum v. Wabash &c. R. Co.*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. 549; *Byrd v. Hudson*, 113 N. Car. 203, 18 S. E. 209; *Gulf &c. R. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129. See also note to *People*

v. Fielding, 158 N. Y. 542, 53 N. E. 497, in 46 L. R. A. 641, where numerous decisions in criminal cases are cited. But see *Houston &c. R. Co. v. Pelun*, 36 Tex. Civ. App. 553, 82 S. W. 526; *Hall v. Wolff*, 61 Iowa 559, 16 N. W. 710. The court could doubtless stop counsel of its own motion from continuing to make improper remarks, but if the court does not do so, and no objection or complaint is made by opposite counsel below, we think, as stated in the text, that he cannot complain on appeal so as to obtain a reversal on that ground.

⁵⁴ See *Little Rock &c. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *Denver &c. Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811; *Cleveland*

cient to constitute cause for a new trial or to justify a reversal, when the question is duly saved, are comments on facts not in evidence,⁵⁵ and facts not pertinent to the issue and calculated to prejudice and injure the opposite party.⁵⁶ But improper remarks in reply to like remarks first made by opposing counsel are not usually ground for reversal.⁵⁷ And it must appear that

&c. R. Co. v. Simpson, 182 Ind. 693, 104 N. E. 301; Mabin v. Webster, 8 Ind. App. 547, 35 N. E. 194; German Fire Ins. Co. v. Zonker, 57 Ind. App. 696, 108 N. E. 160; Henry v. Sioux City &c. R. Co., 70 Iowa 233, 30 N. W. 630; 2 Elliott's Gen. Pr. § 695. See also Southern Ind. R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589; Boyd v. Portland &c. Co., 37 Ore. 567, 62 Pac. 378, 52 L. R. A. 509; Tucker v. Henniker, 41 N. H. 317; Pence v. Chicago &c. R. Co., 79 Iowa 389, 44 N. W. 686; Sears v. Seattle &c. R. Co., 6 Wash. 227, 33 Pac. 389, 1081. Held cured and no error to refuse to set aside submission in Buffkin v. State, 182 Ind. 204, 106 N. E. 362. But compare Whipple v. Mich. Cent. R. Co., 143 Mich. 41, 106 N. W. 690; Pullman Co. v. Pennock, 118 Tenn. 565, 102 S. W. 73; Galveston &c. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127.

⁵⁵ Bullard v. Boston &c. R. Co., 64 N. H. 27, 5 Atl. 838, 10 Am. St. 367; State v. Corpening, 157 N. Car. 621, 73 S. E. 214, 38 L. R. A. (N. S.) 1130, and note; Louisville &c. R. Co. v. Hull, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 771; Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 589; Houston &c. R. Co. v. McCarty, 40 Tex. Civ. App. 364, 89 S. W. 805. See also Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383,

39 L. ed. 453; McHenry &c. Co. v. Sneddon, 98 Ky. 684, 34 S. W. 228; Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575; Geist v. Detroit City R. Co., 91 Mich. 446, 51 N. W. 1112; Augusta &c. R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706; Rochester v. Shaw, 100 Ind. 268. Most of them holding that an instruction will not cure the error where counsel is not stopped after proper objection.

⁵⁶ Andrews v. Chicago &c. R. Co., 96 Wis. 348, 71 N. W. 372; Chicago &c. R. Co. v. Martin, 28 Ind. App. 468, 63 N. E. 247, 249; Houston &c. R. Co. v. Rehm, 36 Tex. Civ. App. 553, 82 S. W. 526; Beaumont Trac. Co. v. Delworth (Tex. Civ. App.), 94 S. W. 352; Salter v. Rhode Island Co., 27 R. I. 27, 60 Atl. 588. See generally "Misconduct of Counsel in Argument," 14 Cent. Law Jour. 406; Louisville &c. R. Co. v. Crow, 32 Ky. L. 1145, 107 S. W. 807; notes in Ann. Cas. 1912A, 1292, 1913D, 1117, 1914A, 948.

⁵⁷ Keyser v. Chicago &c. R. Co., 56 Mich. 559, 23 N. W. 311, 56 Am. Rep. 405, 66 Mich. 390, 33 N. W. 867; Jenkins v. North Carolina &c. Co., 65 N. Car. 563; Paschal v. Owen, 77 Tex. 583, 14 S. W. 203; St. Louis &c. R. Co. v. Daugherty (Tex. Civ. App.), 31 S. W. 705. But they are not always excused on this ground. See Welch v. Union &c.

they are prejudicial,⁵⁸ at least calculated to be so. Making an unfounded charge that a witness for the defendant had been corrupted by defendant's agents has been held cause for reversal.⁵⁹ So have other improper remarks derogatory to employes as witnesses,⁶⁰ unsupported by any evidence, or similar remarks calculated to unduly arouse prejudice against the "wealthy" and "highhanded" corporation "without soul or conscience."⁶¹ But where, two years after an action was instituted and a general denial filed, the defendant railroad company amended its answer pending trial and alleged that it was not because the engineer had suddenly become insane at the time of the transaction complained of, it was held that counsel for the plaintiff had a right to comment upon the delay and time of filing such amendment and setting up such defense.⁶² So, where the plain-

Co., 117 Iowa 394, 90 N. W. 828; *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 596, 15 Atl. 411.

⁵⁸ See *Chicago &c. R. Co. v. Sullivan* (Ill.), 17 N. E. 460; *Burdick v. Haggart*, 4 Dak. 13, 22 N. W. 589; *Festner v. Omaha &c. R. Co.*, 17 Nebr. 280, 22 N. W. 557; *Gulf &c. R. Co. v. Fox* (Tex.), 6 S. W. 569; *Dugan v. Chicago &c. R. Co.*, 85 Wis. 609, 55 N. W. 894.

⁵⁹ *Sutton v. Chicago &c. R. Co.*, 98 Wis. 157, 73 N. W. 993; *Augusta &c. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706.

⁶⁰ But interest of a witness as shown is of course a subject of fair comment. *Morehouse v. Heath*, 99 Ind. 509, 518; *Central R. Co. v. Mitchell*, 63 Ga. 173, 180. See also *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

⁶¹ See *Gulf &c. R. Co. v. Wallen*, 65 Tex. 568; *Chicago &c. R. Co. v. Martin*, 28 Ind. App. 468, 63 N. E. 247; *Henry v. Sioux City &c. R. Co.*, 70 Iowa 233, 30 N. W. 630; *Louisville*

&c. R. Co. v. Payne, 138 Ky. 274, 127 S. W. 993, Ann. Cas. 1912A, 129n, and note; *Johnson v. Detroit &c. R. Co.*, 135 Mich. 353, 97 N. W. 760; *Whipple v. Mich. Cent. R. Co.*, 143 Mich. 41, 106 N. W. 690; *Galveston &c. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *Dillington v. Scales*, 78 Tex. 205, 11 S. W. 566; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582, 7 Cent. Law Jour. 208. But tears and tricks of advocacy and mere epithets may not be cause for reversal. *Dowdell v. Wilcox*, 64 Iowa 721, 21 N. W. 147; *Baker v. Madison*, 62 Wis. 137, 147, 22 N. W. 141, 583; *Haderlein v. St. Louis &c. R. Co.*, 3 Mo. App. 601. See also *Staal v. Grand Rapids &c. R. Co.*, 57 Mich. 239, 23 N. W. 795; and compare *Chicago &c. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381.

⁶² *Central &c. R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. 170.

tiff's attorney said to a witness, "remembering that you told us you expected your expert fee in this case, I hope you won't charge the poor railroad anything extra," it was held not sufficient cause for reversal.⁶⁸

⁶⁸ Chicago &c. R. Co. v. Sullivan (Ill.), 17 N. E. 460. And a similar decision was rendered where the plaintiff's attorney said to the jury, "you can and you should, out of the abundance of this company, take enough to keep this woman

and her children from want all the days of their lives." East Tenn. &c. R. Co. v. Gurley, 12 Lea. (Tenn.) 46. See also Huckshold v. St. Louis &c. R. Co., 90 Mo. 548, 2 S. W. 794.

CHAPTER LXXXV.

ACTIONS BY AND AGAINST CARRIERS OF GOODS AND ANIMALS.

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| Sec. | Sec. |
| 2725. Right to sue third persons for injuries to goods. | 2740. Burden of proof in case of delay in transportation. |
| 2726. Actions for breach of contract of transportation generally. | 2741. Burden of proof that injury could have been avoided notwithstanding vis major. |
| 2727. Actions for refusal to receive or carry. | 2742. Evidence—Bill of lading. |
| 2728. Replevin by consignee—Tender of freight charges. | 2743. Evidence of the shipper's assent to limitations. |
| 2729. Actions for transportation charges. | 2744. Evidence in cases of delay in transportation. |
| 2730. Delay in transportation not equivalent to conversion. | 2745. Evidence as to loss or injury. |
| 2731. Actions for loss or injury where carrier acts as warehouseman. | 2746. Evidence—Failure or refusal to deliver. |
| 2732. Pleading—Delay in transportation. | 2747. Miscellaneous questions of evidence—Injuries to live stock. |
| 2733. Pleading—Loss or injury of goods in transit. | 2748. Pleading and proof where goods have no market value. |
| 2734. Pleading—Injuries to live stock. | 2749. Damages for breach of contract to carry. |
| 2735. Pleading—Failure or refusal to deliver goods to consignee. | 2750. Damages for delay. |
| 2736. Pleading limitation of liability. | 2751. Damages for delay—Special damages—Loss of profits. |
| 2737. Pleading failure to give notice of claim of damages. | 2752. Damages for delaying notice of arrival of goods. |
| 2738. Prima facie case of loss or injury — Presumptions — Burden of proof. | 2753. Speculative and remote damages. |
| 2739. Presumptions and burden of proof in case of injury to live stock. | 2754. Damages for injuries to goods or stock in transit. |
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2756. Damages where damaged articles sell for more than valuation in bill of lading.
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2758. Shipper cannot refuse to accept partially damaged shipment and hold carrier for total loss—Damages for injury.
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2764. Instructions—Generally.
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2768. Approved instructions—Delay caused by failure to furnish suitable car.
2769. Instructions—Delay in transportation of live stock.
2770. Instructions—Loss or injury to live stock during transportation.
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2772. Instructions — Injury from failure to feed and water stock.
2773. Instructions—Injury to and loss of stock because of defective or insufficient pens.
2774. Approved instructions as to stock pens.
2775. Instructions—Bad condition of stock when received as affecting liability.
2776. Instructions—Injuries resulting from loading, unloading, or improper loading of cars.
2777. Instructions—Loss of or injury to goods in transit.
2778. Approved instructions in case of loss or delay caused by act of God.
2779. Instructions—Failure or refusal to deliver goods to consignee.
2780. Instructions—Liability as between initial and connecting carriers.
2781. Approved instructions in cases of connecting carriers.
2782. Instructions — Measure of damages for injury to or loss of goods and live stock during transportation.

§ 2725 (1705). Right to sue third persons for injuries to goods. —Actions in which railroad companies are involved as carriers of passengers are usually instituted against the company rather than by it; but the company, of course, may have its action in

a proper case, such, for instance as an action for freight charges. So, the carrier may even have an action against third persons. It has been held that the carrier has such an interest in the goods carried as to entitle him to sue for conversion or injuries to the goods by third persons and recover in a proper case even to the extent of the value thereof, the balance over the carrier's interest to be held in trust by him for the owner;¹ and such recovery by the carrier will bar a subsequent action against such third person by the owner for damages resulting from the same injuries.² It has also been held that a carrier may recover possession of goods which have been surrendered to a third person by fraud or mistake, but that if such person has paid the freight charges the carrier must return the same and can not recover possession while refusing to return the money so paid.³

§ 2726 (1706). **Actions for breach of contract of transportation generally.**—The pleader must set out the contract on which he sues. It is an elementary rule of pleading that in an action to recover damages for the breach of a contract the contract must be set out in *haec verba* or according to its legal effect, with proper assignment of the breaches relied on. It has been held that a defect in this respect will be fatal unless cured by the answer.⁴ It is not necessary that the complaint should describe

¹ *Beaconsfield, The*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993; *Steamboat Farmer v. McCraw*, 26 Ala. 189, 62 Am. Dec. 718; *Pittsburgh &c. R. Co. v. City of Chicago*, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A. (N. S.) 358n, 134 Am. St. 314, affirming, 144 Ill. App. 293; *Chicago &c. R. Co. v. Kansas City Suburban Belt R. Co.*, 78 Mo. App. 245; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Steamboat Co. v. Atkins*, 22 Pa. St. 522. See also *Benner Line v. Pendleton*, 217 Fed. 497.

² *Steamboat Farmer v. McCraw*,

26 Ala. 189, 62 Am. Dec. 718; *Ingersoll v. Van Bokkelin*, 7 Cow. (N. Y.) 670. See generally *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526; *Wingard v. Banning*, 39 Cal. 543; *Lyle v. Barker*, 5 Binn. (Pa.) 457; *Hart v. Hyde*, 5 Vt. 328.

³ *Walker v. Louisville &c. R. Co.*, 111 Ala. 233, 20 So. 358, distinguishing *Young v. East Ala. R. Co.*, 80 Ala. 100. See also *Jeffersonville R. Co. v. White*, 6 Bush (Ky.), 251; *Evans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614.

⁴ *Currell v. Hannibal &c. R. Co.*,

the defendant as a common carrier in express words. It is enough that the facts showing that status are averred. Thus, it has been held that character as a common carrier was sufficiently averred by an allegation that the defendant was a corporation created by the laws of the state and engaged in operating a railroad and conveying grain in cars furnished by it upon its own and other roads.⁵ Another case holds that a complaint alleging that the defendant contracted with the plaintiff to ship, transport and carry its property to its destination, need not allege that the defendant was a common carrier, since the defendant was not sued as a common carrier, but the action was based upon a special contract which any person, natural or artificial, may make, whether he is a common carrier or not.⁶ The plaintiff is not required to allege that the defendant at the time complained of had the means or ability to transport his shipment in accordance with its contract.⁷ An actual delivery or tender of the shipment must be alleged. It is not enough to allege that the carrier executed a bill of lading "acknowledging the receipt" of the goods.⁸ It is not necessary to set out that the rate fixed in the contract was a lawful rate, as the question of the illegality

97 Mo. App. 93, 71 S. W. 113; *Garrison v. Babbage Transp. Co.*, 94 Mo. 130, 6 S. W. 701; *Langford v. Sanger*, 40 Mo. 161; *Peck v. Bridwell*, 6 Mo. App. 451. But see where action is not founded on breach of written contract but on common-law duty to deliver according to plaintiff's directions, *McNeil v. Wabash Ry. Co.* (Mo. App.), 231 S. W. 649.

⁵ *Toledo &c. R. Co. v. Roberts*, 71 Ill. 540.

⁶ *Dunbar v. Port Royal &c. R. Co.*, 36 S. Car. 110, 15 S. E. 357, 31 Am. St. 860.

⁷ *Pittsburgh &c. R. Co. v. Hays*, 49 Ind. 207. As to what must be shown as to damages, see and compare *Pacific Exp. Co. v. Needham*,

37 Tex. Civ. App. 129, 83 S. W. 22; *Texas &c. R. Co. v. Arnett*, 40 Tex. Civ. App. 76, 88 S. W. 448.

⁸ "To substitute in pleading an averment of the acknowledgment, procured, as it may be, by mistake of law or fact, or even by fraud, would be to permit the evidence to be pleaded instead of the fact itself and would change the issue from the fact to the question of the execution and delivery of the contract, and this is against all authority." *Page v. Sandusky &c. R. Co.*, 2 Ohio Dec. 716. But compare *Mott v. Jackson*, 172 Ala. 448, 55 So. 528; *Choctaw &c. R. Co. v. Rolfe*, 76 Ark. 220, 88 S. W. 870; *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

of the contract is a matter of defense.⁹ On the trial, the plaintiff has the burden of proof to establish the contract on which he bases his action.¹⁰ Where the contract entered into with a station agent is for the shipment of goods by a certain train it has been held that the shipper has a right to rely on the authority of the agent to make the contract and he is not required to affirmatively prove such authority.¹¹ The carrier may show a want of authority as for example that the station agent was not empowered to contract for cars to be furnished at another station and in another county.¹² On the question of damages for breach of a contract to ship fruit trees by a certain train whereby they were frozen it has been held that the shipper was entitled to recover items of expense incurred in renotifying and delivering to customers if the carrier was fully informed that these damages would result from a breach of the contract.¹³

§ 2727 (1707). Actions for refusal to receive or carry.—A shipper who is wrongfully refused carriage may recover damages therefor in a proper action;¹⁴ and these damages are usually measured by the difference between the value of the property at the place where it is tendered to the company and its value at the point to which it is to be taken, less the expense of transportation.¹⁵ And it has been held that exemplary damages

⁹ *Thompson v. San Antonio &c. R. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427. See also as to where written contract is matter of defense. *Empire State Cattle Co. v. Atchison &c. R. Co.*, 129 Fed. 480; *Southern Pac. Co. v. Arnett*, 111 Fed. 849.

¹⁰ *Texas &c. R. Co. v. Ray*, 37 Tex. Civ. App. 622, 84 S. W. 691. See also *Gann v. Chicago &c. R. Co.*, 65 Mo. App. 670; *Waters v. Richmond &c. R. Co.*, 110 N. Car. 338, 14 S. E. 802, 16 L. R. A. 834.

¹¹ *Pacific Express Co. v. Needham*, 37 Tex. Civ. App. 129, 83

S. W. 22. But see where it is beyond carrier's line, *Pittsburgh &c. R. Co. v. Bryant*, 36 Ind. App. 340, 75 N. E. 829; ante, § 2166.

¹² *Texas &c. R. Co. v. Ray*, 37 Tex. Civ. App. 622, 84 S. W. 691.

¹³ *Pacific Express Co. v. Needham*, 37 Tex. Civ. App. 129, 83 S. W. 22.

¹⁴ *Louisville &c. R. Co. v. Queen City Coal Co.*, 13 Ky. L. 832; ante, § 2702.

¹⁵ *People v. New York &c. R. Co.*, 22 Hun (N. Y.) 533; *Bracket v. McNair*, 14 Johns (N. Y.) 170, 7 Am. Dec. 447; *O'Connell v. For-*

may be allowed where the refusal to carry is caused by ill will or wilful disregard of the right of the person offering the goods for carriage.¹⁶ Prepayment of freight charges is not necessary to sustain the action for refusal to carry unless this is required by the company.¹⁷ Under the Texas statute making the carrier liable in damages for a refusal to carry upon the tender of the legal and customary rates of freight on the goods offered, it is held unnecessary for the declaration to aver a tender of the money for the freight, it being sufficient to aver a readiness and willingness to pay.¹⁸ It would seem superfluous to allege tender where the refusal to carry was not on account of the nonpayment of the freight but for other reasons.¹⁹ It has also been held, in an action against a carrier for a refusal to transport plaintiff's lumber generally, and not for the refusal of a specified shipment, that it was unnecessary to allege to what place the lumber was to be carried or its market value at such place had it been transported.²⁰ The duty of a railroad company to receive freight may, in case of a refusal, be enforced by mandatory injunction where the injury resulting from its non-performance is continuing; and in proceedings of this character it has been held that it is no defense that a strike of locomotive engineers and firemen has been ordered on the company's road.²¹ It is held in a recent case;²² that a complaint or declaration, in

ster, 10 Watts (Pa.) 418. See also *Chattanooga Southern R. Co. v. Thompson*, 133 Ga. 127, 65 S. E. 285; *Michigan &c. R. Co. v. Caster*, 13 Ind. 164. Or, stated in another way, in case of delay the measure is the loss occasioned by delay and the cost of keeping the goods during the delay. *Houston &c. R. Co. v. Smith*, 63 Tex. 322.

¹⁶ *Avinger v. South Carolina R. Co.*, 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716.

¹⁷ *Galena &c. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574.

¹⁸ *Texas &c. R. Co. v. Hays*, 2

Wills. Civ. Cas. St. App. 341.

¹⁹ *Central &c. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457. And see as to refusal to furnish cars excusing further delivery or offer to deliver. *Louisville &c. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674.

²⁰ *Central &c. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457.

²¹ *Chicago &c. R. Co. v. Burlington &c. R. Co.*, 34 Fed. 481; ante, § 2701.

²² *Di Giorgio &c. R. Co. v. Pennsylvania R. Co.*, 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108n.

an action against a carrier for failure to furnish cars, alleging that plaintiff made requisition on the carrier for cars for transportation of the goods, and that the carrier received and accepted the requisition, and averring that the loss claimed to have been sustained by plaintiff was due to the negligence of the carrier in failing to furnish the cars as requested, stated a cause of action in tort and not in contract, and a recovery must be predicated on the liability of the carrier as a common carrier to furnish cars. It was also held in the same case that the carrier was not liable for deterioration caused by delay in transportation due to the failure of the plaintiff to give sufficient notice to furnish cars; that a requisition on the carrier to furnish cars was not admissible in evidence without preliminary proof of its authenticity, and that a requisition for cars at another time and for other goods was inadmissible.

§ 2728 (1708). **Replevin by consignee—Tender of freight charges.**—The owner of goods should tender the carrier's proper charges before bringing replevin for them. The tender will come too late if made after the suit is commenced.²³ The tender should be kept alive by bringing the money into court.²⁴ Where, however, the carrier has negligently delayed delivery of the goods or otherwise subjected itself to liability for damages because of injury to the property, equal to or greater than the amount of the freight, the consignee may maintain replevin without a tender and the claim for damages and the claim for freight may be adjudicated in the replevin suit.²⁵

²³ *Ohio &c. R. Co. v. Noe*, 77 Ill. 513; *Clark v. Lewis*, 35 Ill. 417; *Miami Powder Co. v. Port Royal R. Co.*, 47 S. Car. 324, 25 S. E. 153, 58 Am. St. 880.

²⁴ *Evansville &c. R. Co. v. Marsh*, 57 Ind. 505.

²⁵ *Missouri &c. R. Co. v. Peru &c. Implement Co.*, 73 Kans. 295, 85 Pac. 408, 6 L. R. A. (N. S.) 1058, 117 Am. St. 468, 9 Ann. Cas. 790, and note; *Cutting v. Grand Trunk*

R. Co., v. 13 Allen (Mass.) 381; *Boston &c. R. Co. v. Brown*, 15 Gray (Mass.), 223; *Humphreys v. Reed*, 6 Whart. (Pa.) 435; *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350; *Moran Bros. v. Northern Pac. R. Co.*, 19 Wash. 266, 53 Pac. 49. It has also been held that the rule requiring a tender of charges does not apply in an action for conversion. *Baltimore &c. R. Co. v. O'Donnell*, 49

§ 2729. (1709.) **Actions for transportation charges.**—The complaint in an action for freight charges should allege the undertaking, the carriage in accordance therewith, the delivery after the transportation is complete and the nonpayment of the freight. It has been held unnecessary for the complainant to declare for tolls as such, but it may describe the services for which the tolls are asked.²⁶ The defendant in his answer may set up any breach of the contract and have the damages applied in reduction of the plaintiff's claim.²⁷ For this purpose he may introduce evidence to show that the goods were damaged in transit.²⁸ But he cannot urge as a defense an unreasonable delay, unless damages have resulted therefrom,²⁹ nor, it seems, that the shipment was in violation of the law if the carrier was ignorant of that fact.³⁰ There is usually a presumption, in the absence of anything to the contrary, that the shipper makes the contract for transportation in his own behalf and he is liable for the freight charges,³¹ but this presumption may be rebutted by evidence

Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579. See also *Louisville &c. R. Co. v. Allgood*, 113 Ala. 163, 20 So. 986; *Long v. Mobile &c. R. Co.*, 51 Ala. 512; *Cleveland &c. R. Co. v. Perishaw*, 61 Ill. App. 179; *Peebles v. Boston &c. R. Co.*, 112 Mass. 498; note in 50 L. R. A. (N. S.) 1172, 1174.

²⁶ *Manchester &c. R. Co. v. Fisk*, 33 N. H. 297. Where there is an express contract for carriage of a certain amount the carrier may recover the freight on that amount in a proper case even though it is not delivered to him, but ordinarily the carrier can only recover for what is actually carried. *Robinson v. Noble*, 8 Pet. (U. S.) 181, 8 L. ed. 910.

²⁷ *Gleadell v. Thomson*, 56 N. Y. 194; *South &c. R. Co. v. Hen-*

lein, 56 Ala. 368; *Hill v. Leadbetter*, 42 Maine 572, 66 Am. Dec. 305; *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350; *Ga. Matte v. Angl*, 1 Hawaii, 136.

²⁸ *Boggs v. Martin*, 13 B. Mon. (Ky.) 239; *Leech v. Baldwin*, 5 Watts. (Pa.) 446.

²⁹ *Page v. Munro*, 1 Holmes (U. S. C. C.), 232.

³⁰ *Donovan v. Compagnie &c.* 39 N. Y. Super. Ct. 519. See also *Rowland v. Miln*, 2 Hilt. (N. Y.) 150.

³¹ *Holt v. Westcott*, 43 Maine 445, 69 Am. Dec. 74; *Wooster v. Tarr*, 8 Allen (Mass.), 270, 85 Am. Dec. 707; *Union Freight Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St. 398; *Grant v. Wood*, 21 N. J. L. 292, 47 Am. Dec. 162; *Barker v. Havens*, 17 Johns (N. Y.), 234, 8 Am. Dec. 393; *Hayward v. Middleton*, 3 McCord (S.

showing that it was understood that the consignee should pay the freight,⁸² and, as elsewhere shown, where another is consignee, he is usually presumed to be the owner and is liable for the freight if he accepts the goods, so that there are cases in which the carrier may sue either one, or the matter may be determined by the particular contract or, in some instances, custom and the previous course of dealing.⁸³ Where the goods are delivered to the consignee there is a presumption, in the absence of contrary evidence, that he paid the freight before receiving them.⁸⁴ On the question of the right of the carrier to demand certain freight charges claimed to be excessive, it has been held proper to admit evidence that the carrier raised its charges without giving notice to the shipper and without his knowing that they were different from what he had been accustomed to pay.⁸⁵ The ordinary bill of lading under which goods are shipped is regarded merely as a receipt and is not conclusive, as between the original parties, either as to the shipment of the goods named in it, or as to the quantity said to have been received, and any mistake or fraud in the shipment may be shown in any action to recover freight.⁸⁶

Car.), 121, 15 Am. Dec. 615. See also *St. Louis &c. R. Co. v. Gramling*, 97 Ark. 353, 133 S. W. 1129; *Baltimore &c. R. Co. v. New Albany Box &c. Co.*, 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; *Baltimore &c. R. Co. v. Luella Coal &c. Co.*, 74 W. Va. 289, 81 S. E. 1044, 52 L. R. A. (N. S.) 398 and note. But compare *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317.

⁸² *Union Freight Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St. 398.

⁸³ See ante, § 2361; also *Central of Georgia R. Co. v. Birmingham Sand &c. Co.*, 9 Ala. App. 419, 64 So. 202. But see as to right of carrier to recover rate established

by interstate commerce commission notwithstanding previous dealing or custom. *Central R. Co. v. Mauser*, 241 Pa. St. 603, 88 Atl. 791, 49 L. R. A. (N. S.) 92n.

³⁴ *Shea v. Minneapolis &c. R. Co.*, 63 Minn. 228, 65 N. W. 458.

⁸⁵ *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.) 393.

⁸⁶ *Sutton v. Kettle*, 1 Spr. (U. S.) 309; *Bissel v. Price*, 16 Ill. 408; *Great Western R. Co. v. McDonald*, 18 Ill. 172; *Portland Bank v. Stubbs*, 6 Mass. 422, 4 Am. Dec. 151; *Meyer v. Peck*, 28 N. Y. 590, affg. 33 Barb. (N. Y.) 532; *Abbe v. Eaton*, 51 N. Y. 410; *Nelson v. Stephenson*, 12 N. Y. Super. Ct. 538. See also ante, §§ 2140, 2142.

§ 2730 (1710). **Delay in transportation not equivalent to conversion.**—It is well settled in most jurisdictions in which the question has been decided, that the owner of goods unreasonably delayed in transportation cannot refuse to receive the goods and treat the delay as equivalent to a conversion.³⁷ The title of the shipment remains in the consignee and he must receive it when tendered so long as it retains its identity, though at the time of delivery he has no use for the goods.³⁸ His remedy is to sue for the damages he has sustained by reason of the delay.³⁹

§ 2731 (1711). **Actions for loss or injury where carrier acts as warehouseman.**—It has already been shown that the carrier sustains the relation of warehouseman towards goods stored for future shipment until such shipment is directed,⁴⁰ and also

³⁷ *St. Louis &c. R. Co. v. Mudford*, 44 Ark. 439; *Briggs v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 515; *Nettles v. South Carolina R. Co.*, 7 Rich. L. (S. Car.) 190, 62 Am. Dec. 409; *Baumbach v. Gulf &c. R. Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693; *Ryland v. Chesapeake &c. R. Co.*, 55 W. Va. 181, 46 S. E. 923. See also *Clark v. American Exp. Co.*, 130 Iowa 254, 106 N. W. 642. But see as to where delay after demand, etc., is a conversion. *Hamilton v. Chicago &c. R. Co.*, 103 Iowa 325, 72 N. W. 536. Compare also *Louisville &c. R. Co. v. Lawson*, 88 Ky. 496, 11 S. W. 511, with *Williams v. Delaware &c. Co.*, 53 Hun 635, 6 N. Y. S. 36, and *Louisville &c. R. Co. v. Campbell*, 7 Heisk (Tenn.) 253. In *Southern Ry. Co. v. Morgan*, 14 Ga. App. 617, 85 S. E. 933, failure to deliver until after occasion for use of shipment had passed was held to support an action for conversion.

³⁸ *Baumbach v. Gulf &c. R. Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693.

³⁹ See cases in preceding notes. See also (where goods were damaged) *St. Louis &c. R. Co. v. Johnson*, 53 Ark. 282, 13 S. W. 1096. As to when refusal to deliver is conversion, see *Atchison &c. R. Co. v. Schriver*, 72 Kans. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056; *Donnell v. Canadian Pac. R. Co.*, 109 Maine 500, 84 Atl. 1002, 50 L. R. A. (N. S.) 1172, and note reviewing a number of cases. Mere delay caused by misrouting does not make the carrier liable as for conversion, but damages caused thereby may be recovered. *Harrill v. Seaboard Air Line Ry. Co.*, 179 N. Car. 540, 103 S. E. 21. See also *Wells, Fargo Co. v. Hanson*, 41 Tex. Civ. App. 174, 91 S. W. 321; and compare *Gatlin v. Atlantic Coast Line R. Co.*, 179 N. Car. 433, 102 S. E. 779.

⁴⁰ Ante, § 2121. *Missouri Pac. R. Co. v. Riggs* (Kans.) 62 Pac. 712.

after transportation and the time fixed in the particular jurisdiction for the termination of the carrier relation has expired.⁴¹ The carrier in this situation is not an insurer and is liable only on the principle of negligence. There is a distinct conflict in the authorities as to the burden of proof in this class of cases. Most courts, proceeding on the theory that the existence of negligence on the part of the warehouseman is an essential element of the plaintiff's case, without proof of which there can be no recovery, place this burden on the plaintiff.⁴² This is in accordance with the rule that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence or nonexistence of facts which he asserts or denies to exist, must prove that those facts do or do not exist."⁴³ One of the courts sustaining this view has said: "In case where a bailee has neglected to deliver property to the bailor on demand, and no allegation is made by the plaintiff in an action as for conversion of the property that it has been lost or destroyed by reason of the negligence of the defendant, the burden of proof rests on the defendant to account for the property. But if the plaintiff alleges in his petition what has become of the property, and avers that it was lost or destroyed through negli-

⁴¹ Ante, § 2304.

⁴² *Wilson v. California &c. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; *Chicago &c. R. Co. v. Kendall*, 72 Ill. App. 105; *Lamb v. Western R. Corp.* 89 Mass. 98; *Willett v. Rich*, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684; *Witting v. St. Louis &c. R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. 636; *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622, 20 S. W. 676; *E. O. Stanard Milling Co. v. White Line &c. Co.*, 122 Mo. 258, 26 S. W. 704; *Draper v. Delaware &c. Canal Co.*, 118 N. Y. 118, 23 N. E. 131; *Lyman v. Southern R. Co.*, 132 N. Car. 721, 44 S. E. 550; *Kahn v. Atlantic &c.*

R. Co., 115 N. Car. 638, 20 S. E. 169; *Clark v. Spence*, 10 Watts. (Pa.) 335; *Runyan v. Caldwell*, 7 Humph. (Tenn.) 134; *East Tenn. &c. R. Co. v. Kelly*, 91 Tenn. 699, 20 S. W. 312, 30 Am. St. 902, 17 L. R. A. 691n. See also *Frederick v. Louisville R. Co.*, 133 Ala. 486, 31 So. 968. But compare *Southern R. Co. v. Aldredge*, 142 Ala. 368, 38 So. 805. Plaintiff must prove the specific acts of negligence which he sets forth in his pleadings and cannot recover on any theory not covered thereby. *Western &c. R. Co. v. Branan*, 123 Ga. 692, 51 S. E. 650.

⁴³ *Stephens Evidence* (Amer. Ed.) 175. See 1 *Elliott Ev.* § 132.

gence or carelessness on the part of the bailee, the burden of proof rests upon him."⁴⁴ But this is not everywhere the rule. Other strong courts place upon the carrier the burden of proving his freedom from negligence. These courts take into consideration the fact that the carrier's custodianship of the property renders it extremely difficult for the shipper to prove particular acts of negligence on the part of the carrier while it makes it easy for the defendant to show what care he has used to prevent the loss. In other words the burden is placed on the party best acquainted with the facts.⁴⁵ And some courts treat the burden as shifting back and forth, but we think this can be true only in respect to the production of evidence and that in the true sense the burden of proof is and remains upon the plaintiff to make out a case on the whole evidence, although certain facts or circumstances may make a *prima facie* case and entitle him to recover if no evidence is produced by the carrier to meet it.⁴⁶ On the question of care it has been held that the carrier may show that it exercised the same degree of care that was exer-

⁴⁴ *E. O. Stanard Milling Co. v. White Line &c. Co.*, 122 Mo. 258, 26 S. W. 704.

⁴⁵ *Boies v. Hartford &c. R. Co.*, 37 Conn. 272, 9 Am. Rep. 347; *Almand v. Georgia &c. R. Co.*, 95 Ga. 775, 22 S. E. 674; *Leland v. Chicago &c. R. Co.*, (Iowa) 23 N. W. 390; *Wardlaw v. South Carolina &c. R. Co.*, 11 Rich. L. (S. Car.) 337; *Fleischman v. Southern R. Co.*, 76 S. Car. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519; *Brunson v. Atlantic &c. R. Co.*, 76 S. Car. 9, 56 S. E. 538, 9 L. R. A. (N. S.) 577n.

⁴⁶ Several of the cases cited in the last preceding note hold that the burden shifts and is upon the defendant to explain where there is a failure to deliver or injury to

the goods. See also *Southern R. Co. v. Aldredge*, 142 Ala. 368, 38 So. 805; *Burnell v. New York &c. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Caronson v. Pennsylvania R. Co.*, 23 Misc. 666, 52 N. Y. S. 95. The authorities are reviewed in *Yazoo &c. R. Co. v. Hughes*, 94 Miss. 242, 47 So. 662, 22 L. R. A. (N. S.) 975, and in the note thereto. See also *Lamb v. Camden &c. R. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Claflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467, and *Standard Marine Ins. Co. v. Traders Compress Co.*, 16 Okla. 356, 148 Pac. 1019, to the effect that the burden in the true sense remains on the plaintiff. Compare also *Belt R. &c. Co. v. McClain*, 58 Ind. App. 171, 106 N. E. 742.

cised by other railroad companies in the care of like property,⁴⁷ but not that other freight of the same kind was always cared for by it in the same manner without loss.⁴⁸ So the carrier may show that it maintained a night watch at its freight house and took other precautions for the safety of goods stored in its depot according to the custom in that part of the country, but this is not conclusive.⁴⁹ So the carrier may show that lightning arresters were inspected by competent experts shortly before goods in its care as a warehouseman were destroyed by lightning.⁵⁰ As tending to establish a want of care it has been held that the shipper could show that oil or other inflammable substances were so placed in the warehouse in which his goods were stored as to be exposed to sparks from passing engines;⁵¹ that smoking in the locality of the warehouse had been prohibited by city ordinance, to show the hazardous character of the place;⁵² that the carrier was involved in a labor dispute, as bearing on the question of the employment of a sufficient number of watchmen,⁵³ and that the employe charged with the care of the place of storage was habitually intoxicated and neglectful of his duties to an extent to charge the carrier with notice.⁵⁴ It has also been held proper to inquire as to the sufficiency of the freight house for the business usually done at that station and its contents at the time of the damage.⁵⁵ The Supreme Court of Georgia holds that one seeking to establish the existence of a custom or usage of notifying consignees which would vary a rule of that jurisdiction that the carrier becomes a warehouse-

⁴⁷ *Cass v. Boston &c. R. Co.*, 96 Mass. 448.

⁴⁸ *Lane v. Boston &c. R. Co.*, 112 Mass. 455.

⁴⁹ *Derosia v. Winona &c. R. Co.*, 18 Minn. 133. See as to liability for neglecting to have watchman. *Belt &c. R. Co. v. McClain*, 58 Ind. App. 171, 106 N. E. 742.

⁵⁰ *Missouri Pac. R. Co. v. Riggs* (Kans.) 62 Pac. 712.

⁵¹ *Nichols v. Smith*, 115 Mass. 332.

⁵² *Judd v. New York &c. S. Co.*, 130 Fed. 991.

⁵³ *Texas &c. R. Co. v. Coutourie*, 135 Fed. 465.

⁵⁴ *Texas &c. R. Co. v. Coutourie*, 135 Fed. 465.

⁵⁵ *Stowe v. New York &c. R. Co.*, 113 Mass. 521. See also *Bates v. Chicago &c. R. Co.*, 140 Wis. 235, 122 N. W. 745, 133 Am. St. 1069.

man on the deposit of the goods at a place of safety ready for delivery to the consignee on demand, must affirmatively prove that this usage was of an established and general nature, and that the notices given in pursuance thereof, were of such character as to indicate or to reasonably warrant the inference, that the company intended to remain liable as a common carrier until the consignee in each instance, has had reasonable time and opportunity to remove his goods.⁵⁶ Where there is no dispute as to the facts the question whether proper care has been exercised may become a question of law for the court,⁵⁷ but it is usually a question for the jury.⁵⁸

§ 2732 (1712). **Pleading—Delay in transportation.**—Good pleading requires the complaint to allege a duty on the part of the carrier to transport plaintiff's goods and to assign a breach of that duty,⁵⁹ although it is generally held sufficient to allege the facts without alleging the duty in express terms. So, as to the negligent delay, it would seem sufficient to allege facts showing an unreasonable and long delay and that this was negligence in the railroad company and that damages to plaintiff resulted therefrom. It is not necessary to detail the evidence by which the plaintiff expects to make out his case.⁶⁰ And it has been held that an allegation that goods were not transported within a reasonable time was good against a general demurrer without alleging what was a reasonable time for such transportation.⁶¹ The pleader is not required to allege the damage to each article through the delay. It is sufficient to

⁵⁶ *Georgia &c. R. Co. v. Pound*, 111 Ga. 6, 36 S. E. 312.

⁵⁷ *Laporte v. Wells, Fargo & Co.'s Express*, 23 App. Div. 267, 48 N. Y. 292.

⁵⁸ See *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801; *Weaver v. Montana Stables*, 46 Wash. 65, 89 Pac. 154; *Weich v. Dougherty (Ky.)*, 90 S. W. 966; *Eaton v. Lancaster*, 79 Maine 477, 10 Atl. 449;

Ashford v. Pittman, 160 N. Car. 45, 75 S. E. 943.

⁵⁹ *Buckley v. Great Western R. Co.*, 18 Mich. 121.

⁶⁰ *Alabama &c. R. Co. v. Pounder*, 82 Miss. 568, 35 So. 155; *Macon &c. R. Co. v. Walton*, 127 Ga. 294, 56 S. E. 419.

⁶¹ *Palmer v. Atchison &c. R. Co.*, 101 Cal. 187, 35 Pac. 630.

itemize the articles, alleging the value of each and the aggregate value of the whole.⁶² It has been held that a railroad company relying on the interference of strikers with its train as a defense must set out the facts in its answer so that the court may determine from them whether the mob or the strike was such as to occasion unavoidable delay and that the strike existed without the defendant's fault.⁶³ Where special damages are demanded because of the delay, the facts showing these damages should be particularly set out. Thus in an action where plaintiff claimed special damages in that the delay prevented the consummation of a "land and cattle deal" by which he would have realized a large profit, it was held that it was the duty of the plaintiff to set out the names of the parties with whom the deal was to be made.⁶⁴ The court said: "The defendant was entitled to have the petition state all the facts in regard to the alleged transaction, in order that it might make the investigation necessary to a proper preparation of its defense. Information as to names of the parties with whom it is alleged the deal could have been made was necessary, in order to enable the defendant to investigate and meet the allegation."⁶⁵ Knowledge of the carrier of the necessity for prompt delivery in the particular instance should be averred in order to allow the admission of evidence of that fact, and authorize the recovery of special damages.⁶⁶

§ 2733 (1713). **Pleading—Loss or injury of goods in transit.**—The complaint must show a delivery to the carrier,⁶⁷ and an

⁶² *Brown v. Adams*, 3 Wills Civ. Cas. Ct. App. § 390.

⁶³ *Louisville &c. R. Co. v. Bell*, 13 Ky. L. 393.

⁶⁴ *Townsend v. Texas &c. R. Co.*, 40 Tex. Civ. App. 71, 88 S. W. 302. See also *Missouri &c. R. Co. v. Vines* (Tex. Civ. App.) 92 S. W. 40; *Foster v. International &c. Ry. Co.* (Tex. Civ. App.), 175 S. W. 762.

⁶⁵ *Townsend v. Texas &c. R.*

Co., 40 Tex. Civ. App. 71, 88 S. W. 302.

⁶⁶ *Pacific Express Co. v. Darnell*, 62 Tex. 639. See also *Central of Ga. Ry. Co. v. Weaver*, 194 Ala. 37, 69 So. 521; *Williams v. Atlantic &c. R. Co.*, 56 Fla. 735, 48 So. 209, 24 L. R. A. (N. S.) 134 and note, 131 Am. St. 169.

⁶⁷ *Jordan v. Hazard*, 10 Ala. 221, *Missouri Pac. R. Co., v. Douglas*, 2 Tex. App. 28, 16 Am. & Eng. R. Cas. 98.

acceptance and undertaking on his part to carry,⁶⁸ since possession of the thing is the essence of every bailment. This might make it necessary, in some instances at least, for the pleader to set out the time when the goods were received by the carrier.⁶⁹ It is not necessary to specially allege that the defendant was a common carrier at the time of the injury in question if the facts alleged sufficiently show him to be such.⁷⁰ A bare allegation that the defendant was a railroad corporation has been held sufficient.⁷¹ Neither is it necessary for the plaintiff to allege that it was defendant's duty to carry the goods safely, since the law implies that duty,⁷² nor that compensation for transportation was paid or agreed to be paid as that condition is likewise implied.⁷³ Under code provisions that when any pleading is founded on a written instrument, a copy thereof must be filed with the complaint, a suit against a carrier for loss or failure to deliver a shipment in good condition should be based on the bill of lading where one has been issued and it embraces the terms of the contract.⁷⁴ And it has been held that every

⁶⁸ *Sommerville v. Merrill*, 1 Port. (Ala.) 107.

⁶⁹ *Missouri Pac. R. Co. v. Creath*, 3 Wills Civ. Cas. Ct. App. § 83.

⁷⁰ *Kain v. Kansas City &c. R. Co.*, 29 Mo. App. 53; *Atlantic &c. R. Co. v. Laird*, 58 Fed. 760; *Wright v. McKee*, 37 Vt. 161; *Mershon v. Hobensack*, 22 N. J. L. 372. but compare *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716 where it is held that an allegation that defendants "before and at the time of shipment were the owners and proprietors of the boat, and co-partners in freighting, and which boat had been usually employed in conveying and transporting cotton for hire," sufficiently alleges that the owners were common carriers. See generally *Louisville &c. R. Co. v.*

Gerson, 102 Ala. 409, 14 So. 873; *Kansas City &c. R. Co. v. Spann*, 145 Ala. 679, 40 So. 83; *Davis v. Jacksonville &c. Line*, 126 Mo. 69, 23 S. W. 965. In actions in case it has been held that the fact must be directly alleged. *Mershon v. Hobensack*, 22 N. J. L. 372.

⁷¹ *Kain v. Kansas City &c. R. Co.*, 29 Mo. App. 53.

⁷² *Lang v. Brady*, 73 Conn. 707, 49 Atl. 199.

⁷³ *Hall v. Cheney*, 36 N. H. 26; *Ferguson v. Cappeau*, 6 Har. & J. (Md.) 394; *Jarrett v. Great Northern R. Co.*, 74 Minn. 477, 77 N. W. 304.

⁷⁴ *Indianapolis &c. R. Co. v. Remmy*, 13 Ind. 518; *Chicago &c. R. Co. v. Reyman* (Ind.), 73 N. E. 587. Compare also *Southern R. Co. v. Brewster*, 194 Ala. 47, 69 So.

proviso in the contract or bill of lading which goes to discharge the entire liability of the carrier under it should be stated; otherwise, if it goes merely to diminish the liability.⁷⁵ But it has been held elsewhere that a petition alleging that the goods had been delivered to defendant railroad company and were in its custody, by virtue of a contract of shipment and that while in its custody they were destroyed by fire, was sufficient without any allegation as to the issuance of a bill of lading. It is not absolutely essential to the existence of the relation that a bill of lading should have been issued.⁷⁶ The failure to set up the contract may not be fatal where the written contract does not vary the common-law liability of the carrier.⁷⁷ But in most jurisdictions the shipper cannot set up a special contract and recover on an implied one, nor can he rely on a parol agreement and recover on proof of a written contract. Such a variance would be fatal.⁷⁸ And this would be the case where the complaint seeks to enforce liability under the common law and the evidence shows a special contract between the parties.⁷⁹ So the variance has been held fatal where the complaint shows negligence as a carrier and the evidence shows negligence as a warehouseman.⁸⁰ A complaint against an express company for loss

111. But see where action is not on the contract. *Louisville &c. R. Co. v. Cody*, 119 Ga. 371, 46 S. E. 429; *Charleston &c. R. Co. v. Duckworth*, 7 Ga. App. 350, 66 S. E. 1018; *St. Louis &c. R. Co. v. Berry*, 42 Tex. Civ. App. 470, 93 S. W. 1107.

⁷⁵ *Ferguson v. Cappeau*, 6 Har. & J. (Md.) 394. Compare also *Baltimore &c. R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664.

⁷⁶ *Martin v. Ft. Worth &c. R. Co.*, 3 Tex. Civ. App. 556, 22 S. W. 1007.

⁷⁷ *San Antonio &c. R. Co. v. Dolan* (Tex. Civ. App.) 85 S. W. 302. But see where the contract does vary the general liability.

Camp v. Hartford &c. Co., 43 Conn. 333; *Fairchild v. Slocum*, 19 Wend. (N. Y.) 329; *Baltimore &c. R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664. Compare also *Illinois Cent. R. Co. v. Gross* (Miss.) 22 So. 946.

⁷⁸ *Evansville &c. R. Co. v. McKinney*, 34 Ind. App. 402, 73 N. E. 148. See also 3 Elliott Ev. § 1907.

⁷⁹ *Brounton v. Southern Pacific Co.*, 2 Cal. App. 173, 83 Pac. 265. See also *Snow v. Indiana &c. R. Co.*, 109 Ind. 422, 9 N. E. 702; *Baltimore &c. R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106.

⁸⁰ *Gratiot St. Warehouse Co. v. St. Louis &c. R. Co.*, 221 Ill. 418,

of a draft merely alleging that it was worth a certain sum has been held insufficient as a statement of value. But a statement of the sum for which it was drawn would have been sufficient. It is not necessary to allege that the drawer had funds on deposit sufficient to pay it. This latter would seem a matter of defense.⁸¹ Another case holds that the owner of state bonds lost by an express company may recover their value without stating in the complaint the numbers or dates of the bonds particularly where there was no rule of the company requiring it.⁸² An allegation that by reason of the negligent manner in which defendant conducted himself, the goods were wholly lost to the plaintiff has been held to sufficiently show that the goods were not delivered by the carrier and dispensed with an express statement to that effect.⁸³ There is authority that the plaintiff may show that a special contract under which the carrier defends was void under the laws of the state of its execution without pleading such laws.⁸⁴ In a recent case, which was an action against a carrier for the loss of freight, the answer denied the allegations of the complaint, and alleged that the loss was through an act of God, and the reply denied the affirmative allegations, and the defendant, after the jury had been sworn, filed an amended answer, in which it withdrew the denials of the answer, except those as to the value of the goods, it was held that the trial court properly refused the defendant's motion to adjudge it the burden of proof, and the concluding argument to the jury.⁸⁵

77 N. E. 675. See also *Keithley v. Lusk*, 190 Mo. App. 458, 177 S. W. 756; *St. Louis &c. R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. ed. 1077.

⁸¹ *Zeigler v. Wells Fargo & Co.*, 23 Cal. 179, 83 Am. Dec. 87. As to what must be specially pleaded in defense, see generally ante, § 2705; also *Southern R. Co. v. Mooresville Cotton Mills*, 187 Fed. 72; *McGregor v. Oregon &c. Nav. Co.*, 50

Ore. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668; *Houston &c. R. Co. v. Harn*, 44 Tex. 628.

⁸² *Martin v. American Express Co.*, 19 Wis. 356.

⁸³ *Williams v. Baltimore &c. R. Co.*, 9 W. Va. 33.

⁸⁴ *Frasier v. Charleston &c. R. Co.*, 73 S. Car. 140, 52 S. E. 964.

⁸⁵ *Southern R. Co. v. Smith*, 125 Ky. 656, 102 S. W. 232.

§ 2734 (1714). **Pleading—Injuries to live stock.**—It is not necessary to allege in express terms that a railroad company, charged with injuring live stock in transit, is a common carrier. It is enough if the facts pleaded show defendant to be such.⁸⁶ An allegation that defendant is engaged in operating a line of railroad will suffice in jurisdictions where railroad companies are made common carriers of live stock by law.⁸⁷ A complaint would seem sufficient to charge a common-law liability which alleges the relation of shipper and carrier, delivery by plaintiff to defendant of the stock in good condition for transportation, the duty to safely carry and deliver, the loss by death or injury of the stock in transit by the carrier's negligence and the amount of the damages.⁸⁸ On the question of damages it has been held that an allegation that a stated number of plaintiff's cattle reasonably worth a certain amount per head were killed by the negligence of the defendant in transporting them was sufficiently specific without separately stating the number that died in transit; and the number that died after reaching their destination.⁸⁹ And where the complaint sets out the damages to an animal as amounting to a certain sum it has been held unnecessary to state the value of the animal before receiving the injury.⁹⁰ A complaint against a carrier for failure to water animals in transit sufficiently setting out the damages from this cause need not set out the places on the road where the defendant failed to feed and water.⁹¹ But where the shipper has entered into a contract with the carrier binding himself to care for his stock and to feed and water them and to load and unload them

⁸⁶ *Denver &c. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285.

⁸⁷ *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, 27 N. E. 586.

⁸⁸ *Smith v. Great Northern R. Co.*, 92 Minn. 11, 99 N. W. 47.

⁸⁹ *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

⁹⁰ *Baltimore &c. R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106; *Galveston &c. R. Co. v. Wil-*

liams (Tex. Civ. App.), 25 S. W. 311. But see *Gulf &c. R. Co. v. Wilhelm*, 3 Wills Civ. Cas. Ct. App. § 458.

⁹¹ *Gulf &c. R. Co. v. Wilhelm* (Tex. Civ. App.), 16 S. W. 109. Compare also *Chicago &c. R. Co. v. Simpson Bros.*, 23 Wyo. 342, 151 Pac. 902, as to sufficiency of complaint for violation of Act of Congress.

at his own risk and expense he must, in a complaint against the carrier for failure to deliver them, allege that the loss was not attributable to his failure to perform his part of the contract or to his negligence in performing it.⁹² Damages caused by a failure to furnish proper cars for transportation of stock are to be specially pleaded;⁹³ an allegation of rough handling of animals is not sufficient to admit proof of a defective car.⁹⁴ In the states where the carrier of live stock is not regarded as strictly a common carrier and hence not an insurer there can be no recovery unless the complaint charges the carrier with negligence.⁹⁵ There is a clear conflict in the cases on the subject of pleading a compliance with a condition in the contract of shipment that notice of damages must be presented within a fixed time after such injuries have been received or after the arrival of the shipment at destination. In states where this condition is deemed a condition precedent to the maintenance of an action the courts require the plaintiff to plead a compliance therewith.⁹⁶ But the greater number of courts seem to view such stipulations as not strictly conditions precedent to actions but rather as limitations on the right of recovery and hence a matter of defense to be raised by the answer.⁹⁷ Where

⁹² *Terre Haute &c. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. 239.

⁹³ *Moore v. Baltimore &c. R. Co.*, 103 Va. 189, 48 S. E. 887.

⁹⁴ *Texas &c. R. Co. v. Stewart*, 43 Tex. Civ. App. 399, 96 S. W. 106.

⁹⁵ *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Louisville &c. R. Co. v. Betz*, 7 Ky. L. 606.

⁹⁶ *Kalina v. Union Pac. R. Co.*, 69 Kans. 172, 76 Pac. 438; *Sprague v. Missouri Pac. R. Co.*, 34 Kans. 347, 8 Pac. 465; *Westminster, The* 127 Fed. 680; *Louisville &c. R. Co. v. Widman*, 10 Ind. App. 92,

37 N. E. 554; *Anderson v. Lake Shore &c. R. Co.*, 26 Ind. App. 196, 59 N. E. 396.

⁹⁷ *Kahnweiler v. Insurance Co.*, 67 Fed. 483; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Hatch v. Minneapolis &c. R. Co.*, 15 N. D. 490, 107 N. W. 1087; *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. 17; *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033; *Malloy v. Chicago &c. R. Co.*, 109 Wis. 29, 85 N. W. 130. See also *Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97; *Kansas &c. R. Co. v. Ayres*, 63 Ark. 331, 38 S. W. 515; *Kansas &c. R. Co. v. Pace*, 69 Ark. 256, 63 S. W.

the action is based on a violation of a special contract the plaintiff should set out the contract either in substance or in *haec verba* and must declare upon it.⁹⁸ But it has been held that where the shipper sues to recover damages for negligence, on account of which the carrier is liable, notwithstanding the special contract, then the shipper is not required to declare upon the contract. Such a contract is regarded as a defensive weapon,⁹⁹ and where the answer makes no mention of it, it will be considered as abandoned or waived.¹ The defense of a strike among employes has been held sufficiently pleaded, to withstand a demurrer, by an answer which alleged that the carrier had been prevented from performing its contract by an insurrection or strike that attained such proportions that it had finally to be put down by the military power of the state.²

§ 2735 (1715). Pleading—Failure or refusal to deliver goods to consignee.—The complaint in an action against the carrier as a common carrier for damages for failure or refusal to deliver goods at the point of destination should show that defendant is a common carrier.³ It is also necessary, ordinarily, to aver the char-

62; *Ft. Worth &c. R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834; *Missouri &c. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78; *McNealey v. Chicago &c. R. Co.*, 119 Mo. App. 200, 95 S. W. 312. It has been held, however, that provisions of a bill of lading limiting the valuation and amount of recovery are available to the carrier without a special plea, where the plaintiff introduced the bill of lading in evidence. *Ex parte J. R. Kilgore & Son*, 191 Ala. 671, 67 So. 1002, denying writ of certiorari in *Illinois Cent. R. Co. v. J. R. Kilgore & Son*, 12 Ala. App. 358, 67 So. 707.

⁹⁸ *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642. There is a fatal variance between

a complaint based on a breach of the carrier's common-law duty and proof that the shipment was made under a special contract. *Lake Erie &c. R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 748.

⁹⁹ *Southern Pac. Co. v. Arnett*, 111 Fed. 849. See also *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642.

¹ *Kansas City &c. R. Co. v. Pace*, 69 Ark. 256, 63 S. W. 62. But see *Baltimore &c. R. Co. v. Ross*, 105 Ill. App. 54; and Alabama case cited at close of note 97 *infra*.

² *Pittsburgh &c. R. Co. v. Hollowell*, 65 Ind. 188, 32 Am. Rep. 63.

³ *Louisville &c. R. Co. v. Gerson*, 102 Ala. 409, 14 So. 873; *Bristol v. Rensselaer &c. R. Co.* 9 Barb. (N. Y.) 158.

acter of the goods and their value,⁴ and the plaintiff's ownership or right to the goods.⁵ The complaint should likewise show in many cases that after the carrier received the goods to be transported, a reasonable time had elapsed, in due course of transportation, for the delivery of the goods and also, in some cases at least, that demand was made and delivery refused. And it must usually allege the payment or tender of the carrier's reasonable charges or give a reason for the failure of the plaintiff to do so, since the carrier has a right to hold the goods until the charges for transportation have been paid.⁶ The carrier's answer denying that it received the goods amounts to an admission that they were not delivered.⁷

§ 2736 (1716). **Pleading limitation of liability.**—It is often said that the carrier seeking to avoid liability for a loss on injury on the ground that it was within an exception in a special contract, must specifically plead the contract containing the exception,⁸ and

⁴ *Atlantic &c. R. Co. v. Howard Supply Co.*, 125 Ga. 478, 54 S. E. 530.

⁵ *Galveston &c. R. Co. v. Borden* (Tex. Civ. App.) 29 S. W. 1100; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Pennsylvania Co. v. Poor*, 103 Ind. 553, 3 N. E. 253; *Ohio &c. R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727.

⁶ *Jeffersonville &c. R. Co. v. Gent*, 35 Ind. 39. But see *Baltimore &c. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579. That the complaint is demurrable where it fails to allege a demand see *Jarrett v. Great Northern R. Co.*, 74 Minn. 477, 77 N. W. 304. But compare *Baltimore &c. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117n, 34 Am. St. 579.

⁷ *Hot Springs R. Co. v. Hudgins*, 42 Ark. 485. As to answer see also

generally *Broadwood v. Southern Exp. Co.*, 148 Ala. 17, 41 So. 769; *Louisville &c. R. Co. v. Price*, 159 Ala. 213, 48 So. 814; *Skinner v. Chicago &c. R. Co.*, 12 Iowa 191; *Cohen Bros. v. Missouri &c. R. Co.*, 44 Tex. Civ. App. 381, 98 S. W. 437.

⁸ *Louisville &c. R. Co. v. Cunningham*, 8 Ill. App. 289; *Cleveland &c. R. Co. v. Schaefer*, 47 Ind. App. 371, 90 N. E. 502; *Atchison &c. R. Co. v. Ditmars*, 3 Kans. App. 459, 43 Pac. 833; *Missouri &c. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kans. 525, 40 Pac. 899; *Bonfiglio v. Lake Shore &c. R. Co.*, 125 Mich. 476, 84 N. W. 722; *Clark v. St. Louis &c. R. Co.*, 64 Mo. 440; *Halliday v. St. Louis &c. R. Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Dierling v. Wabash R. Co.*, 163 Mo. App. 292, 146 S. W. 814; *Pennsylvania R. Co. v. Yoder*, 25 Ohio C.

must allege that the injury was within one of such exceptions.⁹ Thus it has been held that a railroad company, which sought to be relieved from liability as a common carrier by reason of a special contract made by a connecting carrier, must plead such special contract, and could not under an answer denying generally the averments of the plaintiff's petition which alleged liability as a common carrier, introduce evidence showing a special contract with the connecting carrier, especially where it maintained throughout the trial that it never assumed the relation of a carrier to the property.¹⁰ It would seem clear that the general rule should be, as stated, where the action is not on the special contract or it is not set out by the plaintiff so as to show the limitation, but where it is on the special contract the plaintiff would have to plead such contract, and, in many jurisdictions, set out the writing in full. This, however, would not necessarily show that the alleged cause of action, or injury, was within one of the exceptions. If it did, of course, the complaint might be held bad on its face.¹¹

C. 32; *Atchison &c. R. Co. v. Bryan* (Tex. Civ. App.), 28 S. W. 98; *Galveston &c. R. Co. v. Efron*, (Tex. Civ. App.), 38 S. W. 639. See also *St. Louis &c. R. Co. v. Cumbe*, 101 Ark. 172, 141 S. W. 939; *Snow v. Indiana &c. R. Co.*, 109 Ind. 422, 9 N. E. 702; *Tuggle v. St. Louis &c. R. Co.*, 62 Mo. 425; *McGregor v. Oregon R. & Nav. Co.*, 50 Ore. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668. It would seem, however, that if the complaint was on the theory that there was no special contract and there was one in fact, it might be shown under the general denial and the plaintiff might thus be defeated, in some jurisdictions at least, because of the variance. See ante, § 2705.

⁹ *Lewis v. Smith*, 107 Mass. 334; *Hinkle v. Southern R. Co.*, 126 N.

Car. 932, 36 S. E. 348; *Baker v. Brinson*, 9 Rich. L. (S. C.) 201; *Queen, The*, 78 Fed. 155. See also *Western Ry. v. Hart*, 160 Ala. 599, 49 So. 371; *Nashville &c. R. Co. v. Johnson*, 60 Ind. App. 416, 106 N. E. 1087. But see for answer making published tariffs and bill of lading an exhibit, held sufficient to make them admissible in evidence to show terms of shipment. *Wegener v. Chicago &c. Ry. Co.*, 162 Wis. 322, 156 N. W. 201.

¹⁰ *Missouri &c. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kans. 525, 40 Pac. 899. See also *Cleveland &c. R. Co. v. Schaefer* 47 Ind. App. 371, 90 N. E. 502.

¹¹ See *Inman &c. Co. v. Seaboard &c. Ry. Co.*, 159 Fed. 960, and compare also *Burke v. Erie R. Co.*, 134 App. Div. 413, 119 N. Y. S. 309.

§ 2737 (1717). Pleading failure to give notice of claim of damages.—A plea of failure to give notice of damages to a “station agent” at destination within a fixed time as provided in the contract should allege that there was a station agent at this point upon whom the notice could be served.¹² A mere allegation that the carrier had an “agent” at that point has been held insufficient.¹³ It is not necessary, however, to allege that the shipper knew that his contract contained this condition.¹⁴ And, as elsewhere shown such stipulations are regarded in many jurisdictions as conditions precedent, and the plaintiff must allege and prove performance thereof or a good excuse for failure to comply with them.¹⁵

§ 2738 (1718). Prima facie case of loss or injury—Presumptions—Burden of proof.—It is well settled that the plaintiff whose goods are lost or injured during transportation will have made out a prima facie case of liability against the carrier in whose custody they were at the time of the loss, when he proves that the goods were received by the carrier in good order and that the carrier failed to deliver them according to his under-

¹² Galveston &c. R. Co. v. Williams (Tex. Civ. App.), 25 S. W. 1019; Galveston &c. R. Co. v. Thompson (Tex. Civ. App.), 23 S. W. 1019; Missouri &c. R. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 13 Am. St. 776n, 2 L. R. A. 75n; Missouri &c. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Missouri &c. R. Co. v. Childers, 1 Tex. Civ. App. 302, 21 S. W. 76. As to when an employe is or is not such an agent see Southerland v. Atlantic &c. R. Co., 158 N. Car. 327, 74 S. E. 102.

¹³ Galveston &c. R. Co. v. Williams (Tex. Civ. App.), 25 S. W. 1019.

¹⁴ Adams Express Co. v. King, 3 Ill. App. 316.

¹⁵ See ante, §§ 2271, 2734. For additional and recent cases as to stipulations as to notice of claim before recent Acts in regard to time, see Baltimore &c. R. Co. v. Leach, 249 U. S. 217, 63 L. ed. 570, 39 Sup. Ct. 254; Southern Pac. R. Co. v. Stewart, 248 U. S. 446, 63 L. ed. 570, 39 Sup. Ct. 139; Chicago &c. R. Co. v. Blankenship (Ind.), 127 N. E. 209; Bronstein v. Payne (Md.), 113 Atl. 648; Union Pac. R. Co. v. Pacific Market Co. (Wyo.), 200 Pac. 108. And that they can not be waived, see Hines v. Mason, 144 Ark. 11, 221 S. W. 861; Fletcher v. New York &c. R. Co., 229 Mass. 258, 118 N. E. 294.

taking.¹⁶ Where the injury and damages have been thus established the presumption of negligence is raised;¹⁷ and the burden is on the carrier to prove, or go on and show, the facts which excuse or relieve him from liability,¹⁸ as for example that his liability as a common carrier had ceased before the loss occurred,¹⁹ or that the loss was due to an inherent defect in the

¹⁶ *Chesapeake &c. R. Co. v. Radbourne*, 52 Ill. App. 203; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518, 43 N. E. 162; *Angle v. Mississippi &c. R. Co.* v. 18 Iowa 555; *Crawford v. Adams Express Co.*, 7 Ky. L. 362; *Adams Express Co. v. Crawford*, 8 Ky. L. 619; *Little v. Boston &c. R. Co.*, 66 Maine 239; *Cass v. Boston &c. R. Co.*, 14 Allen (Mass.), 448; *Powers Mercantile Co. v. Wells Fargo & Co.*, 93 Minn. 143, 100 N. W. 735; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *Grier v. St. Louis &c. R. Co.*, 108 Mo. App. 565, 84 S. W. 158; *Merritt v. Earle*, 31 Barb. (N. Y.) 38; *Westcott v. Fargo*, 63 Barb. (N. Y.) 349, 6 Lans. (N. Y.) 319; *Foley v. Lehigh Valley R. Co.*, 96 N. Y. 182; *Adams Express Co. v. Holmes* (Pa.) 9 Atl. 166, 6 Sad. 167; *Bell v. Reed*, 4 Bin. (Pa.) 127, 5 Am. Dec. 398; *Grogan v. Adams Express Co.*, 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360; *Ewart v. Street*, 2 Bailey (S. Car.), 157, 23 Am. Dec. 131; *Smyrl v. Niolon*, 2 Bailey (S. Car.), 421, 23 Am. Dec. 146; *McCall v. Brock*, 5 Strob. (S. Car.) 119; *Missouri Pac. R. Co. v. Scott*, 4 Tex. Civ. App. 76, 26 S. W. 239; *Murphy v. Staton*, 3 Munf. (Va.) 239; *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713.

¹⁷ *Union Express Co. v. Graham*, 26 Ohio St. 595; *Little v. Boston &c. R. Co.*, 66 Maine 239; *Doan v. St. Louis &c. R. Co.*, 38 Mo. App. 408; *Flynn v. St. Louis &c. R. Co.*, 43 Mo. App. 424. See also *St. Louis &c. R. Co. v. Hudgins Produce Co.*, 118 Ark. 398, 177 S. W. 400; *Denver &c. R. Co. v. A. Peterson Grocery Co.*, 59 Colo. 125, 147 Pac. 663; *Presley Fruit Co. v. St. Louis &c. R. Co.*, 130 Minn. 121, 153 N. W. 115; *J. S. Pinkussohn Cigar Co. v. Clyde S. S. Co.*, 101 S. Car. 429, 85 S. E. 1060.

¹⁸ *McCoy v. Keokuk R. Co.*, 44 Iowa 424; *Mahon v. Olive Branch*, 18 La. Ann. 107; *Blum v. Monahan*, 36 Misc. 179, 73 N. Y. S. 162; *Hays v. Kennedy*, 3 Grant Cas. (Pa.) 351, 41 Pa. St. 378, 80 Am. Dec. 627; *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; *St. Louis &c. R. Co. v. Martin* (Tex. Civ. App.), 35 S. W. 28. See also *Nashville &c. R. Co. v. Johnson* (Ind. App.), 106 N. E. 414; *Cleveland &c. R. Co. v. Schaefer*, 47 Ind. App. 371, 90 N. E. 502; *Yazoo &c. R. Co. v. Hughes*, 94 Miss. 242, 47 So. 662, 22 L. R. A. (N. S.) 975, and note.

¹⁹ *South &c. R. Co. v. Wood*, 71 Ala. 215, 46 Am. Rep. 309; *Peoria &c. R. Co. v. United States &c. Co.*, 136 Ill. 643, 29 N. E. 348.

article shipped,²⁰ or was caused by an act of God or the public enemies of the state.²¹ When the carrier has met the issue and shown that the damages are occasioned by a cause which exempts him from liability then, as it is sometimes said the burden of showing that the damages could have been avoided by the exercise of reasonable care on the part of the carrier is shifted to the plaintiff.²² The subject of presumptions and burden of proof in relation to connecting carriers is considered in another place in this volume.²³

§ 2739 (1719). Presumptions and burden of proof in case of injury to live stock.—As in other cases, the burden is upon the plaintiff, in an action against the carrier for loss or injury to live stock, to first make at least a *prima facie* case under his complaint;²⁴ but when loss or injury to stock while in the

²⁰ *Green v. Indianapolis &c. R. Co.*, 56 Mo. 556.

²¹ *Van Winkle v. South Carolina R. Co.*, 38 Ga. 32; *J. H. Cownie Glove Co. v. Merchants Dispatch Co.*, 130 Iowa 327, 106 N. W. 749; *Alden v. Pearson*, 69 Mass. 342; *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Wallingford v. Columbia &c. R. Co.*, 26 S. Car. 258, 2 S. E. 19; *Nashville &c. R. Co. v. Stone*, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; *Gulf &c. R. Co. v. Belton Oil Co.*, 45 Tex. Civ. App. 44, 99 S. W. 430; *Fentiman v. Atchison &c. R. Co.*, 44 Tex. Civ. App. 455, 98 S. W. 939; *Baltimore &c. R. Co. v. Morehead*, 5 W. Va. 293. See also post § 2741.

²² *Memphis &c. R. Co. v. Reeves*, 77 U. S. 176, 19 L. ed. 909; *Mitchell v. United States Express Co.*, 46 Iowa 214; *Davis v. Wabash &c. R. Co.*, 89 Mo. 340, 1 S. W. 327; *Lamar Mfg. Co. v. St. Louis &c.*

R. Co., 117 Mo. App. 453, 93 S. W. 851; *Jones v. Minneapolis &c. R. Co.*, 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507. But we think, as elsewhere explained, that the burden in one sense is not shifted at any time but usually remains upon the plaintiff throughout. See *Yazoo &c. R. Co. v. Hughes*, 94 Miss. 242, 47 So. 662, 22 L. R. A. (N. S.) 975, and note, ante §§ 2697, 2712, 2731.

²³ See ante § 2190.

²⁴ *Klair v. Philadelphia &c. R. Co.*, 2 Boyce (25 Dela.), 274, 78 Atl. 1085; *Baltimore &c. R. Co. v. Clift*, 142 Ky. 573, 134 S. W. 917; *Knowlton v. Chicago &c. R. Co.*, 115 Minn. 71, 131 N. W. 858; *Peterson v. Chicago &c. R. Co.*, 19 S. Dak. 122, 102 N. W. 595. See also *Chicago &c. Ry. Co. v. Blankenship* (Ind. App.), 127 N. E. 209; *Schade v. Missouri Pac. Ry. Co.*, 204 Mo. App. 88, 221 S. W. 146.

carrier's custody is proved, it is then, ordinarily, for the carrier to show his freedom from negligence or that the injury was within one of the specified exceptions in the contract or under the common law.²⁵ If, however, the owner accompanies the cattle under a contract to care for them and is given an opportunity to do so, then, according to the prevailing and better rule, he has the burden of proving that the injuries to the shipment were due to the carrier's negligence.²⁶ It has been held that a

²⁵ Louisville &c. R. Co. v. Smitha, 145 Ala. 686, 40 So. 117; Chesapeake &c. R. Co. v. Radbourne, 52 Ill. App. 203; Adams Exp. Co. v. Bratton, 106 Ill. App. 563; Chicago &c. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Powers v. Chicago &c. R. Co., 130 Iowa 615, 105 N. W. 345; Mosteller v. Iowa Cent. R. Co., 153 Iowa 390, 133 N. W. 748; Louisville &c. R. Co. v. Harned, 23 Ky. L. 1651, 66 S. W. 25; Louisville &c. R. Co. v. Brown, 28 Ky. L. 772, 90 S. W. 567; Cole v. Minneapolis &c. R. Co., 117 Minn. 33, 134 N. W. 296; Kansas City &c. R. Co. v. Heard, 87 Miss. 378, 39 So. 1011; Hance v. Pacific Ex. Co., 48 Mo. App. 179; Lachner Bros. v. Adams Exp. Co., 72 Mo. App. 13; Louisville &c. Ry Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311. But there are exceptions or cases in which this rule does not apply, for the nature of the injury or the evidence proving the loss or injury may at the same time show that it was not caused by the carrier's negligence, and in such cases there may be no such presumption shifting the burden to the carrier. See Wente v. Chicago &c. R. Co., 79 Nebr. 175, 112

N. W. 300, 15 L. R. A. (N. S.) 756n; Lewis v. Pennsylvania R. Co., 71 N. J. L. 339, 59 Atl. 1117. And compare also Louisville &c. R. Co. v. Cecil, 145 Ky. 271, 140 S. W. 186.

²⁶ St. Louis &c. R. Co. v. Weekly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. 104; Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. 239; Grieve v. Illinois &c. R. Co., 104 Iowa 659, 74 N. W. 192; Wilke v. Illinois Cent. R. Co., 153 Iowa 695, 133 N. W. 746, Ann. Cas. 1913E, 308n; Kansas &c. R. Co. v. Reynolds, 8 Kans. 623; Louisville &c. R. Co. v. Hedger, 72 Ky. 645, 15 Am. Rep. 740; McCampbell v. Louisville &c. R. Co., 150 Ky. 723, 150 S. W. 987; Louisville &c. R. Co. v. Wathen, 22 Ky. L. 82, 49 S. W. 185; Regan v. Adams Exp. Co., 49 La. Ann. 1579, 22 So. 835; Cleve v. Chicago &c. R. Co., 77 Nebr. 166, 108 N. W. 982; Galveston &c. R. Co. v. Chittim (Tex. Civ. App.), 28 S. W. 700; Missouri Pac. R. Co. v. Scott, 4 Tex. Civ. App. 76, 26 S. W. 239; Texas &c. R. Co. v. Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829; Bosley v. Baltimore &c. R. Co., 54 W. Va. 563, 46 S. E. 613, 66 L.

shipper who claims that his stock contracted Texas fever during transit has the burden of proving that a car furnished by a railroad company for the transportation of his stock was infected with the germs of the disease and that the company was chargeable with knowledge thereof, and that his cattle contracted the disease in the car.²⁷ Where live stock carried over the lines of different carriers is damaged subsequent to its shipment and it is not shown on what particular line the injury occurred the presumption usually is—and this is the rule regardless of the nature of the shipment—that the injury was caused by the fault of the last carrier.²⁸ But it seems plain that this presumption will not arise where the shipper accompanies the animals.²⁹ The burden of showing a want of consideration for a contract limiting the value in case of loss has been held to be on the shipper where he alleges such want of consideration.³⁰

§ 2740 (1720). **Burden of proof in case of delay in transportation.**—It is the general rule that the carrier has the burden of producing evidence to show that an unusual delay in delivering the goods arose from some other cause than his neglect.³¹ An

R. A. 871. But compare *Faust v. Chicago &c. R. Co.*, 104 Iowa 241, 73 N. W. 623, 65 Am. St. 454.

²⁷ *St. Louis &c. R. Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878.

²⁸ *St. Louis &c. R. Co. v. Byers*, 40 Tex. Civ. App. 533, 90 S. W. 720; *Jones v. St. Louis &c. R. Co.*, 115 Mo. App. 232, 91 S. W. 158; *Paramore v. Western R. Co.*, 53 Ga. 383; *Wimmer v. Northwestern R. Co. (S. Car.)*, 107 S. E. 479.

²⁹ *Texas &c. R. Co. v. Gray*, 45 Tex. Civ. App. 208, 99 S. W. 1125; *Crowley v. Louisville &c. R. Co.*, 7 Ky. L. 743, (But compare *Louisville &c. R. Co. v. Hawley*, 10 Ky. L. 117).

³⁰ *Evansville &c. R. Co. v.*

Kevekordes, 35 Ind. App. 706, 69 N. E. 1022.

³¹ *Galena &c. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Cleveland &c. R. Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198; *St. Clair v. Chicago &c. R. Co.*, 80 Iowa 304, 45 N. W. 570; *Teller v. Chicago &c. R. Co. (Iowa)*, 112 N. W. 631; *Louisville &c. R. Co. v. Hawley*, 10 Ky. L. 117; *Baltimore &c. R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033; *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232; *Parker v. Atlantic &c. R. Co.*, 133 N. Car. 335, 45 S. E. 658, 63 L. R. A. 827; *Mann v. Birchard*, 40 Vt. 326, 94 Am. Dec. 398; *Bosley v. Baltimore &c. R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871.

unreasonable delay, however, must be shown; evidence of a slight delay, not unreasonable or unusual, is not sufficient to make out a *prima facie* case.⁸² It has been held that the rule as to the burden of proof in cases of unreasonable delay is not affected by stipulations in the contract that the shipment is "subject to delay," as the rule is well settled that a carrier cannot stipulate against liability for negligence.⁸³ It has also been held that the plaintiff should be allowed to prove representations made by the carrier's agent as to the time required to transport the goods, as these representations may have been the inducement to the contract.⁸⁴ And, on the other hand, it has been held that the defendant on his part may show that the plaintiff, before starting, gave his consent to a delay if necessary.⁸⁵ The plaintiff, to make out his case, should prove the value of the goods at the place of destination when they ought to have arrived and also their value when they did arrive,—this to show his loss by the delay. And to show when they ought to have arrived, if the contract is silent on this point, he may introduce evidence as to the length of time usually required or necessary to effect the transit.⁸⁶ The consignee may also prove what disposition was made of goods claimed to have been damaged by the delay. If sold he should prove the price and expenses of the

⁸² *Adams Express Co. v. Bratton*, 106 Ill. App. 563; *Cunningham v. Chicago &c. R. Co.*, (Mo. App.), 182 S. W. 1033; *Choctaw &c. R. Co. v. Walker*, 71 Ark. 571, 76 S. W. 1058. See generally ante, § 2232.

⁸³ *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335, 45 S. E. 658, 63 L. R. A. 827. But see *Sherwood v. New York &c. R. Co.*, 86 Hun 556, 33 N. Y. S. 771, where the New York rule sanctioning these contracts is applied to a case of delay with the opposite conclusion.

⁸⁴ *Blodgett v. Abbott*, 72 Wis.

516, 40 N. W. 491, 7 Am. St. 873. But compare *St. Louis &c. R. Co. v. Vaughn*, 84 Ark. 311, 105 S. W. 573.

⁸⁵ *Johnson v. Lightsey*, 34 Ala. 169, 73 Am. Dec. 450.

⁸⁶ *Atlanta &c. R. Co. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600; *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335, 45 S. E. 658, 63 L. R. A. 827; *Southerland v. Atlantic &c. R. Co.*, 158 N. Car. 327, 74 S. E. 102. See also ante § 2232. But compare *McManus v. Chicago &c. R. Co.*, 156 Iowa 359, 136 N. W. 769.

sale. If stored he should show how long and at what expense.⁸⁷ It has been held where the carrier attempted to excuse his delay on the ground of a strike among employes at a terminal that the shipper was entitled to show the means taken by other carriers to avoid the effect of the strike.⁸⁸

§ 2741 (1721). **Burden of proof that injury could have been avoided notwithstanding vis major.**—Where the carrier shows that the loss was by some vis major, as by a flood for instance, then, it has been held, the burden is cast on the owner to show that the damage could have been avoided by the exercise of reasonable care and skill. Negligence is not presumed.⁸⁹ As said by the Supreme Court of the United States: "A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writer of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused. What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."⁴⁰ But, as elsewhere shown there is conflict upon this general subject.⁴¹

⁸⁷ *Illinois Central R. Co. v. Cobb*, 72 Ill. 148.

⁸⁸ *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335, 45 S. E. 658, 63 L. R. A. 827. See generally note in Ann. Cas. 1915C, 1189.

⁸⁹ *Mitchell v. United States Exp. Co.*, 46 Iowa 214; *Memphis &c. R. Co. v. Reeves*, 77 U. S. (10 Wall.) 176, 19 L. ed. 909; *Davis v. Wabash &c. R. Co.*, 89 Mo. 340, 1 S. W. 327; *Jones v. Minneapolis*

&c. R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507.

⁴⁰ *Memphis &c. R. Co. v. Reeves*, 77 U. S. (10 Wall.) 176, 19 L. ed. 909. See also *Lamar Mfg. Co. v. St. Louis &c. R. Co.*, 117 Mo. App. 453, 93 S. W. 851; *St. Louis &c. R. Co. v. Dreyfus*, 42 Okla. 401, 141 Pac. 773, L. R. A. 1915D, 547; *International &c. R. Co. v. Bergman (Tex.)*, 64 S. W. 999.

⁴¹ See ante, § 2204, See also re-

§ 2742 (1722). **Evidence—Bill of lading.**—It is the general rule where the action against a common carrier is founded on a bill of lading that such bill of lading must be produced in evidence or its nonproduction accounted for, and its substance proved as alleged in the declaration or complaint.⁴² And though the declaration is not based on the bill of lading but on an oral contract, the bill of lading is competent evidence to prove delivery to the carrier and to aid in establishing a contract of which delivery to the consignee was one of the stipulations.⁴³ But the bill of lading is not conclusive. It is in the nature of a receipt and therefore may be explained or contradicted by parol evidence.⁴⁴ In a case where it appeared that three bills of lading were made out, one signed by the shipper and sent to the auditor of the carrier, and one sent to the shipper, and a third to which the signatures of the other two were copied was filed in the initial office, it was held that the last was a copy and could only be admitted as secondary evidence.⁴⁵ Under the Carmack amendment it is held that possession of a bill of lading is not necessary and that consignees or other persons beneficially entitled to recover may sue.⁴⁶

view of authorities pro and con and reasoning in 3 Elliott Ev. § 1916. A recent case upon the subject is *National Rice Milling Co. v. New Orleans &c. R. Co.*, 132 La. Ann. 615, 61 So. 708, Ann. Cas. 1914D, 1099, where it is held that the burden is upon the carrier and that the Carmack Amendment does not affect the state rule. See also note in 88 Am. St. 68, 123, and note in L. R. A. 1915D, 547.

⁴² *Peck v. Dinsmore*, 4 Port. (Ala.) 212; *Missouri Pac. R. Co. v. Nicholson*, 2 Wills. Civ. Cas. Ct. App. § 169; *Galveston &c. R. Co. v. Van Winkle*, 3 Wills. Civ. Cas. Ct. App. § 444; *Texas &c. R. Co. v. Wheat*, 2 Wills. Civ. Cas. Ct.

App. § 166. But see *Central R. &c. Co. v. Bayer*, 91 Ga. 115, 16 S. E. 953.

⁴³ *Atlanta &c. R. Co. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600. But this might be a fatal variance.

⁴⁴ *Great Western R. Co. v. McDonald*, 18 Ill. 172; *Meyer v. Peck*, 28 N. Y. 590, affg. 33 Barb. 532; *Hazard v. Illinois &c. R. Co.*, 67 Miss. 32, 7 So. 280; ante, §§ 2125, 2139.

⁴⁵ *Walker v. Southern R. Co. (S. Car.)*, 56 S. E. 952.

⁴⁶ *Pecos &c. R. Co. v. Meyer* (Tex. Civ. App.), 155 S. W. 309; *Norfolk &c. R. Co. v. Norfolk Truckers Exch.*, 118 Va. 650, 88 S. E. 318.

§ 2743. (1723.) **Evidence of the shipper's assent to limitations.**—Owing somewhat, perhaps, to the difficulty of proving the intellectual process involved in the assent of the shipper in limiting provisions in a bill of lading or contract of shipment the law does not restrict the evidence on this issue to one particular fact. The carrier is allowed in general to prove all the circumstances surrounding the transaction which have any legitimate tendency to establish the shipper's knowledge or assent. "Such facts may be shown, it is true, by direct evidence of express notice and assent at the time, but that is by no means the only evidence by which they may be established. They may be shown presumptively, by evidence of a long course of previous dealings between the parties of a like character, or by previous proposals by the shipper to the carrier as to the terms and conditions upon which the shipment should be made. Indeed, it would be difficult to enumerate all the facts and circumstances which might have a tendency to prove the shipper's assent to the bill of lading."⁴⁷ Thus the fact that the shipper had filled up similar bills of lading for shipments which contained the same stipulations as the one in question has been held admissible to show knowledge of the provision and the shipper's assent thereto.⁴⁸ The question whether the shipper understood and assented to the limiting provisions is often regarded as one of fact for the jury.⁴⁹ But, in the absence of fraud, concealment, or im-

⁴⁷ *Lake Shore &c. R. Co. v. Davis*, 16 Ill. App. 425. See also *Field v. Chicago &c. R. Co.*, 71 Ill. 458; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523.

⁴⁸ *Wabash &c. R. Co. v. Jaggerman*, 115 Ill. 407, 4 N. E. 641. See also *Ghormley v. Dinsmore*, 53 N. Y. Super Ct. 36.

⁴⁹ *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Chicago &c. R. Co. v. Montfort*, 60 Ill. 175; *Field v. Chicago &c. R. Co.*, 71 Ill. 458; *Merchants Dispatch Transp. Co. v. Leysor*, 89 Ill. 43; *Michigan Cent. R. Co. v. Hale*,

6 Mich. 243; *Grossman v. Dodd*, 63 Hun 324, 17 N. Y. S. 855. Compare also *Cox v. American Exp. Co.*, 147 Iowa 137, 124 N. W. 202. For cases in which custom or previous acceptance of similar bills of lading was held not to be conclusive of shipper's assent, see also *Erie &c. Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51; *Pittsburgh &c. R. Co. v. Barrett*, 36 Ohio St. 448; *Lake Shore &c. R. Co. v. Davis*, 16 Ill. App. 425; *Peoria Packing Co. v. Nashville &c. R. Co.*, 164 Ill. App. 646.

proper practice, there is usually a presumption, which may be conclusive, that acceptance of the bill of lading constitutes assent to its provisions, and this has been held even though the shipper did not read them, as it was his duty to do.⁵⁰

§ 2744. (1724.) Evidence in cases of delay in transportation.—On the question of damages resulting from delay it is proper to show the value of the goods at the place of destination when they ought to have arrived and their value when they did arrive.⁵¹ If on the day of the delayed arrival of the goods the class of property shipped has no market value at the point of destination then evidence of market value at other points whose markets have influence on that of the point of destination has been held admissible.⁵² These outside values may be proved by witnesses who base their opinions on market reports and quotations.⁵³ The prices at which the consignee of the commodity sold similar goods on the day that the consignment should have arrived may be shown by the defendant as tending to establish the market price at that time.⁵⁴ One case holds that while a bill

⁵⁰ See ante, § 2258. See also *St. Louis &c. R. Co. v. Pearce*, 82 Ark. 339, 101 S. W. 760; *Fried v. Wells Fargo & Co.*, 51 Misc. 669, 100 N. Y. S. 1007; *Schaller v. Chicago &c. R. Co.*, 97 Wis. 31, 71 N. W. 1042.

⁵¹ *Atlanta &c. R. Co. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600; *Lyons v. Grand Trunk Ry. Co.*, 185 Mich. 417, 152 N. W. 88, Ann. Cas. 1917D, 162n; *Holden v. New York Central R. Co.*, 54 N. Y. 662; *Parker v. Atlantic Coast Line R. Co.*, 133 N. Car. 335, 45 S. E. 658; 63 L. R. A. 827; *Ft. Worth &c. R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Texas &c. Ry. Co. v. DeLong* (Tex. Civ. App.), 176 S. W. 874.

⁵² *Hudson v. Northern Pac. R. Co.*, 92 Iowa 231, 60 N. W. 608, 54

Am. St. 550; citing *Lowell v. Commissioners*, 146 Mass. 403, 16 N. E. 8; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 202. But, ordinarily, market value at the place of destination and not elsewhere is to be considered. *San Antonio &c. R. Co. v. Thompson* (Tex. Civ. App.), 66 S. W. 792. See as to loss of market by deviation, *Minneapolis &c. Ry. Co. v. Reeves Coal Co.* (Minn.), 181 N. W. 335, 14 A. L. R. 405, and note.

⁵³ *Hudson v. Northern Pac. R. Co.*, 92 Iowa 231, 60 N. W. 608, 54 Am. St. 550; *Sisson v. Cleveland &c. R. Co.*, 14 Mich. 489, 90 Am. Dec. 252; *Peter v. Thickstun*, 51 Mich. 589, 17 N. W. 68; *Cleveland &c. R. Co. v. Perkins*, 17 Mich. 296.

⁵⁴ *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 148. Fluctuations during

of lading which is held to contain an implied obligation to deliver in a reasonable time can not be varied by parol evidence as to such obligation, yet, for the purpose of affecting the measure of damages it is competent to show by parol that the carrier had notice that unusual loss would result from delay in making the delivery.⁵⁵ Evidence of market values the day before the goods should have arrived, though incompetent as evidence of value on the particular date, may be regarded as harmless where the verdict is less than is warranted by the competent evidence.⁵⁶

§ 2745. (1725.) Evidence as to loss or injury.—It has been held that the value of the articles alleged to have been lost must be proved, though not traversed by the answer.⁵⁷ But there seems a good reason for relaxing the rule as to exactness of

delay may be shown. *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. ed. 644; *Chicago &c. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. 320.

⁵⁵ *Central Trust Co. v. Savannah &c. R. Co.*, 69 Fed. 683. See also *Louisville &c. R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720.

⁵⁶ *Galveston &c. R. Co. v. Williams* (Tex. Civ. App.), 25 S. W. 1019. In an action to recover penalty for delay under the North Carolina statute the burden is on the plaintiff to show that the time for transportation was unreasonable and that whether the goods were transported within a reasonable time is for the jury. *Alexander v. Atlantic &c. R. Co.*, 144 N. Car. 93, 56 S. E. 697.

⁵⁷ *Huston v. Peters*, 58 Ky. 558. (But compare *Merchants' Dispatch Transp. Co. v. Hoskins*, 19 Ky. L. 799, 41 S. W. 31, 44 S. W.

362.) See also *Cownie Glove Co. v. Merchants &c. Transp. Co.*, 130 Iowa 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060n, 114 Am. St. 419; *McFall v. Wabash R. Co.*, 117 Mo. App. 477, 94 S. W. 570. The burden is on the plaintiff to establish the negligence alleged, but while this was stated to be the rule in a late decision it was also held that an express company which had contracted to carry certain berries in a refrigerator car, was under a duty to re-ice the car en route as might be necessary to protect the fruit, and that evidence that, when the car arrived, its ice bunkers were found to be nearly empty and the berries spoiled, was sufficient to warrant a finding that the destruction of the berries was due to lack of refrigeration and that the carrier was negligent. *C. C. Taft Co. v. American Exp. Co.*, 133 Iowa 522, 110 N. W. 897, 10 L. R. A. (N. S.) 614, 119 Am. St. 642.

proof of the number or value where the lost package or trunk is filled with miscellaneous articles.⁵⁸ A bill of lading is admissible to prove delivery to the carrier and his acceptance of the shipper's goods,⁵⁹ though it includes other goods than those injured,⁶⁰ but unless declared upon it is not admissible until its execution has been proved.⁶¹ The condition of the property at the time it was delivered to the carrier should be proved in order to establish negligence by showing its damaged condition when delivered.⁶² As tending to show an admission of liability it has been held that it may be proved that the carrier offered a reward for the recovery of the lost goods.⁶³ Similarly, a letter from the carrier acknowledging the receipt of a package to be forwarded has been held a sufficient recognition of the plaintiff as owner and its receipt by the company.⁶⁴ A refusal to pay for injury to goods on the ground that they were carried at the "owner's risk" may be proved as showing a waiver of other grounds of defense and an admission that the goods were injured while in the possession of the carrier.⁶⁵ It has been held proper to allow the introduction of the claim filed by plaintiff before bringing his suit to show that he claimed less damages than laid

⁵⁸ *Stadhecker v. Combs*, 9 Rich. L. (S. Car.) 193.

⁵⁹ *Fasy v. International Nav. Co.*, 77 App. Div. 469, 79 N. Y. S. 1103, affirmed in 177 N. Y. 591, 70 N. E. 1098.

⁶⁰ *Wallace v. Vigus*, 4 Blackf. (Ind.) 260.

⁶¹ *Peck v. Dinsmore*, 4 Port. (Ala.) 212; *St. Louis &c. R. Co. v. Watkins*, 45 Tex. Civ. App. 321, 100 S. W. 162.

⁶² *Brooks v. Dinsmore*, 6 N. Y. St. 281. See also *Mears v. New York &c. R. Co.*, 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. 193; *Paterson v. Chicago &c. R. Co.*, 95 Minn. 57, 103 N. W. 64; *Goodman v. Oregon R. &c. N. Co.*, 22 Ore. 14, 28 Pac. 894. But com-

pare *Henry v. Central R. Co.*, 89 Ga. 815, 15 S. E. 757; *Hartwell R. Co. v. Kidd*, 10 Ga. App. 771, 74 S. E. 310.

⁶³ *Bennett v. Northern Pac. Exp. Co.*, 12 Ore. 49, 6 Pac. 160.

⁶⁴ *Stadhecker v. Combs*, 9 Rich. L. (S. Car.) 193.

⁶⁵ *South &c. R. Co. v. Wilson*, 78 Ala. 587. See also as to declarations and admissions of carrier's agents or employees. *St. Louis &c. R. Co. v. Burrow & Co.*, 89 Ark. 178, 116 S. W. 198; *St. Fein v. Weir*, 129 App. Div. 299, 114 N. Y. S. 426, aff'd in 92 N. E. 1084; *St. Louis &c. R. Co. v. Watkins*, 45 Tex. Civ. App. 321, 100 S. W. 162; *Missouri Pac. R. Co. v. Gernon*, 84 Tex. 141, 19 S. W. 461.

in his complaint.⁶⁶ On the question of care it has been held proper to introduce evidence as to devices employed by other carriers to avoid accidents similar to the one causing the injuries complained of.⁶⁷ It has likewise been held proper to show the incapacity of the trainmen to perform duties that if properly performed by them would have prevented the accident.⁶⁸ Where the property lost during transportation was a manuscript of a school text-book dealing with a subject on which there was no text-book it was held proper to permit the plaintiff to testify as to the time spent in the preparation of the manuscript and what he considered it worth.⁶⁹

§ 2746. (1726.) Evidence—Failure or refusal to deliver.—The shipper suing for non-delivery of his goods has the burden of proving this fact.⁷⁰ Owing to the essentially negative character of the issue, however, slight evidence of non-delivery will suffice.⁷¹ Where the failure to deliver is shown, then the carrier

⁶⁶ *Missouri &c. R. Co. v. Clayton* (Tex. Civ. App.), 84 S. W. 1069. See also as to admission by consignee, *Louisville &c. R. Co. v. Yudelson*, 135 Ga. 731, 70 S. E. 576.

⁶⁷ *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 34 Am. Rep. 191. See also *Louisville &c. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314.

⁶⁸ *Galveston &c. R. Co. v. Johnson* (Tex.), 19 S. W. 867. See also *Kates Transfer &c. Co. v. Klassen*, 6 Ala. App. 301, 59 So. 355.

⁶⁹ *Southern Exp. Co. v. Owens*, 146 Ala. 412, 41 So. 752, 8 L. R. A. (N. S.) 369n, 119 Am. St. 41, 9 Ann. Cas. 1143. So the value of the article to the shipper was held to be the proper measure of damages where it had no market value, in *St. Louis &c. R. Co. v. Dague*, 118

Ark. 277, 176 S. W. 138, Ann. Cas. 1917B, 577n.

⁷⁰ *Kansas City &c. R. Co. v. Morrison*, 103 Ark. 522, 146 S. W. 853; *Cohen v. Southern Express Co.*, 53 Ga. 128; *Roberts v. Chittenden*, 88 N. Y. 33; *Sehneideau v. Pennington*, 21 La. Ann. 299. Of course the plaintiff must also show delivery to the carrier. *Southern R. Co. v. Allison*, 115 Ga. 635, 42 S. E. 15; *Peele v. Atlantic &c. R. Co.*, 149 N. Car. 390, 63 S. E. 66. But not necessarily that a bill of lading was issued. *Alabama &c. R. Co. v. Darby*, 119 Ala. 531, 24 So. 713. See also *Girardeau v. Southern Exp. Co.*, 48 S. Car. 421, 26 S. E. 711.

⁷¹ *Chicago &c. R. Co. v. Provine*, 61 Miss. 288; *Woodbury v. Frink*, 14 Ill. 279; *The Falcon*, 3 Blatchf. 64.

has the burden of showing any excuse he may have.⁷² The carrier also has the burden—where it raises that defense—of showing that the shipper assented to a billing of the goods to another place than the one specified in the bill of lading.⁷³ And where such carrier seeks to charge the shipper with notice of a diversion it should show actual notice to the shipper or facts from which such notice may reasonably be inferred.⁷⁴ Where the goods are delivered without the production of the bill of lading it has been held that the carrier has the burden of proving that they were delivered to the proper person,⁷⁵ but in support of a contention that the goods were properly delivered the carrier may show a course of dealing between the parties justifying such delivery.⁷⁶ It may be said, generally, that no greater degree of proof is required of the authority of the person to receive the goods than of any other issue in a civil action.⁷⁷ The good moral character of employes is not an issue where goods are stolen while in transit, and evidence thereof is not admissible in the carrier's behalf.⁷⁸

§ 2747. (1727.) **Miscellaneous questions of evidence—Injuries to live stock.**—It may be said, generally, that a *prima facie*

⁷² *Sheldon v. Robinson*, 7 N. H. 157, 26 Am. Dec. 726; *Chapman v. New Orleans &c. R. Co.*, 21 La. Ann. 224, 99 Am. Dec. 722; *Valentine v. Long Island R. Co.*, 187 N. Y. 121, 79 N. E. 849. See also *Cohen & Menk v. Southern Exp. Co.*, 53 Ga. 128; *Hammett v. Wabash R. Co.*, 128 Mo. App. 1, 106 S. W. 1106, 1107.

⁷³ *Cleveland &c. R. Co. v. C. & A. Potts & Co.*, 33 Ind. App. 564, 71 N. E. 685.

⁷⁴ *Cleveland &c. R. Co. v. C. & A. Potts & Co.*, 33 Ind. App. 564, 71 N. E. 685.

⁷⁵ *National Bank v. Atlanta &c. R. Co.*, 25 S. Car. 216. See also *Atlantic &c. R. Co. v. Dahlberg Brokerage Co.*, 170 Ala. 617, 54 So.

168; *Florence &c. R. Co. v. Jensen*, 48 Colo. 28, 108 Pac. 974.

⁷⁶ *Bernstein v. New York &c. R. Co.*, 88 N. Y. S. 971. Compare *Gilkinson v. The Scotland*, 14 La. Ann. 417.

⁷⁷ *Wilcox v. Chicago &c. R. Co.*, 24 Minn. 269. See *Kommel & Son v. Champlain Transp. Co.*, 93 Vt. 1, 105 Atl. 253, 2 A. L. R. 275, and note.

⁷⁸ *Bank of Irwin v. American Express Co.*, 127 Iowa 1, 102 N. W. 107 (also holding that evidence that consignee had lost money by theft of some of its employes several months before is inadmissible in an action against an express company for failure to deliver money).

case against the carrier is made by proof of the delivery of the animals to the carrier in good order and their arrival at the place of destination in bad order.⁷⁹ But this rule, like most general rules, is subject to qualification. It does not, for example, apply in full force where the consignee accompanies the stock under a contract to load and unload them and take charge of them during transportation,⁸⁰ nor where the plaintiff's own evidence shows that the animals did not suffer through the carrier's neglect.⁸¹ It has been held proper to receive the evidence of shippers that the carrier never offered them any contract except one containing a limitation of its liability as tending to show that the carrier did not hold itself ready to make a common-law contract.⁸² On the question of the shipper's contributory negligence it has been held proper to show that he overloaded the car and that this caused the injuries, and this, even though he had contracted for a larger car.⁸³ On the question of damages it has been held that the plaintiff may testify as to the condition of the cattle and their weight when he purchased them as tending to show their value when turned over to the carrier.⁸⁴ But evidence as to the price paid for them has been held not admissible.⁸⁵ On the question of value at the place of destination it is the value of the stock at the time they should have arrived that is to be established, and evidence of market value on an

⁷⁹ *Keyes-Marshall &c. Co. v. St. Louis &c. R. Co.*, 105 Mo. App. 556, 80 S. W. 53; *Bosley v. Baltimore &c. R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871; *George v. Chicago &c. R. Co.*, 57 Mo. App. 358; *Chicago &c. R. Co. v. Slatery*, 76 Nebr. 721, 107 N. W. 1045, 124 Am. St. 825; *Crowley v. Louisville &c. R. Co.*, 7 Ky. L. 743.

⁸⁰ *Crowley v. Louisville &c. R. Co.*, 7 Ky. L. 743; ante §§ 2338, 2739.

⁸¹ *Wente v. Chicago &c. R. Co.*, 79 Nebr. 175, 112 N. W. 300, 15 L. R. A. (N. S.) 756n; *Baltimore &c.*

R. Co. v. Fox, 113 Ill. App. 180. See also ante, § 2739.

⁸² *Nashville &c. R. Co. v. Stone*, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955.

⁸³ *Texas &c. R. Co. v. Klepper* (Tex. Civ. App.), 25 S. W. 150. See also *Ficklin v. Wabash R. Co.*, 115 Mo. App. 633, 92 S. W. 347.

⁸⁴ *St. Louis &c. R. Co. v. Williams* (Tex. Civ. App.), 32 S. W. 225. But of course this could not be the rule if the time were remote.

⁸⁵ *Galveston &c. R. Co. v. Tuckett* (Tex. Civ. App.) 25 S. W. 150.

earlier date is usually inadmissible.⁸⁶ Where the stock has no market value at the point of destination then the value at the nearest market may be shown.⁸⁷ It has been held that the shipper can not prove the price at which he had contracted to sell his stock, unless he shows that the carrier had notice of the contract.⁸⁸ The plaintiff may show the condition of the injured animals up to the time of the trial as a means of ascertaining the result of the injury inflicted, so as to better enable the jury to fix the damages at the time and place of delivery.⁸⁹ On this question the supreme court of the United States has said: "The market value of the cattle at their destination would depend upon their condition when they reached it. Proof that the deaths subsequently resulted from injuries the cattle had received in the collision would simply show their real condition when they reached their destination. It would not establish any new injury or any additional damages. The plaintiffs were permitted to prove that some of the cattle had been so badly injured at the time of their delivery that they subsequently died from the effect of such injury, and, therefore, were of no value when delivered. There was as to those animals no double assessment of damages."⁹⁰ It would seem from this that the only limit to the inquiry, in this respect, up to the trial is whether or not the subsequent development in the condition of the animals was traceable directly to the injury inflicted by the carrier.⁹¹ Where a complaint against a railroad company for damages for negligence in carrying and delivering cattle shipped over its line, alleged that such company had orally agreed to carry and de-

⁸⁶ *Gulf &c. R. Co. v. Hughes* (Tex. Civ. App.), 31 S. W. 411.

⁸⁷ *Houston &c. R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556.

⁸⁸ *Ft. Worth &c. R. Co. v. Hamm* (Tex. Civ. App.), 93 S. W. 215. See post, §§ 2749, 2762.

⁸⁹ *New York &c. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292.

⁹⁰ *New York &c. R. Co. v. Es-*

till, 147 U. S. 591, 13 Sup. Ct. 444; 37 L. ed. 292.

⁹¹ *Wilcox v. Plummer*, 29 U. S. 172, 7 L. ed. 821; *Sorenson v. Northern Pac. R. Co.*, 36 Fed. 166; *Estill v. New York &c. R. Co.*, 41 Fed. 853, citing *Kain v. Kansas City &c. R. Co.*, 29 Mo. App. 53; *Lake Erie &c. R. Co. v. Rosenberg*, 31 Ill. App. 47; *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

liver the cattle upon certain conditions, and the company admitted the receipt and shipment of the cattle, but alleged that they were carried under a written contract, the conditions of which had not been complied with by plaintiff, and proof was offered on one side that the contract of shipment was oral, and upon the other that it was written, which tended, however, to show actionable negligence under either theory, it was held that the plaintiff could recover the damages sustained as measured by the agreement established by the evidence.⁹²

§ 2748. (1728.) **Pleading and proof where goods have no market value.**—It has been held that the plaintiff under an allegation in general terms that his goods destroyed by the carrier during transportation were of a certain money value may prove their intrinsic value by proper evidence after he has shown that they have no market value.⁹³ The general rule in such cases is that the measure of damages is the cost of reproducing or replacing them, or, if this can not be done, then their fair value to the owner.⁹⁴ But there is often a market value in some other

⁹² *Cornelius v. Atchison &c. R. Co.*, 74 Kans. 599, 87 Pac. 751, also holding that one of the parties could not testify as to what he had in mind, or his unexpressed intent in making an agreement, and that a provision in a live stock shipping contract that notice of claim for damages should be a condition precedent to recover for loss or injury during transportation did not refer to what happened after transportation had ended. For additional decisions upon questions of evidence in live stock cases, see generally, *Cincinnati &c. R. Co. v. Smith*, 165 Ky. 235, 176 S. W. 1013; *Colsch v. Chicago &c. R. Co.*, 171 Iowa 78, 153 N. W. 327; *Botts v. St. Louis &c. R. Co.*, 191 Mo. App. 676, 177 S. W. 746;

Ball v. Lusk, 189 Mo. App. 297, 175 S. W. 238.

⁹³ *Missouri &c. R. Co. v. Davidson*, 25 Tex. Civ. App. 134, 60 S. W. 278. But where there is a market value it, and not the intrinsic reasonable value is usually the proper measure. *Mobile &c. R. Co. v. Robbins Cotton Co.*, 94 Miss. 351, 48 So. 231; *Galveston &c. R. Co. v. Jones*, 104 Tex. 92, 134 S. W. 328.

⁹⁴ See *Houston &c. R. Co. v. Ney* (Tex. Civ. App.), 58 S. W. 43; *International &c. R. Co. v. Nicholson*, 61 Tex. 550; *Houston &c. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808; *Green v. Boston &c. R. Co.*, 128 Mass. 221, 35 Am. Rep. 370; *Rodocanachi v. Milburn*, 18 Q. B. Div. 67.

market than that to which the goods are immediately shipped, and, as elsewhere stated, this may be shown in a proper case.⁹⁵

§ 2749. (1729.) Damages for breach of contract to carry.— The generally accepted rule makes the measure of damages for refusal to receive and transport goods or for a breach of a contract for the transportation of goods by failure to furnish cars, the difference between their market price or value at the destination to which they were to have been carried at the time they would have arrived there, if the carrier had performed his contract or duty, and their value at the same time at the place from which they were to have been carried, deducting the transportation charges.⁹⁶ In addition to these damages there may often

⁹⁵ See also *Louisville &c. R. Co. v. Mason*, 11 Lea (Tenn.), 116; *Union Pac. R. Co. v. Williams*, 3 Colo. App. 526, 34 Pac. 731; *Houston &c. R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556; *Atchison &c. R. Co. v. Nation* (Tex.), 92 S. W. 823.

⁹⁶ *St. Louis &c. R. Co. v. Neal*, 56 Ark. 279; *Galena &c. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Michigan &c. R. Co. v. Caster*, 13 Ind. 164; *Bridgman v. Emily*, The 18 Iowa 509; *Newport News &c. R. Co. v. Mercer*, 96 Ky. 475; *Armistead v. Shreveport &c. R. Co.*, 108 La. Ann. 171, 32 So. 456; *Harvey v. Connecticut &c. R. Co.*, 124 Mass. 421, 26 Am. R. 673; *Ward's Cent. & P. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544; *Crowley v. Davidson*, 13 Minn. 92; *Birney v. Wabash &c. R. Co.*, 20 Mo. App. 470; *People v. New York &c. R. Co.*, 22 Hun (N. Y.), 533; *Toledo &c. R. Co. v. Wren*, 78 Ohio St. 137, 84 N. E. 785; *Pennsylvania R. Co. v. Titus-*

ville &c. R. Co., 71 Pa. St. 350; *Missouri &c. R. Co. v. Wither- spoon* (Tex. Civ. App.) 38 S. W. 833; *Inman v. St. Louis &c. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37. The only doubt about this rule is as to the time of determining the value at the place of shipment. It is stated by both Moore and Hutchinson and by Judge Thompson substantially as in the text. But Hale both in his work on Bailments and Carriers and his work on Damages, states the rule as if the value at the place of shipment were to be determined at the time of the offer and refusal, and this does not seem to be altogether without reason, but by none of these text-writers is there any discussion of the question or even intimation that there is any question. Text-writers on Damages, such as Joyce, Sedwick, and Sutherland do not seem to have considered the question, but merely state the rule in the most general terms, to the effect that the

be a recovery of special damages where the carrier has clear notice that these damages will result from a breach of the contract.⁹⁷ But mere knowledge that the goods are for sale at the destination is not sufficient to warrant a recovery of the profits on these contemplated sales.⁹⁸ Manifestly the shipper can not recover both the profits he might have made if his property had been shipped and the expenses incurred in preparing it for transportation.⁹⁹ It has been held proper to show in such an action that because of the refusal to transport plaintiff's grain, it became heated and spoiled, although this resulted from something

measure of damages is the difference in value at the two places, without intimating at what time it is taken at the place of shipment or refusal. So, with only two or three exceptions, the courts are equally vague and each writer cites most of the same cases in support of his statement. In *Galena &c. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574, the syllabus in the case as last reported seems to support Hale's statement but the opinion seems to be to the contrary, or at least does not so state the rule.

⁹⁷ *Hadley v. Baxendale*, 9 Exch. 341; *International &c. R. Co. v. Startz* (Tex. Civ. App.), 33 S. W. 575; *Gulf &c. R. Co. v. Martin* (Tex. Civ. App.) 28 S. W. 576. See also *St. Louis &c. R. Co. v. Ozier*, 86 Ark. 179, 110 S. W. 593, 17 L. R. A. (N. S.) 327; note to *Illinois Cent. R. Co. v. River &c. Coal &c. Co.*, 150 Ky. 489, 150 S. W. 641, in 44 L. R. A. (N. S.) 643n, Ann. Cas. 1914C, 1255n; *Weston v. Boston &c. R. Co.*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. 330, 5 Ann. Cas. 825, and

note; *Houston &c. R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 45 L. R. A. 225 (carrier's knowledge of contract held not essential to make it liable for profits).

⁹⁸ *Harvey v. Connecticut &c. R. Co.*, 124 Mass. 421, 26 Am. Rep. 673; *Harrison v. New Orleans &c. R. Co.*, 28 La. Ann. 777.

⁹⁹ "Appellees cannot be permitted to recover the profit they would have made had there been no breach of the contract, and at the same time recover for the expense they would have incurred had the contract been performed by appellant. Had appellant performed its alleged obligation, appellees would have expended for machinery, lumber, labor, etc., as much as or more than they did expend and therefore it is manifest that such expenditures were not a result of the breach of the alleged contract, and appellees cannot recover both the profit they would have made upon and the expenditures involved in procuring, shelling, and shipping the corn." *Gulf &c. R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

inherent in the nature of the grain itself.¹ Where, however, the goods were to be shipped to a consignee at a price less than the market price at the point of destination, it was held that the contract price should govern in determining the damages, and not the market price.² Where the shipment is accepted after a wrongful refusal the shipper may recover as part of his damages the expense of carrying it to the depot the second time.³ Where the carrier refuses transportation to a shipper at a rate previously agreed upon the shipper can not immediately sue for loss of prospective profits on contracts for the sale of the goods offered. His duty is to perform his contracts and make shipments at the regular rates and then hold the carrier for the excess over the rate agreed upon.⁴ But it is to be observed that while the shipper, under a general contract with a carrier to ship his property, rests under the obligation to reduce his damages by procuring other conveyance for his goods on the failure of the carrier to furnish facilities, he is not ordinarily obliged to take this step until he is notified that the carrier can not or will not transport his goods within a reasonable time.⁵ It has been held that exemplary damages were recoverable by the shipper where the railroad company refused to carry his goods out of ill will or in willful disregard of his rights.⁶

¹ *Pittsburgh &c. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682.

² *Missouri &c. R. Co. v. Wither-
spoon* (Tex. Civ. App.), 38 S. W. 833.

³ *Inman v. St. Louis &c. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37. And where goods were at first refused and afterwards accepted, and decreased in value in the meantime it was held that the shipper could recover the difference. *Chicago &c. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 70.

⁴ *Steffen v. Mississippi &c. R. Co.*, 156 Mo. 322, 56 S. W. 1125. So,

increased cost of transportation by other means may be all that can be recovered in some cases. *Ogden v. Marshall*, 8 N. Y. 340, 59 Am. Dec. 497; *O'Connor v. Forster*, 10 Watts (Pa.), 418; *Crouch v. Railway Co.*, 11 Exch. 742. Compare *Shores Lumber Co. v. Starke*, 100 Wis. 498, 76 N. W. 360.

⁵ *Louisville &c. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674.

⁶ *Avinger v. South Carolina R. Co.*, 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716.

§ 2750. (1730.) Damages for delay.—The carrier is liable to the shipper of goods or live stock intended for sale at destination for the depreciation in their value caused by unreasonable delays in transportation. This depreciation is the difference in the value of the goods at the time and place they ought to have been delivered and their value at the time of actual delivery,⁷ together

⁷ *Missouri &c. R. Co. v. Truskett*, 186 U. S. 480, 22 Sup. Ct. 943, 46 L. ed. 1259, affirming 104 Fed. 728; *George Dumois, The*, 88 Fed. 537; *Pilcher v. Central of Ga. R. Co.*, 155 Ala. 316, 46 So. 765; *Columbus &c. R. Co. v. Flournoy*, 75 Ga. 745; *East Tennessee &c. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809; *Illinois &c. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Cutting v. Grand Trunk R. Co.*, 13 Allen (Mass.) 381; *Smith v. New Haven &c. R. Co.*, 94 Mass. 531, 90 Am. Dec. 166; *Scott v. Boston &c. R. Co.*, 106 Mass. 468; *New Orleans &c. R. Co. v. Tyson*, 46 Miss. 729; *D. Klass Com. Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. App. 545; *Perry v. Chicago &c. R. Co.*, 89 Mo. App. 49; *Sloop v. Wabash R. Co.*, 93 Mo. App. 605, 67 S. W. 956; *G. S. Roth Clothing Co. v. Maine &c. Co.*, 44 Misc. 237, 88 N. Y. S. 987; *Ward v. New York &c. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Lee & Co. v. St. Louis &c. R. Co.*, 136 N. Car. 533, 48 S. E. 809; *Davidson Dev. Co. v. Southern R. Co.*, 147 N. Car. 503, 61 S. E. 381; *East Tenn. &c. R. Co. v. Hale*, 85 Tenn. 69, 1 S. W. 620; *Texas &c. R. Co. v. Scharbauer* (Tex.), 52 S. W. 590; *Galveston &c. R. Co. v. Botts* (Tex.), 70 S. W. 113;

St. Louis &c. R. Co. v. Burns (Tex.), 80 S. W. 104; *Texas &c. R. Co. v. Stephens* (Tex.), 86 S. W. 933; *Houston &c. R. Co. v. Foster* (Tex.), 86 S. W. 44; *Chicago &c. R. Co. v. C. C. Mill &c. Co.*, (Tex.), 87 S. W. 753; *Gulf &c. R. Co. v. Beattie* (Tex.), 88 S. W. 367; *Texas Cent. R. Co. v. Miller* (Tex.), 88 S. W. 499; *Texas &c. R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. 272; *Southern Kansas R. Co. v. Crump*, 32 Tex. Civ. App. 222, 74 S. W. 335; *Garlington v. Ft. Worth &c. R. Co.*, 34 Tex. Civ. App. 274, 78 S. W. 368; *Chicago &c. R. Co. v. Halsell*, 35 Tex. Civ. App. 126, 80 S. W. 140; *Missouri &c. R. Co. v. Jarrell*, 38 Tex. Civ. App. 425, 86 S. W. 632; *St. Louis &c. R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938; *Missouri &c. R. Co. v. Allen*, 39 Tex. Civ. App. 236, 87 S. W. 168; *Texas &c. R. Co. v. Sherrod* (Tex. Civ. App.), 87 S. W. 363, affirmed 99 Tex. 382, 89 S. W. 956; *Newell v. Smith*, 49 Vt. 255; *Norfolk &c. R. Co. v. Potter*, 110 Va. 427, 66 S. E. 34; *Woodford v. Baltimore &c. R. Co.*, 70 W. Va. 195, 73 S. E. 290. Or between their value when they ought to have been delivered and their value when they actually arrived and were ready for delivery. *Clark v. American Express Co.*,

with interest from the time they should have been delivered.⁸ If freight charges are unpaid, however, they are to be deducted. Where the time of delivery is not fixed by the contract the law implies a time reasonably necessary to complete the transportation.⁹ But as said by one court: "The law does not attempt to fix by rule what is a 'reasonable time.' Each case is referred to its own peculiar circumstances, an account being taken of the mode of conveyance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities for transportation under the control of the carrier. Temporary interruptions, or obstructions, which could not with ordinary prudence be provided against, excuse 'delays,' but do not absolve from the duty to carry and deliver as soon as it becomes practicable."¹⁰ The carrier is also liable for necessary expenses incurred by the shipper as a result of the delay,¹¹ as, for example, in proper cases, extra feed for delayed live stock,¹² necessary telegrams,¹³ the expense of caring for the goods until the next

130 Iowa 254, 106 N. W. 642. If freight charges are unpaid they should be deducted.

⁸ *Houston &c. R. Co. v. Jackson*, 62 Tex. 209; *New York &c. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292; *Gulf &c. R. Co. v. Jackson*, 99 Tex. 343, 89 S. W. 968; *East Tenn. &c. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809; *Gann v. Railroad Co.*, 72 Mo. App. 34. In *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604; 1 So. 765, it is held that the interest is to be computed from the date of the contract if the action is *ex contractu* and from the date of the injury if the action is one of tort. Shrinkage in weight of live stock is held proper to be considered. *Sturgion v. St. Louis &c. R. Co.*, 65 Mo. 569.

⁹ *Columbus &c. R. Co. v. Flour-*

noy, 75 Ga. 745; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Ward v. New York &c. R. Co.*, 47 N. Y. 29.

¹⁰ *Vicksburg &c. R. Co. v. Ragsdale*, 46 Miss. 458.

¹¹ *San Antonio &c. R. Co. v. Josey* (Tex.), 71 S. W. 606; *Briggs v. New York &c. R. Co.*, 28 Barb. (N. Y.) 515; *Baltimore &c. R. Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. 579.

¹² *Hendrix v. Wabash R. Co.*, 107 Mo. App. 127, 80 S. W. 970; *Ft. Worth &c. R. Co. v. Whiteside* (Tex. Civ. App.), 141 S. W. 1037; *Groot v. Oregon &c. R. Co.*, 34 Utah 152, 96 Pac. 1019. See also *Gulf &c. R. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110.

¹³ *Murrell v. Pacific Express Co.*, 54 Ark. 22, 14 S. W. 1098, 26 Am. St. 17; *Swift River Co. v. Fitch-*

market day,¹⁴ the expense of sending them to another point in order to find a market for them.¹⁵ For delay in the delivery of goods intended for the shipper's use, as, for example, household goods, not for sale, the measure of damages is usually the reasonable value of the use of the property during the delay.¹⁶ It is the duty of the shipper to exercise reasonable diligence and care to minimize the injury to his shipment caused by delay.¹⁷ Thus, it has been held the duty of the consignee of a machine to exercise this degree of care to secure the use of another machine until his own arrives.¹⁸ The term "market value" sometimes used in the rule usually means the value at which the article could be sold in the open market in the quantities as carried, and where the articles shipped are merchandise in large quantities, it has been held improper to measure the damages by the market value of such merchandise when sold at retail.¹⁹

burg R. Co., 169 Mass. 326, 47 N. E. 1015, 61 Am. St. 288.

¹⁴ Ayres v. Chicago &c. R. Co., 75 Wis. 215, 43 N. W. 1122; Cleveland &c. R. Co. v. Strong, 56 Ill. App. 604.

¹⁵ Black v. Baxendale, 1 Exch. 410; St. Louis &c. R. Co. v. Gunter, 39 Tex. Civ. App. 129, 86 S. W. 938. See also for other expenses held recoverable, Chicago &c. R. Co. v. Planters' Gin &c. Co., 88 Ark. 77, 113 S. W. 352; Savannah &c. R. Co. v. Pritchard, 77 Ga. 412, 4 Am. St. 92; Sangamon &c. R. Co. v. Henry, 14 Ill. 156; Flakne v. Great Northern R. Co., 106 Minn. 64, 118 N. W. 58; Nettles v. South Carolina R. Co., 7 Rich. L. (S. Car.) 190, 62 Am. Dec. 409. But compare Hardman v. Brett, 37 Fed. 803; St. Louis &c. R. Co. v. Mudford, 48 Ark. 502, 3 S. W. 814; Denver &c. R. Co. v. DeWitt, 1 Colo. App. 419, 29 Pac. 524; Williams v. Atlantic &c. R. Co., 56 Fla. 735, 48 So. 209,

24 L. R. A. (N. S.) 134n, 131 Am. St. 169; Illinois Cent. R. Co. v. Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758; Ingledew v. Northern R. Co., 7 Gray (Mass.) 86; Gulf &c. R. Co. v. Loome, 84 Tex. 259, 19 S. W. 385; Hales v. London &c. R. Co., 4 B. & S. 66, 116 E. C. L. 66.

¹⁶ Missouri &c. R. Co. v. Clifton (Tex. Civ. App.), 80 S. W. 386; Missouri &c. R. Co. v. Dement (Tex. Civ. App.), 115 S. W. 635. See also Harper Furniture Co. v. Southern Exp. Co., 148 N. Car. 87, 62 S. E. 145, 30 L. R. A. (N. S.) 483n, 128 Am. St. 588.

¹⁷ Chicago &c. R. Co. v. Planters' Gin. &c. Co., 88 Ark. 77, 113 S. W. 352 (quoting text).

¹⁸ Louisville &c. Packet Co. v. Bottorff, 25 Ky. L. 1324, 77 S. W. 920.

¹⁹ Chicago &c. R. Co. v. Broe, 16 Okla. 25, 86 Pac. 441.

§ 2751. (1731.) **Damages for delay—Special damages—Loss of profits.**—It is well settled that special or peculiar damages claimed to have resulted from the carrier's delay can not be recovered unless the carrier has notice before or at the time of accepting the goods of the special circumstances rendering prompt transportation necessary, or at least ought to know of the same.²⁰ After a thorough review of the authorities bearing on this question the supreme court of Mississippi in a case involving delay in the transportation of an essential part of a machine has said that it may be accepted as settled: "1st. The proximate and natural consequences of the breach must always be considered. 2d. Such consequences as from the nature of the subject-matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into. 3d. Damages which fairly may be supposed not to have been necessary and natural sequence of the breach,

²⁰ Southern R. Co. v. Lewis, 165 Ala. 451, 51 So. 863; Crutcher v. Choctaw &c. R. Co., 74 Ark. 358, 85 S. W. 770; Williams v. Atlantic &c. R. Co., 56 Fla. 735, 48 So. 209, 24 L. R. A. (N. S.) 134n, 131 Am. St. 169; Florida East Coast R. Co. v. Peters, 72 Fla. 311, 73 So. 151, Ann. Cas. 1918D, 121n; Elzy v. American Exp. Co., 141 Iowa 407, 119 N. W. 705; Miller Engineering Co. v. Louisiana Ry. &c. Co., 145 La. 460, 82 So. 413, 414 (citing text); American Express Co. v. Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. 708; Southern Pac. R. Co. v. A. J. Lyon & Co., 107 Miss. 777, 66 So. 209, Ann. Cas. 1917D, 171 (citing text); Sankey v. Chicago &c. Ry. Co. (Mont.), 198 Pac. 544; Hunt v. Chicago &c. R. Co., 95 Nebr. 746, 146 N. W. 986, 989; Brown v. Weir, 95 App. Div. 78, 88 N. Y. S. 479; Harris v. Fargo, 113 N. Y. S. 577; Traywick

v. Southern R. Co., 71 S. Car. 82, 50 S. E. 549, 110 Am. St. 563; Choctaw &c. R. Co. v. Bourland (Tex.), 87 S. W. 173; Chicago &c. R. Co. v. C. C. Mill &c. Co. (Tex.), 87 S. W. 753; Daube & Knapp v. Chicago &c. R. Co., 39 Tex. Civ. App. 24, 86 S. W. 797; Missouri &c. R. Co. v. Allen, 39 Tex. Civ. App. 236, 87 S. W. 168; Gulf &c. R. Co. v. Cole, 4 Willson Civ. Cas. Ct. App. § 97, 16 S. W. 176; Hadley v. Baxendale, 9 Exch. 341. But see Bourland v. Choctaw &c. R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111n, 122 Am. St. 647, as to delay in delivery after reaching destination and right to recover special damages therefor on notice at that time. Notice to the carrier may be shown by circumstantial evidence. Baltimore &c. R. Co. v. Whitehill, 104 Md. 295, 64 Atl. 1033.

shall not be recovered, unless by terms of the agreement or by direct notice they are brought within the expectation of the parties. 4th. Losses of profits in a business can not be allowed unless the dates of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself, or by explanation of the circumstances at the time the contract was made that such damages would ensue from non-performance. 5th. If the contract is made with reference to embarking in a new business, (such as sawing lumber for the market,) the speculative profits which might be supposed to arise, but which were defeated because of a breach of contract which delayed the business, can not be looked at as an element of damages. These are dependent largely upon other contingencies, skill, industry, energy, the market, supply of material, keeping machinery in order, loss of time by weather, or breakage of machinery. 6th. If the delay is in the transportation of machinery, to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means; the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time. 7th. The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, diminish the responsibility of the party in default to him."²¹ This subject is also considered in a recent case in Kentucky, wherein it is held that notice to the agent of the carrier, at the place of delivery, after the shipment had failed to arrive on time, of the use to which the shipment, consisting of cotton seed meal and hulls, was intended to be put by the consignee, was not sufficient to render the carrier liable.²²

²¹ Vicksburg &c. R. Co. v. Ragsdale, 46 Miss. 458. For damages held too remote or speculative see Austin v. American Ry. Exp. Co. (Kans.),

200 Pac. 293; Miller v. Express Co., 99 S. Car. 333, 83 S. E. 449.

²² Illinois Cent. R. Co. v. Nelson, 30 Ky. L. 114, 97 S. W. 757, and to

§ 2752. (1732.) Damages for delaying notice of arrival of goods.—In places where a railroad company has established the

same effect, see *Patterson v. Illinois Cent. R. Co.*, 123 Ky. 783, 97 S. W. 426; *Bradley v. Chicago &c. R. Co.*, 94 Wis. 44, 68 N. W. 410. But compare *Illinois Cent. R. Co. v. Johnson*, 116 Tenn. 624, 94 S. W. 600; *Bourland v. Choctaw &c. R. Co.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111n, 122 Am. St. 647. In the course of the opinion in the first case above cited it is said: "It is true that common carriers are liable in damages for the unreasonable delay in the transportation of property of all kinds—the extent of the liability being generally the difference between the market value of the goods when they should have been delivered, and their value at the time of their delivery; but when the carrier at the time the goods are received by it has notice of the use for which they are intended, or such use can be reasonably inferred from the character of the goods, and it may fairly be said that the special use to which the goods are to be put was within the contemplation of both parties at the time the contract was entered into, then special damages may be recovered. But it cannot reasonably be said that cotton seed meal and hulls are such character of goods as to put the carrier on notice that their prompt delivery was necessary to avoid loss on cattle being fed by the shipper." See also *Newport News Co. v. Mercer*, 96 Ky. 475, 29 S. W. 301; *Wells v. National L. Assn.*, 99 Fed. 222, 53 L. R. A. 33; *Duntley v. Boston & Maine R. Co.*, 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. 610; *Illinois Cent. R. Co. v. Southern &c. Co.*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. 933; *Baltimore &c. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579; *Crutcher v. Choctaw &c. R. Co.*, 74 Ark 358, 85 S. W. 770. For cases in which special damages were or could be recovered, see *Bluegrass &c. Co. v. Luthy*, 98 Ky. 583, 33 S. W. 835; *Louisville &c. Packet Co. v. Bottorff*, 25 Ky. L. 1324, 77 S. W. 920; *Illinois Cent. R. Co. v. Mossbarger*, 28 Ky. L. 1217, 91 S. W. 1121; *Gulf &c. R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760. There are also cases in which the measure of damages where the consignee refuses to accept because of the delay is the difference between the contract price and their value when actually delivered. See *Deming v. Grand Trunk R. Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Ft. Worth &c. R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834. And where the goods are not for sale or the like, but are merely intended for some special purpose of the owner, the value of their use during the delay may be the measure of damages—usually their rental value. *Benton v. Fay*, 64 Ill. 417; *Texas &c. R. Co. v. Hassell*, 23 Tex. Civ. App. 681, 58 S. W. 54; *La Conner &c. Co. v. Widmer*, 136 Fed. 177.

custom of notifying consignees of the arrival of their freight at the depot, it seems that patrons have a right to rely on the custom. And it has been held that a consignee not notified may recover—not the value of the goods at the time of their arrival, when notice should have been given, as this would virtually compel the railroad to purchase all such freight,—but the difference between the then value and their value at the date of the notice to the consignee.²³ In this connection, it may be well to note also a case lately decided in Texas, in which notwithstanding the general rule requiring notice to the carrier at or before shipment in order to recover special damages, a distinction is made and it is held that a carrier may be liable for special damages for delay in delivering cattle food after its arrival where it is given notice that such delay will result in injury to the cattle, although such notice is not given until after it reaches its destination.²⁴

§ 2753. (1733.) **Speculative and remote damages.**—In all cases, the general rule is that speculative, remote and contingent damages can not be recovered for breach of the contract.²⁵ In other words, the general rule is that the damages must be proximate and not remote and uncertain.²⁶ Thus, loss of profits or the like, which are uncertain or speculative, can not be recovered.²⁷

²³ *New Orleans &c. R. Co. v. Tyson*, 46 Miss. 729. See also as to measure of damages where consignee refuses to accept goods on ground of inferior quality and delay of carrier in giving notice thereof. *Missouri &c. R. Co. v. Jenkins*, 35 Tex. Civ. App. 429, 80 S. W. 428.

²⁴ *Bourland v. Choctaw &c. R. Co.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. 647. But compare *Chicago &c. R. Co. v. King*, 104 Ark. 215, 148 S. W. 1035; *Strange v. Atlantic &c. R. Co.*, 77 S. Car. 182, 57 S. E. 724; *Towles v. Atlantic &c. R. Co.*, 83 S. Car.

501, 65 S. E. 638; *Gulf &c. R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

²⁵ *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Detroit &c. R. Co. v. McKenzie*, 43 Mich. 609, 5 N. W. 1031 (cases of delay); *Atchison &c. R. Co. v. Thomas*, 70 Kans. 409, 78 Pac. 861; *Central Coal &c. Co. v. Hartman*, 111 Fed. 96.

²⁶ *Williams v. Atlantic &c. R. Co.*, 56 Fla. 735, 48 So. 209, 24 L. R. A. (N. S.) 134n, 131 Am. St. 169; *Medbury v. New York &c. R. Co.*, 26 Barb. (N. Y.) 546.

²⁷ *New York &c. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444,

§ 2754. (1734.) **Damages for injuries to goods or stock in transit.**—The measure of damages for injuries to the subject of the shipment during transportation is the difference between the market value of such goods or animals, as the case may be, in their damaged condition and their value at the place of destination had they been delivered in good order, less the cost of transportation if not paid,²⁸ provided the amount of these charges is proved.²⁹ In some instances there may also be other damages which may be recovered as the natural and proximate result of

37 L. ed. 292; *Armsby v. Union Pac. R. Co.*, 4 Fed. 706; *Little Rock &c. R. Co. v. Conaster*, 61 Ark. 560, 33 S. W. 1057; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 147; *Vicksburg &c. R. Co. v. Ragsdale*, 46 Miss. 458; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. 776; *Simpson v. London &c. R. Co.*, 1 Q. B. Div. 274. But see where profits are not too remote or speculative and carrier has notice. *Ft. Smith &c. R. Co. v. Williams*, 30 Okla. 726, 121 Pac. 275, 40 L. R. A. (N. S.) 494, and numerous authorities there cited.

²⁸ *St. Louis &c. R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619, affirmed 175 Ill. 557, 51 N. E. 911, 67 Am. St. 288; *Cleveland &c. R. Co. v. Patton*, 104 Ill. App. 550, affirmed 203 Ill. 376, 67 N. E. 804; *Illinois &c. R. Co. v. Radford*, 23 Ky. L. 886, 64 S. W. 511; *Silverman v. St. Louis &c. R. Co.*, 51 La. Ann. 1785, 26 So. 447; *Matney v. Chicago &c. R. Co.*, 75 Mo. App. 233; *King v. Sherwood*, 22 App. Div. 548, 48 N. Y. S. 34; *Missouri &c. R. Co. v. Cobb* (Tex.), 36 S. W. 500; *Gulf &c. R. Co. v. Staton* (Tex.), 49 S. W. 277; *Gulf &c. R. Co. v. Houghton* (Tex.), 68 S. W. 718; *Interna-*

tional &c. R. Co. v. Young (Tex.), 72 S. W. 68; *Missouri &c. R. Co. v. Breeding*, 4 Tex. App. Civ. Cas. 217; *Texas &c. R. Co. v. Reeves*, 15 Tex. Civ. App. 157, 39 S. W. 135, writ of error denied, 90 Tex. 499, 39 S. W. 564, 59 Am. St. 830; *Texas &c. R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829; *Gulf &c. R. Co. v. Butler*, 26 Tex. Civ. App. 494, 63 S. W. 650; *Gulf &c. R. Co. v. Butler*, 31 Tex. Civ. App. 576, 73 S. W. 84; *Gulf &c. R. Co. v. Ware*, 34 Tex. Civ. App. 455, 78 S. W. 961; *Texas &c. R. Co. v. Murtishaw*, 34 Tex. Civ. App. 447, 78 S. W. 953. See also *United S. S. Co. v. Haskins*, 181 Fed. 962; *Carpenter v. Baltimore &c. R. Co.*, 6 Pen. (Del.) 15, 64 Atl. 252; *Klair v. Philadelphia &c. R. Co.*, 2 Boyces (Del.) 274, 78 Atl. 1085; *Dawson v. Quincy &c. R. Co.*, 138 Mo. App. 365, 122 S. W. 335; *St. Louis &c. R. Co. v. Piburn*, 30 Okla. 262, 120 Pac. 923; *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17 (though taken for transportation beyond initial carrier's line). See also *New York &c. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 544.

²⁹ *Gray v. Missouri River Packet Co.*, 64 Mo. 47.

the injury. One court has stated the measure of damages to be the difference between the market value of the property at the point of destination in an undamaged condition and the highest realizable value of the property as actually delivered at such point.⁸⁰ It is well settled that these values are to be taken at the point of destination,⁸¹ unless another place has been agreed upon by the parties,⁸² although the destination may be on the line of a connecting carrier not sued.⁸³ In a case where there was no evidence of the value at the point of destination, however, it was held proper to add the freight to the value of the goods at the place of shipment.³⁴ And it has been held that the carrier can not object that the value at the place where the goods were injured was taken as there is a presumption that the value would be greater at the point of destination.⁸⁵ It has also been held that the market value of the goods at destination may be determined by taking the range of prices in the market and striking the average.⁸⁶ If the goods have no market value, the

⁸⁰ *San Antonio &c. R. Co. v. Dolan* (Tex. Civ. App.), 85 S. W. 302.

⁸¹ *St. Louis &c. R. Co. v. Marshall*, 74 Ark. 597, 86 S. W. 802; *Hart v. Spalding*, 1 Cal. 213; *Ringgold v. Haven*, 1 Cal. 108; *Louisville &c. R. Co. v. Heilprin*, 95 Ill. App. 402; *Watkinson v. Laughton*, 8 Johns. (N. Y.) 213; *Galveston &c. R. Co. v. Efron* (Tex.), 38 S. W. 639; *St. Louis &c. R. Co. v. Burns* (Tex.), 80 S. W. 104; *St. Louis &c. R. Co. v. Honea* (Tex.), 84 S. W. 267; *Gulf &c. R. Co. v. Roberts* (Tex.), 85 S. W. 479; *Missouri &c. R. Co. v. Webb*, 20 Tex. Civ. App. 431, 49 S. W. 526; *Southern Pac. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 613; *Texas &c. R. Co. v. White*, 35 Tex. Civ. App. 521, 80 S. W. 641; *Missouri &c. R. Co. v. C. H. Rines & Co.*, 37 Tex. Civ. App. 618, 84 S. W. 1092; *Texas &c.*

R. Co. v. Dishman & Tribble, 38 Tex. Civ. App. 277, 85 S. W. 319; *Texas &c. R. Co. v. Tracey*, 38 Tex. Civ. App. 327, 85 S. W. 833. See also *Plaff v. Pacific Exp. Co.*, 251 Ill. 243, 95 N. E. 1089; *Hunt v. Chicago &c. R. Co.*, 95 Nebr. 746, 146 N. W. 986.

⁸² *Horner v. Missouri &c. R. Co.*, 70 Mo. App. 285.

⁸³ *Galveston &c. R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234. Compare *Missouri &c. R. Co. v. Truskett*, 104 Fed. 728.

⁸⁴ *Artic Bird, The*, 109 Fed. 167. See also *Atchison &c. R. Co. v. Nation & Slaven* (Tex.), 92 S. W. 823.

⁸⁵ *Rome R. Co. v. Sloan*, 39 Ga. 636.

⁸⁶ *Smith v. Griffith*, 3 Hill (N. Y.) 333, 38 Am. Dec. 639.

measure of damages is usually the cost of reproducing and replacing the articles, if this can be done; if it can not be done, then the measure of damages for their loss is the value of the property to the owner³⁷ and this would be the rule in the case of family portraits.³⁸ Where the goods have no market value in their injured state at the point of destination it would seem not improper to take the market value at the nearest market for such goods.³⁹ Since the shipper is required to mitigate his damages he will be allowed to recover reasonable expenses incurred by him in reclaiming his goods,⁴⁰ or in restoring them to their former condition.⁴¹ But in the case of a live stock shipper it is not required that he should hold and feed his stock; he has a right to dispose of them at once and recover his damages under the rules.⁴²

§ 2755. (1735). Damages for injury to animals—Hire of other animals.—It has been held in Georgia that the owner of a

³⁷ *Houston &c. R. Co. v. Ney* (Tex.), 58 S. W. 43. See also *Kates Transfer Co. v. Klassen*, 6 Ala. App. 301, 59 So. 355; *Lloyd v. Haugh &c. Transfer Co.*, 223 Pa. St. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188n.

³⁸ *Louisville &c. R. Co. v. Stewart*, 78 Miss. 600, 29 So. 394; *Houston &c. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808; *Green v. Boston &c. R. Co.*, 128 Mass. 221, 35 Am. Rep. 370. For injury to household goods the measure of damages is held to be the difference in their value just before and just after the injury, and not the market value of similar goods at the nearest second hand stores. *Benedict v. Chicago &c. R. Co.* (Tex.), 91 S. W. 811. Compare *Texas &c. R. Co. v. Wilson Hack Line*, 46 Tex. Civ. App. 38, 101 S. W. 1042, aff'd in 102 Tex. 595.

³⁹ *Houston &c. R. Co. v. Wil-*

liams (Tex.), 31 S. W. 556. See also *Atchison &c. R. Co. v. Nation & Slavens* (Tex.), 92 S. W. 823.

⁴⁰ *North &c. R. Co. v. Akers*, 4 Kans. 453, 96 Am. Dec. 183; *Greenfield Bank v. Leavitt*, 17 Pick. 1 (Mass.), 28 Am. Dec. 268. But compare *Kates Transfer &c. Co. v. Klassen*, 6 Ala. App. 301, 59 So. 355; *Martin v. Delaware &c. R. Co.*, 141 N. Y. S. 942; *Pacific Exp. Co. v. Jones*, 52 Tex. Civ. App. 367, 113 S. W. 952.

⁴¹ *Chicago &c. R. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 538; *Winne v. Illinois Cent. R. Co.*, 31 Iowa 583; *Galveston &c. R. Co. v. Tuckett* (Tex.), 25 S. W. 670; *Missouri &c. R. Co. v. Allen*, 39 Tex. Civ. App. 236, 87 S. W. 168 (medicine for injured animals and time of owner spent in relief).

⁴² *St. Louis &c. R. Co. v. Hunt* (Tex.), 81 S. W. 322.

horse temporarily disabled and permanently injured by negligence of a railroad company is entitled to recover as damages the reasonable cost of hiring another animal while the disability continues and in addition the depreciation in the value of the animal by reason of the permanent injury.⁴³ These were not, however, actions against a carrier as such for injury to the horses in transit, and it was also held that no more could be recovered, at the most, than the market value of the horses at the time of the injury.

§ 2756. (1736.) **Damages where damaged articles sell for more than valuation in bill of lading.**—It is the conclusion of several well-considered cases that the shipper under a contract that in the event of injury to the shipment the carrier shall be liable only to the extent of actual damage not exceeding the valuation, may recover damages for negligent injury though on arrival at destination the goods sell for more than the valuation.⁴⁴ It was held by the Supreme Court of Indiana in such a case that the shipper was entitled to recover such a proportion of the actual loss as the declared valuation bore to the actual value,⁴⁵ but the opinion in the case referred to was afterwards withdrawn and the judgment of the Appellate Court of Indiana, which originally allowed a recovery up to the full valuation, was affirmed without opinion.⁴⁶ Both courts, however, agreed from the beginning in holding that there could be a recovery of some amount even though the goods sold for more than the valuation, and the Supreme Court of Indiana, in the opinion referred to, disposed of the contention that no damages are recoverable in cases

⁴³ *Georgia &c. R. Co. v. Wallace*, 122 Ga. 547, 50 S. E. 478. See also *Telfair County v. Webb*, 119 Ga. 916, 47 S. E. 218; *Atlanta &c. R. Co. v. Hudson*, 62 Ga. 679.

⁴⁴ *United States Exp. Co. v. Joyce*, 36 Ind. App. 1, 69 N. E. 1015; *Starnes v. Louisville &c. R. Co.*, 91 Tenn. 516, 19 S. W. 675. See also *Frank v. Michigan Cent. R. Co.*, 154 N. Y. S. 701; *Washington Horse*

Exch. v. Louisville &c. R. Co., 171 N. Car. 65, 87 S. E. 941; *Illinois Cent. R. Co. v. Wilson*, 131 Tenn. 669, 176 S. W. 1036.

⁴⁵ *United States Exp. Co. v. Joyce (Ind.)*, 72 N. E. 865. See also next following section.

⁴⁶ *United States Exp. Co. v. Joyce*, 76 N. E. 1117, affirming 36 Ind. App. 1, 69 N. E. 1015.

of this character in these words: "It is a startling doctrine if a carrier, who has chanced to receive costly goods at a small declared valuation, may with perfect impunity negligently cause their depreciation to any extent whatever, so long as he leaves a remnant of them of sufficient actual value to equal their declared worth; and it would seem that such a doctrine, if at all sound, might logically be extended to hold that, even though he wilfully appropriated a portion of the goods, he could do so without liability if he left enough to satisfy the appraisal contained in the contract."⁴⁷ But the opposite view seems to be taken in several cases, notably in the Federal Courts.⁴⁸

§ 2757. **Damages in case of agreed valuation and less than total destruction or loss.**—There is also conflict among the authorities as to whether the shipper can recover the full amount of damages, up to the full agreed valuation, where the shipment is not destroyed or wholly lost but only damaged or only part of the goods are lost. Some of the courts take the view that the valuation fixes merely the limit of recovery and allow a recovery for all damages actually incurred up to the full valuation.⁴⁹ Other courts, in accordance with what is deemed by them to be the meaning of the contract and real intention of the parties, permit

⁴⁷ *United States Exp. Co. v. Joyce (Ind.)*, 72 N. E. 865.

⁴⁸ *Lydian Monarch, The*, 23 Fed. 298; *Pearse v. Quebec S. S. Co.*, 24 Fed. 285; *Styria, The*, 95 Fed. 698; *Jennings v. Smith*, 106 Fed. 139. See also *Metropolitan Trust Co. v. Toledo &c. R. Co.*, 107 Fed. 628; *Scammon v. Wells-Fargo & Co.*, 84 Cal. 311, 24 Pac. 284; *Brown v. Steamship Co.*, 147 Mass. 58, 16 N. E. 717; *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642. But compare *Georgia &c. R. Co. v. Hughart*, 90 Ala. 36, 8 So. 62; *Galveston &c. R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Southern Ry. Co.*

v. Jones, 132 Ala. 437, 31 So. 501; *Nashville &c. R. Co. v. Stone*, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955.

⁴⁹ *Brown v. Cunard S. S. Co.*, 147 Mass. 58, 16 N. E. 717; *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642; *Visanska v. Southern Exp. Co.*, 92 S. Car. 573, 75 S. E. 962; *Starnes v. Louisville &c. R. Co.*, 91 Tenn. 516, 19 S. W. 675. See also *Michalitschke Bros. Co. v. Wells-Fargo Co.*, 118 Cal. 683, 50 Pac. 847; *United States Exp. Co. v. Joyce*, 36 Ind. App. 1, 69 N. E. 1015; *Rankin v. Cincinnati &c. R. Co.*, 163 Ky. 183, 173 S. W. 377.

a recovery of only such a proportion of the actual damage as the agreed valuation bears to the actual value of the goods.⁵⁰

§ 2758. (1737.) Shipper can not refuse to accept partially damaged shipment and hold carrier for total loss—Damages for injury.—The doctrine of abandonment for a constructive total loss does not apply to a contract of affreightment,⁵¹ and it is well settled that where a part only of property transported by a common carrier is injured and the remainder is safely carried the owner or consignee can not in consequence of the injury to the part reject the part uninjured and hold the carrier liable for the whole.⁵² And, in general, where goods are only injured in transit and not lost or destroyed, the measure of damages is often said to be the difference between their market value in the

⁵⁰ *Shelton v. Canadian Northern R. Co.*, 189 Fed. 153; *O'Malley v. Great Northern Ry. Co.*, 86 Minn. 380, 90 N. W. 974; *Goodman v. Missouri &c. Ry. Co.*, 71 Mo. App. 460; *Greenfield v. Wells-Fargo & Co.*, 134 N. Y. S. 913. See also *St. Louis &c. R. Co. v. Lesser*, 46 Ark. 236, 243; *London Assur. v. Companhia de Moagens &c.*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. ed. 113. To the effect that agreed valuation for purpose of fixing rate can not to be taken advantage of by carrier to lessen damages for conversion, and for construction of various valuation stipulations with reference to damages, see *Georgia R. &c. Co. v. Johnson*, 121 Ga. 231, 48 S. E. 807; *Carleton v. Union Transfer Co.*, 137 App. Div. 225, 121 N. Y. S. 997; *Huguelet v. Warfield*, 84 S. Car. 87, 65 S. E. 985; *Larsen v. Oregon &c. R. Co.*, 38 Utah, 130, 110 Pac. 983; *Calderon v. Atlas S. S. Co.*, 69 Fed. 574.

⁵¹ *Henderson v. Maid of Orleans*,

The, 12 La. Ann. 352; *Silverman v. St. Louis &c. R. Co.*, 51 La. Ann. 1785, 26 So. 447. See also *Corso v. New Orleans &c. R. Co.*, 48 La. Ann. 1286, 20 So. 752; *Reason v. Detroit &c. R. Co.*, 150 Mich. 50, 113 N. W. 596; *Gulf &c. R. Co. v. Pitts & Son*, 37 Tex. Civ. App. 212, 83 S. W. 727.

⁵² *Michigan Southern &c. R. Co. v. Bivens*, 13 Ind. 263; *Corso v. New Orleans &c. R. Co.*, 48 La. Ann. 1286, 20 So. 752; *Shaw v. South Carolina R. Co.*, 5 Rich. L. (S. Car.) 462, 57 Am. Dec. 768; *McGrath Bros. v. Charleston &c. Ry. Co.*, 91 S. Car. 552, 75 S. E. 44, 42 L. R. A. (N. S.) 782n, Ann. Cas. 1914A, 64; *Galveston &c. R. Co. v. Van Winkle*, 3 Wills. Civ. Cas. Ct. App. § 443; *Gulf &c. R. Co. v. Booton*, 4 Willson Civ. Cas. Ct. App. § 67, 15 S. W. 502. See also *Parsons v. United States Exp. Co.*, 144 Iowa 745, 123 N. W. 776, 25 L. R. A. (N. S.) 842n, and cases cited in last preceding note.

condition in which they were when shipped and their market value when delivered at their destination so far as caused by such injuries, with interest, less unpaid freight charges.⁵³ But, perhaps, a better statement of the general rule is that already made by us in another section.⁵⁴

§ 2759. (1738.) **Damages for loss of goods.**—The general rule allows the owner of goods lost or destroyed during transit to recover from the carrier as damages the value of the goods at destination less the unpaid transportation charges, and in addition, such incidental damages as naturally and proximately flow from the loss, and interest on the value of the goods from the time they should have been delivered.⁵⁵ But it seems that the general rule thus stated has its exceptions and is to be understood as qualified by another rule of damages to the effect that the damages for a failure to perform can not exceed the benefit which would have resulted from a performance of the contract.⁵⁶

⁵³ See *New York &c. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292; *Corso v. New Orleans &c. R. Co.*, 48 La. Ann. 1286, 20 So. 752; *Marquette &c. R. Co. v. Langton*, 32 Mich. 251; *Smith v. New Haven &c. R. Co.*, 12 Allen (Mass.) 531, 90 Am. Dec. 166; *Hackett v. Boston &c. R. Co.*, 35 N. H. 390; *Black v. Camden &c. R. Co.*, 45 Barb. (N. Y.) 40; *Louisville &c. R. Co. v. Trent*, 16 Lea (Tenn.) 420; *Galveston &c. R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Texas &c. R. Co. v. Dishman*, 38 Tex. Civ. App. 277, 85 S. W. 319; *Chesapeake &c. R. Co. v. F. W. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

⁵⁴ See ante, § 2754.

⁵⁵ *Mobile &c. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. ed. 527; *Artic Bird, The*, 109 Fed. 167; *Louisville &c. R. Co. v. Gilmer*, 89 Ala. 534, 7 So. 654; *St. Louis &c.*

R. Co. v. Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. 21; *Ringgold v. Haven*, 1 Cal. 108; *Klair v. Philadelphia &c. R. Co.*, 25 Del. 274, 78 Atl. 1085; *Little v. Boston &c. R. Co.*, 66 Maine 239; *Atchison &c. R. Co. v. Lawler*, 40 Nebr. 356, 58 N. W. 968; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; *Louisville &c. R. Co. v. Mason*, 79 Tenn. 116; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75n, 13 Am. St. 776n; *Fell v. Union Pac. R. Co.*, 32 Utah 101, 88 Pac. 1003, 28 L. R. A. (N. S.) 1; *Chesapeake &c. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161. See also *Walker v. Southern R. Co.*, 76 S. Car. 308, 56 S. E. 952, and *Gulf &c. R. Co. v. Graves* (Tex. Civ. App.), 101 S. W. 488, allowing interest.

⁵⁶ *Sturgess v. Bissell*, 46 N. Y. 462.

Hence there may be cases where the damages will be less than the value at the point of destination as where for example the goods are consigned to a purchaser for a price under the market.⁵⁷ And then on the other hand the damages may exceed those fixed by the general rule, as, for example, where the goods are converted by the carrier and sold for more than their market value at the destination. Here the shipper will be entitled to the amount realized by the carrier.⁵⁸ So, the contract may change the general rule and make the market value at the place of shipment, instead of that at the place of destination, the measure of damages.⁵⁹ Wearing apparel is valued as its condition was at the time of the accident, without reference to its original cost.⁶⁰ The measure of damages for the loss of museum specimens has been held to be their value at the nearest market, rather than the value of the owner's time in collecting them.⁶¹

§ 2760. (1739.) Damages for loss of commercial paper.—The measure of damages for the loss of a chose in action, as a bill, note, or other security for the payment of money, is *prima facie* the amount due thereon, but the defendant may reduce the

⁵⁷ *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442. See also *Henry v. Central &c. Banking Co.*, 89 Ga. 815, 15 S. E. 757; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. R. 83; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601; *Gulf &c. R. Co. v. Coulter* (Tex. Civ. App.), 138 S. W. 16; *Texarkana &c. R. Co. v. Shivel* (Tex. Civ. App.), 114 S. W. 196.

⁵⁸ *Ewart v. Kerr*, 2 McMull. (S. C.) 141.

⁵⁹ *Wegener v. Chicago &c. R. Co.*, 162 Wis. 322, 156 N. W. 201. See also *Davis v. New York &c. Ry. Co.*, 70 Minn. 37, 72 N. W. 823; *Inman v. Seaboard &c. R. Co.*, 159 Fed. 960. And *iso*, as elsewhere

shown, a valid agreed valuation and limitation may change the rule.

⁶⁰ *Walsh v. New York City R. Co.*, 93 N. Y. S. 552; *Brooke v. Cunard S. S. Co.*, 93 N. Y. S. 369.

⁶¹ *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411. But see as to lost manuscript, *Southern Exp. Co. v. Owens*, 146 Ala. 412, 41 So. 752, 8 L. R. A. (N. S.) 369n, 119 Am. St. 41, 9 Ann. Cas. 1143. Market value at place of shipment may sometimes be taken under contract or special circumstances. See *Chicago &c. R. Co. v. Katzenbach*, 118 Ind. 174, 20 N. E. 709; *Evansville &c. R. Co. v. Montgomery*, 85 Ind. 494; *Lakeman v. Grinnell*, 5 Bosw. (N. Y.) 625; *Rome R. Co. v. Sloan*, 39 Ga. 636.

damages by proof of payment, the maker's insolvency, or any fact tending to invalidate the security.⁶² In an action for a loss of this character a statement in the complaint is sufficient if it states the sum for which the instrument was drawn, but a mere averment that it was "valuable" or of a certain value, has been held insufficient. The complaint should describe the lost paper by stating its date, the amount for which it was drawn, the time when it was payable and to whom payable.⁶³

§ 2761. (1740.) **Damages for loss of architect's plans.**—It has been held in an action against a carrier for the loss of an architect's plans for a house that there could be no recovery of damages for the delay in constructing the house where the carrier had no notice of the nature or intended use of the contents of the package.⁶⁴ Relative to the principle on which the decision was based the court said: "It does not appear that the defendant had notice of the contents of the package at the time it was delivered for transportation, or any notice or knowledge that the plaintiff needed the plans for the construction of a house which he had begun to build. The damages caused by the delay are not such as usually and naturally arise solely from a breach of the contract of the defendant to carry the package safely to its destination, nor were they within the reasonable contemplation of both parties to this contract as likely to arise from such a breach. The fact that the plans had a special value to the plaintiff, and could not be purchased, does not touch the question of including in the damages the injury to the plaintiff occasioned by reason of other contracts which he had made, and of work which he had undertaken in expectation of having the plans for use immediately, or after the usual delay involved in sending the plans to Boston, and in having them traced and returned to him. Damages for such injury are not given unless the circumstances are such as to show that the defendant ought fairly to be held to have assumed a liability therefor when it made the contract."⁶⁵

⁶² Zeigler v. Wells, Fargo & Co.,
23 Cal. 179, 83 Am. Dec. 87.

⁶³ Zeigler v. Wells, Fargo & Co.,
23 Cal. 179, 83 Am. Dec. 87.

⁶⁴ Mather v. American Express
Co., 138 Mass. 55, 52 Am. Rep. 258.

⁶⁵ Mather v. American Express
Co., 138 Mass. 55, 52 Am. Rep. 258.

§ 2762. (1741.) **Damages for non-delivery of shipment.**—The measure of damages where the carrier fails to deliver or delivers to one not entitled to the goods is, as a general rule, the value of the goods at the place of destination at the time they should have been delivered, with interest from that time, deducting the unpaid cost of transportation.⁶⁶ Damages of a special character beyond this are not usually recoverable unless the peculiar circumstances from which the damages may ensue are communicated to the carrier when the contract is made.⁶⁷ Although the value to be considered is the value at the point of destination, it seems that the carrier can not complain of evidence of the value of the goods at the point of shipment, as the presumption is that the value there is less than at the point of destination.⁶⁸ It has been held where the goods were taken from the carrier by legal process, as being the goods of a party not the shipper, that the damages were properly measured by the value of the goods at the place where they were taken and not at their destination.⁶⁹

⁶⁶ *Capehart v. Granite Mills*, 97 Ala. 353, 12 So. 44; *Atlantic &c. R. Co. v. Howard Supply Co.*, 125 Ga. 478, 54 S. E. 530; *Plaff v. Pacific Exp. Co.*, 251 Ill. 243, 95 N. E. 1089; *Cincinnati &c. R. Co. v. Webb*, 8 Ky. L. 44; *Baltimore &c. R. Co. v. Pumphrey*, 59 Md. 390; *Forbes v. Boston &c. R. Co.*, 133 Mass. 154; *Horner v. Missouri Pac. R. Co.*, 70 Mo. App. 285; *Wilson v. St. Louis &c. R. Co.*, 129 Mo. App. 347, 108 S. W. 612; *Baltimore &c. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 519; *Brown v. Northwestern R. R.*, 75 S. Car. 20, 54 S. E. 829; *Carter v. International &c. R. Co. (Tex.)*, 93 S. W. 681; *Missouri &c. R. Co. v. C. H. Rines*, 37 Tex. Civ. App. 618, 84 S. W. 1092. See also *Roth Coal Co. v. Louisville &c. R. Co.*, 142 Tenn. 52, 215 S. W. 404.

⁶⁷ *Hadley v. Baxendale*, 9 Excheq. 341; *Grayson County Nat. Bank v. Nashville &c. R. Co. (Tex.)*, 79 S. W. 1094. See also ante, §§ 36, 37. But in *Clements v. Burlington &c. R. Co.*, 74 Iowa 442, 38 N. W. 144, it was held that evidence of the price at which the plaintiff had contracted to sell the goods at destination was admissible as affording some evidence of their value at that point.

⁶⁸ *Echols v. Louisville &c. R. Co.*, 90 Ala. 366, 7 So. 655; *Rome R. Co. v. Sloan*, 39 Ga. 636.

⁶⁹ *Van Winkle v. United States S. Co.*, 37 Barb. (N. Y.) 122. See generally as to seizure of goods by legal process, *Pittsburgh &c. R. Co. v. Cox*, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. 377, and note; also ante, §§ 2313, 2314.

§ 2763. (1742.) Exemplary damages for refusal to deliver.—Exemplary or punitive damages can not, of course, be recovered in ordinary cases for mere delay, failure to carry, loss or injury to the goods, or the like. Where, however, it is pleaded and shown that the carrier wantonly and in reckless disregard of the rights of the consignee wilfully refused to deliver his goods, the jury, in some jurisdictions at least, may allow exemplary damages in addition to the compensatory damages proven.⁷⁰ But where there is doubt about the person entitled to the goods the carrier has a reasonable time to investigate the matter and is not to be made liable in exemplary damages because of mere brusqueness of the agent, not amounting to insult in refusing to turn the goods over pending investigation.⁷¹

§ 2764. (1743.) Instructions—Generally.—The general rules as to instructions, including their form, pertinency, and the like, are the same in railroad cases as in other cases. Approved instructions in actions against carriers of goods and live stock will be found in the cases cited below.⁷² In the following sections

⁷⁰ *Silver v. Kent*, 60 Miss. 124; *Texas &c. R. Co. v. Curry*, 2 Wills. Civ. Cas. Ct. App. § 453. See also *Stricker v. Leathers*, 68 Miss. 803, 9 So. 821, 13 L. R. A. 600n; *Blackmer v. Cleveland &c. R. Co.*, 101 Mo. App. 557, 73 S. W. 913; *Avinger v. South Carolina R. Co.*, 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716; *Mills v. Southern Ry.*, 90 S. Car. 366, 73 S. E. 772.

⁷¹ *Illinois Cent. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663, 16 So. 252. See also *Mayfield v. Southern R. Co.*, 84 S. Car. 393, 66 S. E. 405.

⁷² *Louisville &c. R. Co. v. Gidley*, 119 Ala. 523, 24 So. 753 (connecting carrier); *Illinois &c. R. Co. v. Cobb*, 72 Ill. 148, 154 (injury to grain and effect of bill of lading);

Baltimore &c. R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643 (delay, etc.); *Derosia v. Winona &c. R. Co.*, 18 Minn. 142 (when liability of carrier ceases and that of warehouseman begins; but compare *Independence Mills Co. v. Burlington &c. R. Co.*, 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258; *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604, 1 So. 765 (reasonable time to carry and deliver); *Wolf v. American Exp. Co.*, 43 Mo. 421, 423, 97 Am. Dec. 406 (injury to wine by freezing); *Kirkpatrick v. Kansas City &c. R. Co.*, 86 Mo. 341 (destruction of grain in hands of carrier sold to plaintiff in transit); *Gulf &c. Ry. Co. v. Brackett &c. Mill &c. Co.* (Tex. Civ. App.), 162 S. W. 1191 (connecting carrier), and see *Wabash*

cases are considered in which instructions as to some particular phase of the general subject, or some peculiar question, were involved. These, and other cases cited, will also serve to show the application of general rules and principles already considered.

§ 2765. **Instructions—Failure to furnish cars.**—A charge approved on appeal in an action for damages for failure to furnish an adequate supply of cars is as follows: (1) “The court instructs the jury that it was the duty of defendant at the times complained of to provide and maintain reasonably adequate and sufficient facilities—that is, cars—for the transportation of all coal which might ordinarily be expected to seek transportation along its line of road, including plaintiff’s coal in question; and that it was also the duty of defendant to use reasonable care and diligence to furnish cars to plaintiff at its mine when requested or demanded by it for the transportation of the coal then being mined and shipped by plaintiff over defendant’s road, but defendant was entitled to be given reasonable notice by plaintiff prior to the time or times said cars were needed to be furnished for the transportation of plaintiff’s coal at the time or times in question. So, if you shall believe from the evidence that plaintiff at the times, or either one or more of them, in the month of -----, -----, as complained of and mentioned in evidence, requested or demanded of defendant or its authorized agent to furnish and place at its mine any car or cars in which to load and transport plaintiff’s coal, then being mined, if it was, and shall further believe from the evidence that defendant failed or refused to furnish and place said car or cars at said mine at

R. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641; St. Louis &c. R. Co. v. Cates, 15 Tex. Civ. App. 135, 38 S. W. 648 (damages). As to live stock, in addition to cases cited in subsequent sections, see Dunn v. Hannibal &c. R. Co., 68 Mo. 270, 271; Richmond &c. R. Co. v. Trousdale, 99 Ala. 389, 13 So. 23, 42 Am. St. 69; Toledo &c. R. Co. v. Lock-

hart, 71 Ill. 627; McCollom v. Indianapolis &c. R. Co., 94 Ill. 534; Kansas City &c. R. Co. v. Simpson, 30 Kans. 645, 2 Pac. 821, 46 Am. R. 104; Bills v. New York &c. R. Co., 84 N. Y. 5; Missouri &c. R. Co. v. Chittim, 24 Tex. Civ. App. 599, 60 S. W. 284; Norfolk &c. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606.

said time or times when needed, although defendant had reasonable time in which to do so, if it did, after notice was given it or its said agent, if any was given, that said car or cars were so needed, and if you shall further believe from the evidence that such failure or refusal, if any, was due to inadequate or insufficient supply of cars provided and maintained by the defendant for transportation of such coal as might have been reasonably expected to seek transportation over its line as above required, or if it was due and occasioned by reason of the failure, if any, of defendant's employe or employes in charge thereof to use reasonable care and diligence to furnish and place said cars at the time or times needed and demanded upon reasonable notice, if any, as above required, and if by reason and on account of either of such failure, if any there was, plaintiff was unable to run its mine or transport its coal, and thereby sustained a loss in its profits, or was compelled to and did expend money in maintaining its plant while idle, if any, then in that event you should find for the plaintiff and award to it such an amount or amounts as will fairly and reasonably compensate for such loss, if any, so sustained and which was the direct and proximate result thereof, the measure of recovery being the reasonable difference, if any, in what it actually cost plaintiff to mine and place said coal on the market (plus the value of the coal in the mine), and what it could have reasonably sold it for, on such coal as plaintiff could have reasonably mined and sold at said time or times, and also the actual expenses incurred in wages paid out and for the reasonable cost of the fuel used to maintain a said plant by plaintiff at said time or times while so remaining idle, if any, on account thereof, not exceeding upon the whole the sum of \$---, but, unless you should so find and believe from the evidence as above required, you must find for the defendant.

(2) The court instructs the jury that the defendant was not required to anticipate an abnormal demand for cars, or an unprecedented or unexpected press of business and to keep cars to meet such contingency, so if you shall believe from the evidence that defendant provided and maintained at the times in question a reasonably adequate or sufficient number of cars for the handling and transportation of coal which might have been reasonably

expected to seek transportation along its lines, including plaintiff, and if you shall also believe from the evidence that defendant or its agents in charge thereof used reasonable care and diligence to furnish cars to plaintiff, and did, without preference or discrimination, furnish same to plaintiff, if it did so, at its mine after being notified a reasonable time before the said time or times, if it was, then in that event you should find for the defendant.⁷³

§ 2766. (1744.) Instructions—Delay in transportation of goods.—An instruction making it the duty of a railroad company to carry goods to their destination within a reasonable time and give the consignee notice, in accordance with the terms of the contract, is erroneous, in an action for damages to the goods caused by the carrier's failure to promptly notify the shipper of the refusal of the consignee to accept the goods, where it is neither alleged nor proved that the goods were not transported within a reasonable time, nor that the consignee was not given notice of arrival.⁷⁴ In an action for injuries to stock delivered to a railroad company for shipment at 2 P. M. Saturday, and not shipped until 6 P. M. the following Monday because there was no Sunday train run on the road, an instruction that in considering the question whether the carrier failed to transport the goods within a reasonable time the railroad company can not be charged with negligence for failure to transport the goods on Sunday if the carrier did not run a freight train on its line on that day, was held not objectionable as being on the weight of the evidence, nor as presenting a hypothetical issue, nor as laying undue stress on a question not in issue.⁷⁵ In the same case on appeal to the Supreme Court, however, it was held that the court should not refuse an instruction that the jury should find for the plaintiff if the defendant negligently failed to ship the

⁷³ Illinois Cent. R. Co. v. River &c. Coal &c. Co., 150 Ky. 489, 150 S. W. 641, 44 L. R. A. (N. S.) 643n, Ann. Cas. 1914C, 1255n, also approved and given in Branson's Instructions, § 255.

⁷⁴ Missouri &c. R. Co. v. Jenkins, 35 Tex. Civ. App. 429, 80 S. W. 428.

⁷⁵ Belcher v. Missouri &c. R. Co. (Tex. Civ. App.), 47 S. W. 384, 1020.

goods on the day it received them for transportation, and the delay in transportation would not have occurred but for such negligence, if the other issues are found in the plaintiff's favor;⁷⁶ but in such case it was error to charge that the jury should determine whether the carrier was negligent in not transporting the goods within a reasonable time, taking into consideration that the carrier was not bound to run its freight train on Sunday if it ran no freight trains over its line on that day, as it might cause the jury to believe that the carrier was not bound to transport the goods until the following Monday, the plaintiff being entitled to have the jury instructed on the facts proved and their minds directed to the circumstances on which plaintiff relied.⁷⁷ In an action for damages to ferns by freezing, because of the carrier's negligent delay in transportation and delivery, the court properly left the question as to when the freezing took place to the jury, and properly refused to instruct that if the jury believed that by usual dispatch the plants would have reached their destination on the morning of February 23d, and that the coldest weather after the shipment occurred in the twelve hours preceding the morning of the twenty-third, then there is no evidence that the plants were injured because of the long time occupied in transportation.⁷⁸ Where the court instructed the jury on the question of negligence of the carrier in failing to ship goods within a reasonable time, which were received for shipment at 2 P. M. Saturday and were not shipped until 6 P. M. the following Monday, it was held that an instruction to find for the shipper if the carrier was negligent in not shipping the goods Saturday, need not be given.⁷⁹

§ 2767. (1745.) Instructions—Delay in shipment of live stock because of failure to furnish cars.—Where an action is based on the negligence of the carrier in failing to furnish cars,

⁷⁶ *Belcher v. Missouri &c. R. Co.*, 92 Tex. 593, 50 S. W. 559, reversing 47 S. W. 1020.

⁷⁷ *Belcher v. Missouri &c. R. Co.*, 92 Tex. 593, 50 S. W. 559, reversing 47 S. W. 1020.

⁷⁸ *Siebrecht v. Pennsylvania R. Co.*, 21 Misc. 615, 48 N. Y. S. 3, affirming 20 Misc. 730, 46 N. Y. S. 1100.

⁷⁹ *Belcher v. Missouri &c. R. Co.* (Tex. Civ. App.), 47 S. W. 384.

and not upon the statute, an instruction in an action for damages for loss of weight and deterioration in the market value of cattle, which directs the jury to ignore rush of business on the road and scarcity of cars, which the defendants set up in defense, is erroneous;⁸⁰ but an instruction that if the carrier failed to furnish cars within a reasonable time, and the shipper tendered his cattle on a certain day and the carrier refused to receive them on account of the scarcity of cars, whereby the shipper was compelled to hold his cattle, to his injury, he may recover, is not erroneous as assuming that the time between plaintiff's request for cars and the tendering of his cattle was a reasonable time in which to obtain cars, when construed in connection with another instruction that if the defendant was not negligent in its failure to furnish cars when plaintiff tendered his cattle, the jury should find for the defendant.⁸¹ In view of an instruction that if the carrier was not negligent in failing to furnish cars when plaintiff tendered his cattle the jury should find for the defendant, an instruction that if the carrier failed to furnish cars within a reasonable time and the shipper tendered his cattle at a certain time, and the carrier refused to receive them because it had no cars, whereby the shipper was compelled to hold his cattle to his injury, the carrier is liable for the damage, is not erroneous as assuming that the time between the shipper's request for cars and the tendering of his cattle was a reasonable time in which to obtain cars.⁸² Where a shipper of cattle sues several carriers for delay in shipment because of the initial carrier's failure to furnish cars within a reasonable time and consequent loss by decline in the market, an instruction should be refused which exempts the initial carrier from liability if by the use of ordinary diligence by the connecting carriers the cattle would have reached the market before decline in the market

⁸⁰ *Texas &c. R. Co. v. Nelson*, 38 Tex. Civ. App. 605, 86 S. W. 616. An instruction relating to the carrier's absolute refusal to furnish transportation should not be given where the evidence relates only to delay in furnishing transportation.

Illinois Cent. R. Co. v. Bundy, 97 Ill. App. 202.

⁸¹ *Texas &c. R. Co. v. Powell*, 34 Tex. Civ. App. 575, 79 S. W. 86.

⁸² *Texas &c. R. Co. v. Powell*, 34 Tex. Civ. App. 575, 79 S. W. 86.

price;⁸³ and where a shipper is damaged merely by delay in furnishing transportation for live stock, an instruction is erroneous which predicates recovery on the failure and refusal of the carrier to furnish transportation.⁸⁴ An instruction that in determining what is a reasonable time within which to furnish cars for shipment of stock, the jury may take into consideration the weather and the unusual rush of business, if any, is not erroneous;⁸⁵ nor is it error to refuse a charge in an action for damages caused by delay in furnishing cars, that the carrier could not receive the stock for shipment until they had been inspected, where there is no evidence that the failure of the carrier to receive the stock was due to lack of inspection, but it does appear that it would not have received them sooner than it did if they had been inspected, and that the shipper was ready to have them inspected when the carrier would receive them.⁸⁶ Where a complaint is based on breach of contract to transport cattle promptly on a certain day, and the answer charges the delay to the failure of the shipper to have his cattle inspected on that day, as required by law, and the plaintiff replied that he was ready to have them inspected on the evening of that day, but did not do so because he was informed by the defendant's agent that they could not be shipped that night, and the only issue except the amount of damages was whether the plaintiff was so notified, the court should not submit the case to the jury by instructing that if there was no agreement for immediate shipment the carrier would nevertheless be liable for any delay in transportation, and that they should determine whether there was such delay, as it deprived the carrier of the defense of non-inspection.⁸⁷ An instruction that the law makes it the duty of the carrier to feed and water live stock during transportation, and that its liability begins when the shipper has done all that is required of him in preparing his stock for shipment and de-

⁸³ Texas &c. R. Co. v. Smith & White, 34 Tex. Civ. App. 571, 79 S. W. 614.

⁸⁴ Illinois Cent. R. Co. v. Bundy, 97 Ill. App. 202.

⁸⁵ Pecos &c. R. Co. v. Evans-

Snider-Buel Co., 100 Tex. Civ. App. 190, 97 S. W. 466.

⁸⁶ Gulf &c. R. Co. v. Terry & McAfee (Tex.), 89 S. W. 792.

⁸⁷ Galveston &c. R. Co. v. Rutledge (Tex.), 37 S. W. 176.

livery of them to the carrier, is erroneous, where the shipper has undertaken to feed and water his stock, and they were damaged by failure of the carrier to furnish cars within a reasonable time and because there was no water or feed at the place where they were taken for shipment.⁸⁸ The court may properly refuse to instruct, in an action for breach of contract to furnish cars for shipment of stock, that if the damage to the stock was contributed to by the poor and weak condition of the stock independent of any other cause, the carrier is not liable for damages caused by such condition of the cattle, as it is misleading.⁸⁹ Where a railroad company agreed to furnish cars to a shipper of stock at a certain hour on a certain day, so that the stock could reach market on a certain day, but the cars were furnished a day late, and the shipper was compelled to hold his stock overnight in a crowded pen, to their damage, and the market declined before the stock reached it, on account of the delay, it has been held that instructions are not erroneous which direct the jury to allow damages caused by the stock being confined in the pens and for failure to reach the market before decline in price.⁹⁰ And the court may properly charge, in an action for failure to furnish cars as the carrier agreed to do, that if the day in question was the best sale day and the shipper desired his cattle to be at the market on that day, which was in contemplation of both parties when the contract was made, the shipper is entitled to such special damages as resulted from the delay.⁹¹

§ 2768. Approved instruction—Delay caused by failure to furnish suitable car.—In an action for damages for unreasonable delay caused by failure to furnish a safe and suitable car for transportation of live stock the following instruction was approved: The court instructs the jury that if they believe from the evidence that the defendant failed to exercise reasonable care to furnish plaintiffs with a car safe and suitable for the transpor-

⁸⁸ *St. Louis &c. R. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673.

⁸⁹ *Pecos River R. Co. v. Latham* (Tex. Civ. App.), 88 S. W. 392.

⁹⁰ *San Antonio &c. R. Co. v. Pratt*, 89 Tex. 310, 34 S. W. 445.

⁹¹ *Hamilton v. Western &c. R. Co.*, 96 N. Car. 398, 3 S. E. 164.

tation of their stock from L. to S. B., and that by reason of such failure a car was furnished which was unsuitable or unsafe for the transportation of said stock from L. to S. B., and that by reason of the unsafe or unsuitable condition of said car it was detained at C. for repairs, and that by reason of said detention or by reason of any delays on the route resulting from said detention at C., plaintiff's stock was unreasonably delayed in their transportation from L. to S. B., the jury should find for the plaintiffs.⁹²

§ 2769. (1746.) Instructions—Delay in transportation of live stock.—An instruction making it the duty of the carrier to transport stock with diligence and within a reasonable time without delay, and authorizing recovery for negligence in detaining the stock an unreasonable time is not erroneous.⁹³ Neither is an instruction erroneous which makes it the duty of the carrier to transport stock with such dispatch as was reasonably necessary,

⁹² *Adams Exp. Co. v. Hundley*, 145 Ky. 7, 139 S. W. 1084. Also approved and given in *Branson's Instructions*, § 256. See also for instruction holding initial carrier liable for damages for injuries caused by the failure to furnish safe and suitable car. *Fuller v. Chicago & Ry. Co.*, 99 Nebr. 611, 157 N. W. 332.

⁹³ *Glasscock v. Chicago & R. Co.*, 86 Mo. App. 114; *St. Louis & R. Co. v. Hunt* (Tex.), 81 S. W. 322; *Baltimore & R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033. The use of the words "proper time" in an instruction in an action for unnecessary time in shipment of stock, is not erroneous when they can only be understood to mean "reasonable time" when considered in the light of the context. *Missouri & R. Co. v. Stanfield*, 40 Tex. Civ. App. 385, 90 S. W. 517. Since only reasonable diligence in

the transportation of stock is required, an instruction that the carrier must transport stock to their destination in as safe and speedy a way as possible, is erroneous. *International & R. Co. v. Young* (Tex.), 72 S. W. 68. In action for delay in transportation of cattle where it appears that it took seventy hours to make the trip, which was ordinarily made in thirty-six and two-fifth hours, it was proper for the court to charge that where the carrier undertakes to transport property and delay is caused by an accident which does not ordinarily happen to those who use proper care, it constitutes reasonable evidence, in the absence of satisfactory explanation by the carrier, that the accident occurred from want of care. *Northern Pac. R. Co. v. Kempton*, 138 Fed. 992.

since delays which were reasonable under the circumstances are impliedly to be taken into consideration.⁹⁴ It has been held that if two contracts for transportation are pleaded, and the facts pleaded authorize recovery on the carrier's common-law liability, the right of recovery should not be confined to a particular contract.⁹⁵ The right given railroad companies by a Texas statute, to regulate the time and manner of transporting passengers and property, does not authorize an instruction in an action for delay in transportation of live stock, that the carrier has the right to regulate the time to be occupied in the transportation of stock between given points, and that the legal presumption is that the time fixed by the railroad company is a reasonable one.⁹⁶ Where a number of car loads of cattle were delayed for more than five hours after being unloaded for feed and rest, the only excuse being that no regular train went out during such time, an instruction that delay on account of the carrier's regular train for

⁹⁴ St. Louis &c. R. Co. v. Hunt (Tex.), 81 S. W. 322. An instruction in an action for delay in transportation of cattle, that the carrier is liable only in case the delay was both unnecessary and unreasonable has been held erroneous, since unreasonable delay alone would render the carrier liable. Rogers v. Texas &c. R. Co. (Tex.), 94 S. W. 158. An instruction that the only duty a carrier owes the shipper is to carry the stock with reasonable diligence and avoid unnecessary delay was properly refused where negligence was charged in different counts, for failure to furnish cars, and for negligence in transportation and delivery. Baltimore &c. R. Co. v. Whitehill, 104 Md. 295, 64 Atl. 1033. It being shown that cattle injured each other in the car while the train was standing, an instruction that before the plain-

tiff can recover therefor he must show that the train was standing an unusual length of time, as a result of the carrier's negligence, during which time the injury occurred, and it was the cause thereof, is not erroneous as rendering the carrier liable without reference to its negligence. Texas &c. R. Co. v. Fambrough (Tex.), 55 S. W. 188. For instruction held not to be erroneous in stating the elements to be considered in determining what was a reasonable time for filing claim for damages, see Cleveland &c. R. Co. v. Hayes, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839.

⁹⁵ St. Louis &c. R. Co. v. Barnes (Tex.), 72 S. W. 1041.

⁹⁶ Texas &c. R. Co. v. Currie, 33 Tex. Civ. App. 277, 76 S. W. 810. The statute in question was Sayles Ann. Civ. Stat. 1897, art. 4484.

an unreasonable time without reasonable excuse was not justifiable, was not erroneous.⁹⁷ In an action for a railroad company's negligence and delay in the transportation of horses, an instruction that if the shipper failed to feed them on delivery to the carrier, on account of being informed by the carrier that the train would leave with them at a certain time, the shipper's failure to do so would not be negligence, is erroneous, as invading the province of the jury.⁹⁸ And an instruction that the carrier is not liable for delay in the transportation of horses caused by their arrival after the departure of the train on the defendant's connecting line, if they were forwarded by the next regular train, has been held erroneous as relieving the defendant from liability regardless of its facilities for avoiding delay.⁹⁹ But, in an action for delay in the transportation of twelve cars of stock, where the testimony shows that ten cars and upward constitute a trainload,

⁹⁷ *St. Louis &c. R. Co. v. Gunter*, 44 Tex. Civ. App. 480, 99 S. W. 152. An instruction in an action for delay in the transportation of cattle, that the shipper was not entitled to damages because of the unloading of the cattle, was properly refused as eliminating the time they were detained, in determining the reasonableness of the time required to make the trip, where the cattle were unloaded at an intermediate point after a run of 17 hours and were detained 23 hours. *Gulf &c. R. Co. v. Beattie (Tex.)*, 88 S. W. 367. Where, in an action for damages caused by delay in the transportation of cattle by a carrier unloading them at an intermediate station for feed, water and rest, the issue pleaded by the carrier that the unloading of the cattle did not constitute negligence, was submitted by a special charge tendered by the carrier and the charge throughout authorized recovery

only in the event there was negligence proximately resulting in injury, it was not error to refuse an instruction offered by the carrier that if by the unloading and watering the cattle they were strengthened and benefited and better able to undergo the rest of the journey there would be no liability for such delay, although a prudent and careful person under such circumstances would not have unloaded the cattle.

⁹⁸ *Mobile &c. R. Co. v. Mullins*, 70 Miss. 730, 12 So. 826. Whether delay in the shipment of stock was reasonable is a mixed question of law and fact for the jury and the court should refuse to charge on the issue whether the stock were confined in the cars an unreasonable time. *Louisville &c. R. Co. v. Smitha*, 145 Ala. 686, 40 So. 117.

⁹⁹ *Galveston &c. R. Co. v. Tuckett (Tex.)*, 25 S. W. 150.

and that in such case it is customary for the railroad company to furnish independent power for the trains, and that plaintiff's shipment consisted of twelve cars, the court may properly instruct the jury that they may consider evidence relating to the question whether the stock being transported in quantities greater than in car loads should be transported by train provided with special motive power.¹ Where a stock car was delayed for more than a day beyond its schedule time, the court properly refused to instruct, in an action for damages from delay, that the railroad company was not required to transport the stock cars in its fast train, since it would be misleading.² An instruction in an action against connecting carriers, which states that the jury may apportion the whole amount of damages among the defendants according to and in proportion to their respective liability as indicated by instructions given, does not permit the jury to fix the liability of each carrier without regard to the evidence.³ In an action for delay in delivery of cattle to a connecting carrier, the court properly refused to instruct that the defendant was not liable if the delay was only such as was necessary to comply with § 4386 of the Revised Statutes of the United States, requiring cattle to be unloaded for feed, water and rest once every twenty-eight hours, unless the cars are provided with such facilities, where there was a delay of eleven hours after being en route fourteen hours, and the cars were provided with facilities for feeding and watering, and but for such delay they would have arrived in time, even if they had been unloaded for feed, water and rest.⁴ An instruction in an action for injuries to stock in transit, authorizing a verdict for the defendant if it used ordinary care to transport the stock with reasonable dispatch, but ignoring the question whether the stock were carefully unloaded, by the carrier during transportation, has been held er-

¹ Northern Pac. R. Co. v. Kempton, 138 Fed. 992.

² Louisville &c. R. Co. v. Smitha, 145 Ala. 686, 40 So. 117.

³ Gulf &c. R. Co. v. Cushney, 95 Tex. 309, 67 S. W. 77; Houston &c. R. Co. v. Scott, 99 Tex. 326, 89 S.

W. 763; Northern Pac. R. Co. v. Kempton, 138 Fed. 992.

⁴ Missouri Pac. R. Co. v. Hall, 66 Fed. 868, 32 U. S. App. 60. Time has been extended to thirty-six hours by later act.

erroneous.⁵ Where a shipper of cattle sues for damages for delay and rough handling, an instruction which ignores the issue of delay and rough handling of the cattle en route should be refused,⁶ and the court should refuse an instruction where the evidence justifies the finding of unreasonable delay, that if the stock were transported by the defendant without unnecessary rough handling the carrier was not liable for injuries to them.⁷ An instruction that injury to cattle by rough handling, if done in the usual and customary manner, does not render the carrier liable, has also been held erroneous.⁸ In an action for delay in transportation and rough treatment of cattle, it has likewise been held that the court may properly refuse to charge that if death or injury to the cattle was contributed to by their condition, such damages should be excluded, as the carrier was bound to transport them with reasonable diligence and care whatever their condition;⁹ and in such case if neither the plea nor the evidence raises the issue that the damage was caused by the bad condition of the tracks, such question should not be submitted to the jury.¹⁰

§ 2770. (1747.) Instructions—Loss or injury to live stock during transportation.—An instruction defining negligence to be

⁵ St. Louis Southwestern R. Co. v. Lovelady, 36 Tex. Civ. App. 282, 81 S. W. 1040.

⁶ Ft. Worth &c. R. Co. v. Alexander, 36 Tex. Civ. App. 297, 81 S. W. 1015.

⁷ Louisville &c. R. Co. v. Smitha, 145 Ala. 686, 40 So. 117.

⁸ Chicago &c. R. Co. v. Carroll, 36 Tex. Civ. App. 359, 81 S. W. 1020. In an action for injury to horses by delay in transportation and for rough handling, an instruction that the burden was on the plaintiff to show that there was an "established market" value for the horses at their destination is misleading because of the use of the word "established." St. Louis &c.

R. Co. v. Berry, 42 Tex. Civ. App. 470, 93 S. W. 1107. An erroneous instruction in an action for damage to stock during transportation, that the shipper may recover for damages resulting from rough handling is not cured by another instruction making recovery to depend on the negligence of the carrier, since rough handling is not necessarily included in the term "negligence." Ft. Worth &c. R. Co. v. James, 39 Tex. Civ. App. 408, 87 S. W. 730.

⁹ Texas &c. R. Co. v. Dawson, 34 Tex. Civ. App. 240, 78 S. W. 235.

¹⁰ St. Louis &c. R. Co. v. Carlisle, 34 Tex. Civ. App. 268, 78 S. W. 553.

"the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done," is not erroneous in the use of the words "reasonable and prudent," instead of the words "reasonably prudent."¹¹ But an instruction which imposes on the plaintiff in an action for injury to live stock the burden of disproving contributory negligence has been held erroneous.¹² Where a shipper of cattle was to care for and load and unload them, an instruction that injury to the cattle during shipment raises the presumption of negligence on the part of the carrier, should be qualified by a statement excepting injuries resulting from the vice of the animals or the negligence of the shipper.¹³ An instruction that if the jury believe from the evidence that the defendants or either of them negligently caused or permitted the cars containing plaintiff's cattle to be bumped together or used in switching, and that the alleged injuries were caused by such negligence, plaintiff is entitled to recover is not erroneous on the theory that it authorizes a verdict for the plaintiff irrespective of negligence.¹⁴ And where the court in its instruction on the

¹¹ St. Louis &c. R. Co. v. Smith, 33 Tex. Civ. App. 520, 77 S. W. 28.

¹² The instruction made it a prerequisite to recovery by the plaintiff that the jury believe that the injury was caused by the fault of the defendant without fault or negligence on the part of the plaintiff. St. Louis &c. R. Co. v. Berry, 42 Tex. Civ. App. 470, 93 S. W. 1107. An instruction was properly refused as misleading, that if the injury or loss was caused by the concurrent negligence of the plaintiff and the defendant the plaintiff cannot recover, and if the damage was caused by the mistake of the depot clerk in taking the plaintiff's telephone message, and the plaintiff was negligent in undertaking to

communicate with the clerk by phone, the plaintiff cannot recover. Southern R. Co. v. Forgey, 105 Va. 599, 54 S. E. 477.

¹³ Norfolk &c. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606. An instruction that the carrier is liable unless the injuries to the stock were caused by the act of God, the public enemy, negligence of the shipper, or the vicious propensities of the stock is erroneous, as it imposes on the carrier too high a degree of care, only ordinary care being required. Ft. Worth &c. R. Co. v. Lock, 30 Tex. Civ. App. 426, 70 S. W. 456.

¹⁴ Houston &c. R. Co. v. Kothmann, 37 Tex. Civ. App. 548, 84 S. W. 1089.

carrier's common-law liability treated the carrier as an insurer of the animals carried by it against loss or injury, except loss or injury arising from the act of God or the public enemy, and the evidence tended to show that the loss must have resulted from the intrinsic qualities of the animals, a further exception should have been added relieving the carrier from liability for injury resulting from the nature and propensities of the animals which could not have been prevented by ordinary diligence by the carrier.¹⁵ An instruction that the carrier's responsibility for live stock transported by it exists from the time the stock are received by it until they reach their destination is not erroneous as holding the carrier absolutely liable without regard to the defenses set up by the carrier.¹⁶ Unless the plaintiff alleged notice that stock were being shipped for a particular market it is proper to charge that the carrier does not guarantee the delivery of the stock on any particular market day.¹⁷ And in an action for the death of hogs transported by the defendant, an instruction on the carrier's common-law liability is proper, where the plaintiff testified that the shipment was made under an oral contract which contained no limitation of liability, and the defendant offered testimony to show that the shipment was under a written contract limiting its liability.¹⁸ An instruction limiting the carrier's liability to that fixed by special contract has

¹⁵ *St. Louis &c. R. Co. v. Clark*, 48 Kans. 321, 29 Pac. 312. The court should not charge, in an action for negligent injury of stock, that damages must be assessed for injuries necessarily received by the stock in transit, regardless of the carrier's negligence, since it is calculated to mislead the jury. *St. Louis Southwestern R. Co. v. Smith*, 33 Tex. Civ. App. 520, 77 S. W. 28. The court should refuse to instruct that the evidence must show the exact number of cattle injured and killed in each of several different grades before the plaintiff

can recover, where there is evidence from which the jury can determine the number of killed and injured cattle in each grade. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

¹⁶ *McCollom v. Indianapolis &c. R. Co.*, 94 Ill. 534.

¹⁷ *Norfolk &c. R. Co. v. Reeves*, 97 Va. 284, 33 S. E. 606.

¹⁸ *St. Louis &c. R. Co. v. Clark*, 48 Kans. 321, 29 Pac. 312. See also *St. Louis & Southwestern R. Co. v. Barnes (Tex.)*, 72 S. W. 1041.

been held erroneous if the damage is due to negligence of the carrier;¹⁹ but it is proper to instruct that if the rate charged was the only rate given to the shipper it was not a reduced rate, where the evidence shows that the shipper was charged the regular schedule rate.²⁰ Where, however, stock was shipped under a valid special contract limiting the carrier's common-law liability, it is error to instruct that nothing will relieve the carrier from liability but the act of God, a public enemy, or the conduct of the shipper.²¹ Where a shipper had applied for the same reduced rate on stock that he had theretofore received, but when the shipment was ready he objected to the written contract tendered by the carrier's clerk for signature, because the valuation of the stock was much less than its true value, and on being told by the clerk that it was merely a form, whereupon the shipper executed the contract, it was held that an instruction in an action for injury to the stock because of the carrier's negligence, that the shipper was bound by the limitation in the contract was proper, since the elements of duress and fraud did not enter into the contract.²² Where, under a special contract, the shipper was to load and unload his cattle at his own risk, in consideration of a lower rate, the court properly instructed that if the shipper, without notice to the carrier, undertook to unload the cattle before daylight, and in so doing used a chute that he knew was defective, he was guilty of negligence and can not recover.²³ If a shipment of stock is made under a contract containing exceptions to the carrier's liability, it has been held error for the court to instruct the jury that the carrier has the burden of proving that the loss occurred under circumstances which bring it within an excep-

¹⁹ The contract provided that in case of unusual delay the amount actually expended by the shipper in feed and water for the stock shall be full compensation for the loss or damage sustained in consequence of delay. *Botts v. Wabash R. Co.*, 106 Mo. App. 397, 80 S. W. 976

²⁰ *Bowring v. Wabash R. Co.*, 90 Mo. App. 324.

²¹ *Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418, 13 So. 698.

²² *Jennings v. Smith*, 106 Fed 139.

²³ *Candee v. New York & C. R. Co.*, 73 Conn 667, 49 Atl 17.

tion of the bill of lading²⁴ Where a shipper sues for damages to his cattle caused by shipment by a longer route than that desired by the shipper, the court should instruct on the issue whether the shipper was bound by a written contract of shipment providing that the cattle should be shipped by the route taken, if there is evidence bearing thereon;²⁵ but the issue of increased damage because of shipment over a longer route than that selected by the shipper should not be submitted to the jury, unless there is evidence of increased damage by such shipment.²⁶ The court should not instruct that injury to the stock must be permanent before the shipper can recover damages therefor,²⁷ but the court should not refuse to instruct that the carrier is not liable for any shrinkage in cattle due to the defendant having watered them just before putting them in the carrier's hands for shipment, where the carrier introduced evidence on such issue, and the shipper claims damage because the cattle were stampeded by the negligence of the carrier just prior to being loaded.²⁸ If there is a conflict in the evidence as to whether the agents of the owner of a horse or the agents of the carrier had charge of him when he was injured, the court should not charge that if the servants of the shipper refused to obey the agents of the carrier in regard to shipment, the latter would, notwithstanding, be chargeable with the injury, and that it was the duty of the agents of the carrier to refuse to transport the horse if they could not control the servants of the shipper.²⁹ An instruction need not be given as to the effect of an agreement of the shipper to care for stock during shipment, if the shipper was not given opportunity to care for them.³⁰

²⁴ Mitchell v. Carolina Cent. R. Co., 124 N. Car. 236, 32 S. E. 671, 44 L. R. A. 515.

²⁵ Houston &c. R. Co. v. Buchanan, 38 Tex. Civ. App. 165, 84 S. W. 1073.

²⁶ Gulf &c. R. Co. v. Irvine & Woods (Tex. Civ. App.), 73 S. W. 540.

²⁷ Gulf &c. R. Co. v. Simmons (Tex.), 28 S. W. 825.

²⁸ Gulf &c. R. Co. v. Wilm, 9 Tex. Civ. App. 161, 28 S. W. 925.

²⁹ Bowie v. Baltimore &c. R. Co., 1 Mac Arthur (D. C.) 94.

³⁰ Gulf &c. R. Co. v. Dunn (Tex.), 78 S. W. 1080.

§ 2771. Approved instruction—Failure to take proper care of live stock during transportation.—The following instructions were approved in comparatively recent cases: (1) The court instructs the jury that if you believe from the evidence in this case that the cattle shipped by plaintiffs were delayed for an unreasonable time in the pens of defendant at ----, and that any of the cars transporting same were not bedded or were improperly bedded, and that said cars or any of them were in bad repair, and that defendant failed to exercise ordinary care in transporting and handling the cattle while in transit, and that such acts, or either of them, if any, was occasioned by negligence, as herein defined, and as the direct and proximate cause of such acts or either of them, ---- head of cattle was killed or died in transit, and ---- other head afterwards died, then you are instructed to find for the plaintiffs the reasonable market value of the cattle so dead or died, at the time at ----, ----. (2) The court instructs the jury that if you find that the train was at any time left standing while en route, and the cattle injured themselves by fighting and moving about, then, in order for plaintiffs to recover for injuries sustained by the cattle by fighting and moving about while the train was standing, it devolves upon the plaintiffs to show that the train was standing an unusual length of time, and that the train was standing by reason of the negligence of the defendant or its agents, and that the cattle would not have been so injured but for such negligence, and that the acts of the cattle were such as are the ordinary acts of cattle under the same circumstances, and that the defendant and its agents knew of such actions of cattle, or could have known by ordinary care and diligence; and, if you fail to so find in this case, the plaintiffs cannot recover for injuries received by the cattle in fighting and moving about.⁸¹

§ 2772 (1748). Instructions—Injury from failure to feed and water stock.—Under a contract of shipment imposing the risk

⁸¹ *Gulf &c. R. Co. v. Brock* (Tex. 55 S. W. 188. Also approved and Civ. App.), 150 S. W. 488; Texas given in *Branson's Instructions, &c. R. Co. v. Fambrough* (Tex.), § 258.

and expense of feeding and watering live stock on the shipper, where the evidence shows that there was no water in the pens, and the shipper did not ask that water be furnished, an instruction that the plaintiff could not recover damages sustained by the stock by failure to feed and water them while in the pens awaiting shipment, is not erroneous.³² Nor, on the other hand, is an instruction erroneous which authorizes recovery by the plaintiff for the injuries to his cattle, if one of the carriers failed to afford him an opportunity to feed and water the stock at a certain place, where it appears that the stock would have been watered and fed at such place if suitable pens and facilities had been provided.³³ And where a shipper of cattle sued a railroad company for damages to his cattle in the course of shipment for failure of the carrier to feed and water them, an instruction that the plaintiff is entitled to recover if the carrier failed to deliver the stock according to contract, and if when delivered the cattle were in bad condition, damaged and depreciated in value, was held not objectionable as authorizing damages on an issue not raised by the pleadings.³⁴ An instruction which confines negligence in feeding and watering stock to one station is not erroneous where it appears that the only attempt made and the only opportunity given to water the stock was at such station.³⁵ Nor is an instruction objectionable as leaving it to the jury to determine the binding force of the contract of shipment which states that it was the defendant's duty to afford the shipper facilities for unloading and feeding his stock, if by so doing the train would not have been delayed, and leaving it to the jury to determine whether the carrier had performed such duty.³⁶ But it was held that the court properly refused an instruction in an action for negligence of the carrier in feeding and watering stock, which stated that neither of the defendants could be held liable

³² St. Louis &c. R. Co. v. Hunt (Tex.), 81 S. W. 322.

³³ Texas &c. R. Co. v. Byers Bros. (Tex.), 84 S. W. 1087.

³⁴ Taylor &c. R. Co. v. Montgomery, 4 Willson Civ. Cas. Ct. App. § 238 (Tex.), 16 S. W. 178;

Taylor &c. R. Co. v. Sublett (Tex.), 16 S. W. 182.

³⁵ Galveston &c. R. Co. v. Thompson (Tex.), 23 S. W. 930.

³⁶ Comer v. Columbia &c. R. Co., 52 S. Car. 36, 29 S. E. 637.

for damages resulting from any acts of negligence on the part of the plaintiff or other parties in charge of or feeding and watering or handling the cattle, since it did not limit negligence to the acts of the plaintiff and his representatives.³⁷ And the court properly refused to instruct that if the cattle were injured or died from the effects of being overheated on account of hot weather the plaintiff can not recover, where the jury had already been instructed that the carrier would not be liable for injuries to the cattle not resulting from its want of care, and there was evidence that the carrier was negligent in feeding and watering the cattle, since it tended to mislead the jury by eliminating the condition of the weather in considering the question of care in providing the cattle with water.³⁸ It is error to charge that the carrier is liable if it omitted to give the shipper an opportunity to feed and water the stock, where the evidence shows that he did not make application therefor,³⁹ and where the contract for shipment required the carrier to provide proper facilities on train and at station for the proper care of stock, an instruction that the finding should be for the carrier if the car of stock was placed at the carrier's pens at the point of destination as soon as could reasonably be done was held erroneous as withdrawing from the consideration of the jury the right that the plaintiff might have to recover because of the conductor's refusal to cut off the car or allow plaintiff to unload the stock at an intermediate station.⁴⁰ So, under a contract providing that the shipper was to feed, water and take care of the stock an instruction that in all cases, except unavoidable delay, accident or collision, the carrier was bound to feed and water the stock was held to be erroneous.⁴¹ So, also, was an instruction that it was the duty of the carrier to feed and water the stock en route, or give the shipper an opportunity to do so, where only about three hours were required to make the shipment, and the

³⁷ Southern Kans. R. Co. v. Crump, 32 Tex. Civ. App. 222, 74 S. W. 335.

³⁸ Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312.

³⁹ Mobile &c. R. Co. v. Francis (Miss.), 9 So. 508.

⁴⁰ Johnson v. Alabama &c. R. Co., 69 Miss. 191, 11 So. 104.

⁴¹ Louisville &c. R. Co. v. Trent, 79 Tenn. (11 Lea.) 82.

shipper made no request that the car be stopped for feeding and watering.⁴² Under the United States statute requiring that in interstate shipments of cattle the cattle shall be fed, watered and rested once every twenty-eight hours, an instruction in action for injuries to cattle thus shipped, that the carrier is required to furnish to persons in charge of the cattle an opportunity to feed, water and rest them upon demand therefor at reasonable and customary time as provided by the Texas statute, was held to be erroneous.⁴³

§ 2773 (1749). Instructions—Injury to and loss of stock because of defective or insufficient pens.—Under a Texas statute requiring railroad companies to erect at every station buildings or enclosures for the protection of freight of every description from exposure to the weather, stock or otherwise, an instruction that railroads are required to erect at every station suitable pens and enclosures to protect cattle that may be delivered for shipment from exposure to the weather, stock and otherwise, was held to be erroneous, since the instruction may have caused the jury to believe that railroad companies are required to provide covered pens, if not warm stalls.⁴⁴ But in an action for the loss of mules transported by the defendant, where the loss was due to the fact that the defendant failed to provide stock pens at a station, it was the duty of the court to instruct, of its own motion, that the escape of the mules would not of itself render the carrier liable for the killing of the mules on the defendant's road if the carrier's agents and employes used ordinary care and diligence to prevent the loss.⁴⁵ Where the court instructed in an action for loss of cattle, that if the defendant's

⁴² Texas &c. R. Co. v. Stribling (Tex. Civ. App.), 34 S. W. 1002.

⁴³ International &c. R. Co. v. Startz, 37 Tex. Civ. App. 51, 82 S. W. 1071. It has been held that an instruction that the carrier may be liable for confinement without food or water and rest for a shorter period than that specified in the fed-

eral statute as the limit is not erroneous in a proper case. Texas &c. Ry. Co. v. McMillen (Tex. Civ. App.), 183 S. W. 773.

⁴⁴ Ft. Worth &c. R. Co. v. Cage Cattle Co. (Tex.), 95 S. W. 705.

⁴⁵ Louisville &c. R. Co. v. Hall, 106 Ga. 786, 32 S. E. 860.

train could not proceed because of a storm and cold weather, and without the shipper's consent the carrier unloaded the cattle and put them into pens insufficient in size and strength to hold them, and they escaped without the fault or negligence of the plaintiff, but because of the carelessness and negligence of the defendant, which resulted in the loss of the stock, the plaintiff is entitled to recover, but that the plaintiffs can not recover if the stock were in charge of one of the plaintiffs, and they were placed in the yards by him, and that the failure of the carrier to place the cattle in a certain part of the pens at the request of the plaintiffs, would not render the carrier liable as a matter of law, but that negligence must be determined from all the facts and circumstances of the case, the instruction being favorable to the defendant, he can not be heard to complain of it, the question of burden of proof and loss by act of God having been considered in other instructions given.⁴⁶ And where a shipper of cattle sues for escape of the cattle from pens of the carrier into which they have been put for shipment, an instruction that the carrier's liability commenced when the cattle were put in its pens and were received by the carrier for shipment, if the carrier knew the cattle were put there for shipment over its road, was held to be erroneous in view of evidence that they were not delivered or accepted for immediate shipment, and that the carrier refused to accept them for shipment until after they were loaded in the cars by the shipper.⁴⁷ An instruction relating to the liability of the carrier where the pens were injured by the derailed car of another road was held irrelevant to the issue under an allegation that the pens were not sufficient to hold the cattle,⁴⁸ but an instruction in an action for escape of stock from pens that the defendant was not liable because of injury to the pens by a derailed car of another road unless the pens were in such position with reference to the other road as to render the act of locating them there negligence, is not out-

⁴⁶ Chapin v. Chicago &c. R. Co.,
79 Iowa 582, 44 N. W. 820.

⁴⁷ Kansas City &c. R. Co. v. Barnett, 69 Ark. 150, 61 S. W. 919.

⁴⁸ Houston &c. R. Co. v. Trammell, 28 Tex. Civ. App. 312, 68 S. W. 716.

side the issue.⁴⁹ An instruction that the carrier should not keep cattle confined in cars for more than twenty-eight consecutive hours without unloading them for feed, water and rest, but if they were delayed in transportation by the carrier beyond that time and the delay beyond such time was unreasonable under the circumstances, the delay was not justified, is not objectionable as holding as a matter of law that the carrier should not have permitted the cattle to remain in the pens more than five hours.⁵⁰

§ 2774. Approved instruction as to stock pens.—The following instructions as to duty and liability in regard to stock pens have been approved: (1) The court instructs the jury that it was the duty of defendant company to maintain about its stock pens at L., Ky., such fence as in the judgment of ordinarily careful and prudent persons would safely and securely hold and confine such stock as might be placed there for loading upon its cars for shipment, and if you shall believe from the evidence that defendant company negligently failed to have and maintain such fence about said pens, and that by reason of such failure plaintiff's three horses escaped therefrom and were injured, you should find for plaintiff and award him in damages the difference between the fair market value of said horses delivered at A., Ga., in the condition they were in when first placed in said pens at L., Ky., and their condition after they were injured by escaping therefrom, not exceeding \$----- (2) The court instructs the jury that if they believe from the evidence that the stock pen in which plaintiff's stock were confined at the time complained of was in a reasonably safe condition—that is, such as a reasonably prudent person would believe sufficient to confine stock under usual and ordinary conditions there—they should find for defendant.⁵¹ And in another

⁴⁹ Houston &c. R. Co. v. Trammell, 28 Tex. Civ. App. 312, 68 S. W. 716.

⁵⁰ St. Louis &c. R. Co. v. Gunter, 44 Tex. Civ. App. 480, 99 S. W. 152.

⁵¹ Louisville &c. R. Co. v. Thompson, 144 Ky. 765, 139 S. W. 939. Also approved and given in Branson's Instructions, § 259

case the court approved the following instruction: The court instructs the jury that it was the duty of the railway company to furnish sufficient stock pens at ----, ----, to load such lots of cattle as were ordinarily tendered at that point for shipment.⁵²

§ 2775 (1750). **Instructions—Bad conditions of stock when received as affecting liability.**—An instruction in action for damages to cattle that the carrier is required to deliver them in as good condition as it received them, and on failure to do so must be responsible for the difference in their value in such condition and their value in the condition in which they were delivered, is not misleading in view of another charge that the carrier is responsible only for injuries traceable to its negligence.⁵³ Where the plaintiff sues for damages to cattle during transportation, and it appears that the cattle were delivered to the carrier in apparently good condition, and the finding of the jury as to the amount of damages is supported by the plaintiff's evidence, a judgment in the plaintiff's favor will not be disturbed on account of the court's refusal to charge that the burden is on the plaintiff to show the amount of damage, and that it resulted from the defendant's negligence during transportation of the cattle.⁵⁴ But the court should refuse to instruct the jury, in an action for injury to a dog, to find for the defendant if the consignee receipted for it in good condition, and the dog afterwards developed a disease from which he died, since the requested instruction does not include as an element of the defendant's nonliability the fact that the disease was not caused by injuries received during transportation.⁵⁵ As to the prior condition of stock transported, where the carrier claims that the stock were weak and thin, caused by their treatment by the plaintiff prior to transportation, the court properly refused to give requested instructions which fail to require that, in order

⁵² *Texas &c. R. Co. v. Fambrough* (Tex.), 55 S. W. 188. Also given in Branson's Instructions, § 259.

⁵³ *New York &c. R. Co. v. Es-*

till, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292.

⁵⁴ *Gulf &c. R. Co. v. Gray* (Tex.), 24 S. W. 921.

⁵⁵ *Southern Exp. Co. v. Ashford*, 126 Ala. 591, 28 So. 732.

to preclude recovery by the plaintiff, his prior treatment of the stock must have proximately caused, or contributed to, the injury complained of;⁵⁶ but refusal to charge that "if cattle, before and when loaded, were in bad shipping condition, and that the condition was the cause of their injuries, then plaintiff can not recover," is not erroneous in view of the charge given that the plaintiff can not recover if the cattle, before and when loaded, were in bad condition, and such condition was the cause of their injuries, since the law does not recognize a shipping condition as contradistinguished from general or ordinary condition.⁵⁷ In an action for injuries to a cow by being hooked into the racks by other cattle while in the carrier's pen, it was held that an instruction to find for the defendant if the jury believes from evidence that the cow was thus injured, should be modified by submitting the question whether it was negligence on the part of the carrier to maintain racks so low that cattle can be hooked into them.⁵⁸ In order to render proper an instruction relating to injuries to cattle during transportation that fact must be put in issue and supported by proof.⁵⁹ Where the court charged that the plaintiff can not recover for damage to cattle from their inherent vice, nor for damage caused by the usual and ordinary course of transportation of animals, it was held unnecessary to give requested instruction to find for the defendant if the cattle were not injured in a manner ordinarily incident to shipment by rail.⁶⁰ So, where the jury are charged that the defendant can only be held liable for damages proximately caused by its negligence, the court may properly refuse to instruct that the defendant is not liable for injuries to stock due to their inherent weakness or vice.⁶¹ But it is proper to refuse an instruction in an action for loss of a horse

⁵⁶ *Ft. Worth &c. R. Co. v. Alexander*, 36 Tex. Civ. App. 297, 81 S. W. 1015.

⁵⁷ *Felton v. Clarkson*, 103 Tenn. 457, 53 S. W. 733.

⁵⁸ *Gulf &c. R. Co. v. Dunman* (Tex.), 81 S. W. 789.

⁵⁹ *Ft. Worth &c. R. Co. v.*

Greathouse, 82 Tex. 104, 17 S. W. 834.

⁶⁰ *Houston &c. R. Co. v. Gray*, 38 Tex. Civ. App. 249, 85 S. W. 838.

⁶¹ *St. Louis &c. R. Co. v. Lovelady*, 36 Tex. Civ. App. 282, 81 S. W. 1040.

that the proximate cause of the accident was the unmanageable condition of the horse, since the question is for the jury.⁶²

§ 2776 (1751). **Instructions—Injuries resulting from loading, unloading, or improper loading of cars.**—Where the plaintiff sued for injury steer while being unloaded from defendant's car because of a defective chute, and the steer was shipped under a uniform live stock contract allowing the plaintiff a lower rate in consideration that he load and unload his cattle at his own risk, it was held proper to instruct that if the jury find that the shipper entered into such a contract he can not recover.⁶³ Yet, where the shipper has assumed the duty of loading and unloading his stock at his own risk, but it appears that in fact the carrier took charge of the loading and unloading, being assisted by the shipper, or his employes, an instruction permitting the shipper to recover for damages resulting from the failure of the carrier to use ordinary care in unloading the stock has been held not objectionable, there being no request for a more specific charge.⁶⁴ But the court erred in an action for injury to a horse during transportation by instructing that if the carrier furnished sufficient means to unload the horse and the injury did not result from the insufficient condition of such means the plaintiff can not recover, since the instruction eliminated the question whether the carrier was negligent in furnishing a suitable place for unloading and was negligent in the use of the appliances at hand.⁶⁵ And an instruction is erroneous, in an action for injuries to a horse during transportation, which states that if the injuries resulted from the slipping of the horse and also the condition and the facilities for loading and for the defendant, since it ignores the propriety of unloading the horse and also the condition and the facilities for loading and unloading and the care to be used by the carrier.⁶⁶ As to the

⁶² *Giblin v. Nat. S. S. Co.* 8 Misc. 22, 28 N. Y. S. 69.

⁶³ *Candee v. New York &c. R. Co.*, 73 Conn. 667, 49 Atl. 17.

⁶⁴ *San Antonio &c. R. Co. v. Dolan* (Tex.), 85 S. W. 302.

⁶⁵ *Frasier v. Charleston &c. R. Co.*, 73 S. Car. 140, 52 S. E. 964.

⁶⁶ *Nashville &c. R. Co. v. Parker*, 123 Ala. 683, 27 So. 323.

liability of the carrier for failure to unload stock, an instruction, that if the plaintiff's agent discovered that some of the cattle were down and in bad condition and requested the conductor that the car be unloaded, and if the request had been complied with, the injuries would not have been sustained; but the conductor, though able to comply with the request, failed to do so, the verdict should be for the plaintiff, was held to be erroneous, since it may have led the jury into believing that the carrier's refusal to unload would render it liable for injuries previously sustained by the cattle.⁶⁷ Under the issue whether a car of stock was properly placed for unloading, and whether the plaintiff failed to unload the stock after the car had been properly placed, the court should not instruct the jury that if the carrier negligently failed to place the car so that the stock could be unloaded the verdict should be for the plaintiff for a sum not exceeding the amount claimed by the plaintiff, as it authorizes recovery whether or not the stock were injured from its negligence and without regard to the damage sustained.⁶⁸ Where the evidence shows that some of the plaintiff's cattle had been trampled on during transportation and were bruised, due to the fact that the plaintiff had promiscuously loaded the cattle without regard to age, size, or sex, the court should not refuse to instruct that plaintiff is not entitled to recover for damages due to promiscuous loading, and error by refusing such instruction is not cured by an instruction that the carrier is not responsible for damage due to overloading the car.⁶⁹ Where the evidence shows that the plaintiff delivered stock to the carrier for through shipment, and that the carrier furnished him three large cars and one small car, the plaintiff paying the same for each car; that the servants of the initial carrier loaded the stock and the servants of the connecting carrier unloaded them and reloaded them into cars of the same size in accordance with the rules of the carrier, and that the smaller car was overloaded, the evidence does not authorize an instruction on the theory that the plaintiff overloaded or improperly loaded the small car.⁷⁰

⁶⁷ *Gulf &c. R. Co. v. Kemp* (Tex.), 30 S. W. 714.

⁶⁸ *Cincinnati &c. R. Co. v. Green*, 14 Ky. L. 815.

⁶⁹ *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607.

⁷⁰ *Missouri Pac. R. Co. v. Kingsbury* (Tex.), 25 S. W. 322.

As to overloading cars, where the carrier claimed that the shipper assumed the risk of overloading, it was held proper for the court to charge that the carrier would be liable for damage resulting from overloading the cars, unless the shipper caused the carrier's employes to overload them, although there was no reply to the defense of overloading.⁷¹ It was not improper to give an instruction in action for injuries to carloads of horses, that in handling the horses it was the defendant's duty to exercise "such care, prudence and caution as an ordinary, careful, prudent and cautious man would have exercised under such circumstances," and that if the carrier failed to exercise such prudence and caution it would amount to negligence.⁷² But an instruction in an action for injuries to a jack in loading him, that the carrier is not liable for injuries caused by his stubbornness in resisting efforts to load him, if the servants of the carrier did not mistreat him and use any more force than was necessary, and exercised ordinary care in loading, has been held misleading.⁷³

§ 2777 (1752.) Instructions—Loss of or injury to goods in transit.—An instruction that requires the carrier to "satisfy" the jury that the loss of goods could not have been prevented by the exercise of due care, was held to be erroneous as requiring too high a degree of care.⁷⁴ So, in an action for the loss of cotton by fire while on the defendants' cars, where there was testimony that the shipper orally agreed with the carrier to cover the cotton with tarpaulin and send a man with buckets of water with the cotton, an instruction that if such contract was made, it was still the defendant's duty to prove that there was no negligence on its part, was held to be erroneous as having the effect to exclude from the jury the question whether the cotton was destroyed by the negligence of the defendant or by failure of the shipper to perform his part of such agreement

⁷¹ Texas &c. R. Co. v. White, 35 Tex. Civ. App. 521, 80 S. W. 641.

⁷² Texas &c. R. Co. v. Tribble, 29 Tex. Civ. App. 104, 67 S. W. 890.

⁷³ Jones v. Memphis &c. Packet Co. (Miss.), 31 So. 201.

⁷⁴ Louisville &c. R. Co. v. Gidley, 119 Ala. 523, 24 So. 753.

if it was made.⁷⁵ If in an action for the loss of goods in transit there is doubt whether the carrier ever received the goods, it is not error for the court to instruct that one railroad company is not liable for loss which occurred on the line of another company.⁷⁶ Where a contract of shipment stipulates that after delivery of the goods to the connecting carrier the defendant should not be liable for injuries thereto, and the evidence shows that a large part of the damage to the goods was sustained after such delivery, the court should instruct that the defendant is not liable for such damage.⁷⁷ And where the plaintiff sued for injury to a carload of fruit caused by failure to properly ice the car, the court properly instructed that if the car was placed on the track for unloading and the consignees were duly notified thereof, the railroad company was not liable for injuries to the goods thereafter occurring to it, notice having been given to the consignee that the goods would arrive at 10:30 Friday night and the car having been placed on the track for unloading 7 o'clock Saturday morning.⁷⁸ Where a consignee of goods sues for injuries to them in transit, and the defendant claims that the goods were injured before they were received for shipment, the carrier is entitled to have such issue submitted to the jury.⁷⁹ A shipper having loaded wet corn into a car which was delayed two days on account of a broken drawhead, an instruction that if the corn was worthless when shipped, and the damage did not result from lack of care by the carrier, and the car was

⁷⁵ *Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53.

⁷⁶ *McCaffrey v. Georgia &c. R. Co.*, 69 Ga. 622. But such an instruction, and several others upheld in cases cited in this section might be erroneous under the Carmack amendment.

⁷⁷ *Gulf &c. R. Co. v. Allcorn* (Tex.), 23 S. W. 186.

⁷⁸ *Maas v. Chicago &c. R. Co.*, 96 Minn. 84, 104 N. W. 717. The question whether the railroad company is liable as carrier or

warehouseman being dependent on the fact whether the car in question, previous to its destruction, had been placed in proper position for unloading, an instruction that if the car was properly placed for unloading the defendant was not liable, has been held to be erroneous. *Independence Mills Co. v. Burlington &c. R. Co.*, 72 Iowa 535, 34 N. W. 320, 2 Am. St. 258.

⁷⁹ *Texas Cent. R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, 70 S. W. 575.

transported within reasonable time the verdict should be for the defendant, was held to be erroneous in that it failed to call the jury's attention to the plaintiff's act of loading the corn in a wet condition and leaving the jury to determine how far such act contributed to the damage.⁸⁰ So, where the only ground of liability alleged by the plaintiff for damage to goods was that the carrier negligently unloaded the goods in rain and stored them in the open air, an instruction that if the goods were delivered to the wrong person by the carrier it would amount to a conversion, entitling the plaintiff to recover the value of the goods, was held to be erroneous, although there was a conflict in the evidence as to whether the person who unloaded the goods was the agent of the plaintiff or defendant.⁸¹ But where a carrier defends an action for loss of goods on the sole ground of want of notice of the delivery of the goods, an instruction that if the delivery was in accordance with the usage as claimed by the shipper, it was sufficient, but failing to submit the question whether the plaintiff was influenced by such usage in his conduct, is not objectionable because of such omission.⁸² A shipper having sued for the loss of cotton placed near a switch for shipment, where there was neither agent, station nor platform, the court should refuse an instruction that if the carrier agreed to furnish a car at such place for shipment of the cotton, but failed to do so, and as a result the cotton was destroyed by fire, the carrier is liable, there being no evidence connecting the fire with the failure to furnish the car.⁸³ The court should

⁸⁰ *Galveston &c. R. Co. v. Smith*, 2 Wills. Civ. Cas. Ct. App. § 138.

⁸¹ *Central &c. Co. v. Cooper*, 95 Ga. 406, 22 S. E. 549.

⁸² *Merriam v. Hartford &c. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344.

⁸³ *Kansas City &c. R. Co. v. Lilly* (Miss.), 8 So. 644. Where the plaintiff sued for loss of cotton by fire after being placed near the defendant's track for shipment, and one theory is that the fire was caused by the railroad company's

negligence, and another theory being that it was burnt, after it had been delivered to the railroad company for shipment, an instruction that if the fire originated from the defendant's locomotive the defendant was liable, was held to be erroneous, since the defendant under the first theory was entitled to have the issue of the plaintiff's contributory negligence in exposing the cotton to fire, submitted to the jury. And in the

not, it has been held, instruct in an action by a consignee to recover for damages to goods in transit that the law will not presume a sale, unless cash is paid before the goods are actually delivered, where the carrier denies the assignee's title, since the intention may have been to vest actionable title in the consignee.⁸⁴ And instructions in an action for goods lost in transit which implied that a bill of lading, not accepted or consented to by the shipper and which consigned the goods to a place different from that designated by him, is binding, were held to be erroneous.⁸⁵ It being neither pleaded nor proved, in an action for injuries to plaintiff's horse, that the plaintiff had undertaken to bed the car, the court may properly refuse to instruct the jury to find for the defendant if the car was not properly bedded and injury resulted therefrom.⁸⁶

§ 2778. Approved instructions in case of loss or delay caused by act of God.—Approved instructions in case of loss or delay claimed to have been caused by the act of God or the like are as follows: The court instructs the jury that the burden is upon the defendant to establish by evidence that the loss or damage in question was caused by an act of God, and if the jury so find, then unless the plaintiff has satisfied you by his evidence that the defendant has been guilty of negligence entering into and co-operating with the act of God in producing such loss, you will find for the defendant.⁸⁷ The court instructs the jury that if you find from the evidence that an obstruction

same case, an instruction on the theory of custom and course of dealing in permitting goods to accumulate on the platform for shipment might be sufficient to constitute possession by the carrier, is irreconcilably in conflict with an instruction that the defendant would not be liable as a common carrier unless the goods were received by it for immediate shipment, and received shipping instructions from the shipper. Mis-

souri &c. R. Co. v. Beard, 34 Tex. Civ. App. 188, 78 S. W. 253.

⁸⁴ Texas Cent. R. Co. v. Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575.

⁸⁵ Cleveland &c. R. Co. v. C. & A. Potts & Co., 33 Ind. App. 564, 71 N. E. 685.

⁸⁶ Texas &c. R. Co. v. Dishman, 41 Tex. Civ. App. 250, 91 S. W. 828.

⁸⁷ Memphis &c. R. Co. v. Reeves, 10 Wall. (U. S.) 189, 19 L. ed. 909; Branson's Inst. § 260.

of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant can not offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.⁸⁸

§ 2779 (1753). **Instructions—Failure or refusal to deliver goods to consignee.**—Where a railroad company is sued for refusal to deliver goods, the court should not refuse to instruct that if the goods were shipped over another line by the plaintiff's agent, who misdirected them, and they were afterwards shipped to their destination partly over the defendant's line, the defendant might hold the goods for freight charges, the value of the goods being less than such charges.⁸⁹ And the defendant in an action for delay in delivery of goods can not complain of an instruction that in determining whether there was delay in transportation of the goods, estimate should be made of the whole time taken for transportation without reference to when the station of the defendant was opened, unless the shipper knew or should have known that the station was not open when the goods were shipped, in that event they should exclude from the estimate the time that elapsed between the date of

⁸⁸ Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642; Branson's Instr. § 261. But see as to what is or is not an act of God and the rules upon the general subject, ante §§ 2202, 2204, 2230, 2310, 2741.
⁸⁹ Texas &c. R. Co. v. Klepper, 29 Tex. Civ. App. 590, 69 S. W. 426.

shipment and the time when the station was opened.⁹⁰ Where the issue whether the shipper gave directions changing the place of destination of the goods is a close one, it has been held that the court should not refuse to instruct that the burden is on the defendant to show that the plaintiff gave such directions, and such instruction was not objectionable as calling the jury's attention to the testimony of a single witness, only one witness having testified on the question, since it was merely a method of identifying such element of the evidence.⁹¹ And in an action for non-delivery of goods, an instruction which stated that in the absence of an agreement to the contrary the carrier is bound to transport and deliver the goods within a reasonable time without regard to unexpected or extraordinary pressure of business, was held abstractly correct and not cause for reversal, although on appeal the record did not disclose any evidence as to pressure of business.⁹² But an instruction that if when a carrier received goods, defendant knew that it could not deliver them because of quarantine regulations, it would be liable for damage because of delay, without the qualification that there must have been a failure to notify the consignor of the carrier's inability to deliver, was held to be erroneous.⁹³ And it has been held that the court should not instruct as to elements of a contract which limits the liability of the carrier and as to the burden of proof thereon, where the contract is declared on and the carrier relies on such limitation, and the only question presented is negligence.⁹⁴ Where the negligent delay in delivery of stock by a carrier might have been the cause of their injury, it was held that the court properly refused to charge that the plaintiff can not recover for damages from delay in delivery.⁹⁵

§ 2780 (1754). Instructions—Liability as between initial and connecting carriers.—Cases cited in this and the following section

⁹⁰ *Texas &c. R. Co. v. Kolp, Jr.* (Tex. Civ. App.), 88 S. W. 417.

⁹¹ *Hartmann v. Louisville &c. R. Co.*, 39 Mo. App. 88.

⁹² *Louisville &c. R. Co. v. Touart*, 97 Ala. 514, 11 So. 756.

⁹³ *Alabama &c. R. Co. v. Hayne*, 76 Miss. 538, 24 So. 907.

⁹⁴ *Wells, Fargo & Co. v. Bell*, 65 Ohio St. 408, 62 N. E. 1035.

⁹⁵ *Louisville &c. R. Co. v. Smitha*, 145 Ala. 686, 40 So. 117.

were decided before the Carmack amendment was passed, or where it was inapplicable, and some of the rulings would not now be the law in cases in which such amendment, or other similar statutes, apply. But in cases of intrastate shipments not affected by statute the decisions are as valuable as they ever were. Where a contract of shipment limits the defendant carrier's liability to its own line, and the point of destination is beyond the defendant's line, it has been held error, under the common law, to instruct that it was the defendant's duty to ship the plaintiff's stock to their destination with reasonable dispatch.⁹⁶ Where an initial carrier was sued for damages for failure to properly bed the cars, it was held that the court properly refused to charge that unless the damage resulted from the defendant's negligence, and the jury was unable to determine what damages occurred on the defendant's line, they should find for the defendant, since it was calculated to mislead the jury into believing that the defendant was not liable for damages caused by its negligence, the injuries to the stock not having developed until after they were delivered to the connecting carrier.⁹⁷ Cattle having been transported by the carrier under a contract limiting liability of each carrier to the injuries occurring on its own line, and there being evidence that after the cattle were delivered to the connecting carrier shipment was delayed, thereby causing injuries to the cattle, the court erred in an action at common law against an initial carrier by extending liability to the initial carrier beyond its own line;⁹⁸ and under a similar contract, an instruction is not erroneous which restricts recovery against the initial carrier to the damage sustained by the plaintiff's cattle while in its possession, the evidence not disclosing that any damage was sustained by the cattle while being transported from the junction of the defendant's road with the line of another carrier to destination by defendant's train and crew, as permitting recovery

⁹⁶ St. Louis &c. R. Co. v. Gunter, 39 Tex. Civ. App. 129, 86 S. W. 938. O'Loughlin, 37 Tex. Civ. App. 640, 84 S. W. 1104.

⁹⁷ Texas Cent. R. Co. v. ⁹⁸ St. Louis &c. R. Co. v. Stokes, 44 Tex. Civ. App. 220, 99 S. W. 120.

for injuries to the cattle while in possession of another carrier.⁹⁹ Where the liability of a carrier is limited to its own line it has been held that the court should instruct the jury that it is not liable for injury to the stock after it passed out of its possession.¹ In an action against an initial carrier and connecting carriers for injuries to the plaintiff's horse and for aggravation of the injuries by delay in shipment, the evidence showing that the horse was injured while in possession of a connecting carrier, and that the delay in shipment occurred on the line of another connecting carrier, but the delay was not shown to have had any serious effect on the horse, it was held not to be error for the court to instruct the jury to find damages against the carrier on whose line the injuries occurred, as such instruction did not render it liable for the aggravation of the injuries of another carrier.² Where the shipper sues connecting carriers for injuries to his horse, and during the trial he admits that the injury did not occur on the line of one of the carriers the court may properly charge that the jury should not find against such carrier if they find for the plaintiff.³ An instruction in an action against connecting carriers that the defendants were bound to use ordinary care in the transportation of cattle, and that if either of the defendants was guilty of negligence in handling the cattle or of negligent delay in transportation, "such defendant so guilty of negligence would be liable for such injuries caused by its negligence," is not subject to the objection that it directs the jury to find against the defendant damages resulting from their combined negligence, when considered in connection with another instruction stating that each defendant is liable for damages resulting from its negligence and unreasonable delay in shipment of the stock.⁴ In an action against connecting

⁹⁹ Chicago &c. R. Co. v. Henderson (Tex.), 73 S. W. 36.

¹ International &c. R. Co. v. Young (Tex.), 72 S. W. 68.

² St. Louis &c. R. Co. v. Buckner, 40 Tex. Civ. App. 636, 90 S. W. 664.

³ Ft. Worth &c. R. Co. v. Gar-

lington, 41 Tex. Civ. App. 340, 92 S. W. 270.

⁴ Atchison &c. R. Co. v. Nation & Slavens (Tex.), 92 S. W. 823. Where a shipper sued a connecting carrier for injuries to his cattle, an instruction that if the jury believed that the defendants or

carriers for injuries to stock the court having charged that each carrier was liable only for its own negligence, an instruction is not erroneous which refers to the fact that the train broke in two and ran together on the line of one of the defendants, injuring the stock.⁵ Where a shipper sued connecting carriers for injuries to cattle it was held that the court is not required to instruct the jury to find the whole amount of damages sustained by the cattle from the point of shipment to their destination, and then apportion the damages to each carrier according to the injuries done by it;⁶ and in such an action an instruction that if the defendants or either of them negligently caused or permitted the cars containing the cattle to be bumped together or to be used in switching, and the cattle were injured thereby, the verdict should be for the plaintiff, is not erroneous as authorizing a verdict for the plaintiff under the facts irrespective of the defendant's negligence.⁷ An instruction in an action against connecting carriers that if both of the defendants failed to exercise ordinary care in the transportation and delivery of horses within a reasonable time, and the jury are unable to determine which of the defendants failed to exercise such care, the burden is on each of the defendants to show that such failure did not occur on its line, was held to be erroneous since there is no rule of law placing the burden on the defendant under such circumstances.⁸

either of them were guilty of the negligence complained of and referred to in other instructions, the verdict should be for the plaintiff, is not subject to the objection, that it authorizes recovery against one of the defendants for the negligence of another, when considered in connection with other instructions specifying the particular matters of negligence charged against each defendant, and also stating that one defendant cannot be held liable for injuries caused

by the negligence of the other. *Houston &c. R. Co. v. Gray*, 38 Tex. Civ. App. 249, 85 S. W. 838.

⁵ *Texas &c. R. Co. v. Hall*, 31 Tex. Civ. App. 464, 72 S. W. 1052.

⁶ *Atchison &c. R. Co. v. Nation & Slavens (Tex.)*, 92 S. W. 823.

⁷ *Houston &c. R. Co. v. Kothmann*, 37 Tex. Civ. App. 548, 84 S. W. 1089.

⁸ *Ft. Worth &c. R. Co. v. Shanley*, 36 Tex. Civ. App. 291, 81 S. W. 1014.

§ 2781. Approved instructions in cases of connecting carriers.—The following instructions have been approved: (1) The court instructs the jury that if, from the evidence, you believe that the plaintiff is entitled to recover herein from all of the defendants, then you are instructed that it is your duty to determine the damage occasioned by the defendants severally, and so state in your verdict. If, from the evidence, you conclude that the plaintiff is entitled to recover against one or more of said defendants, then you will state in your verdict which defendant or defendants, and the amount found against it; and as to the defendant or defendants against whom you find no damage you will return a general verdict for such defendant or defendants.

(2) The court instructs the jury that if, from the evidence, you believe that through the negligence of the defendants, or either of them, plaintiff's cattle were injured in some or all of the particulars alleged by the plaintiff, then you are instructed that the respective defendants herein would be liable only for the damage or injury occurring upon its own line, and from its own negligence, if such negligence was the direct and proximate cause thereof.⁹

(3) The court instructs the jury that if you believe from the evidence before you that on or about —, —, at —, —, plaintiff tendered to the — Railway Company the cattle described in his petition for shipment, and if you believe that said railway company was guilty of an unreasonable and negligent delay in receiving and accepting said cattle when so tendered to it, and if you believe that in the transportation of said cattle from — to their destination in — there were unreasonable delays at or between the various points named in plaintiff's petition, or any of them, and if you further believe that such delays were the result of the negligence of defendants or any of

⁹ *Houston &c. R. Co. v. Gray*, 38 Tex. Civ. App. 249, 85 S. W. 838, Branson's Instr. § 266. See also

Trakas v. Southern Ry. Co., 102 S. Car. 211, 86 S. E. 492.

them, and if you find that as a result of such unreasonable delays, if any, said cattle were injured, and as a result of such injuries any of said cattle died or were killed, then you will find for the plaintiff the damages he sustained thereby, and in estimating the amount of his damages you will fix the same at the market value at the place of destination of the cattle, if any, that died or were killed as a result of such negligence and unreasonable delays, to which you will add the difference, if any, in the market value at destination at time of arrival of all the cattle that survived and their market value at said place in the condition and at the time they should have arrived for such unreasonable delays, if any. And to the aggregate amount of such damage so found by you, if any, you will add interest at the rate of — per cent. per annum from the time of the arrival of said cattle at destination to the date of your verdict. If you find for plaintiff, you will apportion the amount of the damage found by you, if any, between the defendants according to and in proportion to their respective liability, as indicated by instructions which have already been given you. And you will apportion the damages so found by you against those defendants only, if any, that you may find from the evidence were guilty of unreasonable delays in receiving and transporting said cattle, and in thus contributing to their injury, and you will find in favor of such defendants, if any, as you may find from the evidence did not contribute to the injury of said cattle by unreasonable delays in accepting said cattle and in transporting them over its own line of railway.¹⁰

(4) The court instructs the jury that no common carrier can be held liable or bound to carry beyond its own line and no common carrier can be held liable or bound for any injury to any freight occurring on the line of another carrier unless it has specially contracted for carriage of such freight beyond its own line. But if two or more common carriers be engaged in busi-

¹⁰ Gulf &c. R. Co. v. Cushney, 95 Tex. 309, 67 S. W. 77; Branson's R. Co. v. Bath, 40 Tex. Civ. App. 270, 90 S. W. 55. Instr. § 266. See also Houston &c.

ness as such carriers as partners, and as such partners undertake the carriage of freight over one or more lines of railway, then both are liable on such undertaking as common carriers. The — Railway Company of — and the — Railway Company, defendants, are partners. If you find any damages in favor of the plaintiff, and if you believe from the evidence that the defendant — Railway Company alone was guilty of the negligence which caused such damages as you may so find, then you will return your verdict against said defendant alone, and in favor of both of the other defendants. If you find any damages in favor of the plaintiff, and if you believe from the evidence that the defendant — Railway Company of — and the — Railway Company, or either of them, were guilty of the negligence which caused such damages as you may so find, and that the defendant — Railway Company was not guilty of any negligence causing or contributing to cause the damage which you may so find, then you will return your verdict in favor of the last-named defendant, and against the defendants — Railway Company of —, and the — Railway Company.¹¹

(5) The court instructs the jury that if you believe from the evidence that on the — day of —, —, the plaintiff delivered at —, —, to the — Railroad Company, defendant, the cattle described in his petition, for transportation by it to —, —, to be there delivered to the defendant — Railway Company of — for further transportation to —, —, and that said cattle were at —, aforesaid, by said — Railroad Company, delivered to the defendant — Railway Company of —, and by it received for transportation by it or by it and its partner, the defendant — Railway Company to —; and if you further believe from the evidence that the defendants, or any or either of them, were guilty of the acts or any of the acts of negligence in the preceding paragraphs of this charge numbered —, —, and —, specified as complained of and alleged by plaintiff, and that by reason of such act or acts of negligence, if any such there were, the plaintiff's cattle, or any

¹¹ Houston &c. R. Co. v. Gray, Branson's Instr. § 266.
38 Tex. Civ. App. 249, 85 S. W. 838;

of them, were hurt and injured as in said paragraphs stated to have been alleged by plaintiff; and if you further believe from the evidence that by reason of such hurts and injuries to said cattle, if any such there were, some of said cattle were caused to die, and that they and others of said cattle were by reason of such hurts and injuries, if any such there were, reduced in their reasonable cash market value at the time when and in the condition in which they were actually delivered to plaintiff at — below what such value would have been at said place when and in the condition in which they would have been there delivered to the plaintiff but for such hurts and injuries, if any such there were, then you will find in favor of the plaintiff; and if you find in favor of the plaintiff you will assess his damages at the difference between what you believe from the evidence was the reasonable cash market value of those of said cattle that were actually delivered to plaintiff at the time and place when and in the condition in which they were actually delivered to him, and what you believe from the evidence would have been the reasonable cash market value at — of those of said entire lot of cattle so delivered at — to the — Railroad Company that would have been, but for such act or acts of negligence, if any such there were, delivered to plaintiff at —, at the time when and in the condition in which they would have been there delivered to plaintiff but for such act or acts of negligence, if any such act or acts of negligence there were, together with interest on the amount of such difference at the rate of — per cent. per annum from the time when said cattle were actually delivered to plaintiff at — to the date of your verdict.¹²

§ 2782. (1755.) Instructions—Measure of damages for injury to or loss of goods and live stock during transportation.—In an

¹² *Houston &c. R. Co. v. Gray*, 38 Tex. Civ. App. 249, 85 S. W. 838; *Branson's Instr.* § 266. Interest is generally allowed in a proper case but is not ordinarily allowed as part of the damages in some juris-

dictions. See *Louisville &c. R. Co. v. Cheatwood*, 14 Ala. App. 175, 68 So. 720; 96 Kans. 183, 150 Pac. 524; ante §§ 2750, 2762; *Stevens-Scott Grain Co. v. Atchison &c. R. Co.*, 96 Kans. 1, 149 Pac. 744.

action for delay in shipment and delivery of goods, the court should instruct the jury as to the measure of damages.¹³ An instruction that the measure of damages for unreasonable delay in the shipment of live stock, is the difference in the market value of the stock at the place of delivery when the stock arrived there, in the condition they were in, and their market value in the condition they would have been in had there been no delay together with interest from the time of their arrival has been held to state the true measure of damages.¹⁴ And in

¹³ *Chicago &c. R. Co. v. Chestnut Bros*, 28 Ky. L. 404, 89 S. W. 298.

¹⁴ *Glasscock v. Chicago &c. R. Co.*, 86 Mo. App. 114; *Texas &c. R. Co. v. Boggs* (Tex.), 40 S. W. 20; *Cane Hill Cold Storage &c. Co. v. San Antonio &c. R. Co.* (Tex.) 95 S. W. 751; *Missouri &c. R. Co. v. Chittim*, 24 Tex. Civ. App. 599, 60 S. W. 284; *Texas &c. R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. 272; *Ft. Worth &c. R. Co. v. James*, 39 Tex. Civ. App. 408, 87 S. W. 730. A similar instruction was held not to be erroneous as authorizing recovery for loss due to natural shrinkage without negligence, *Texas &c. R. Co. v. Currie*, 33 Tex. Civ. App. 277, 76 S. W. 810; nor as authorizing a finding for damages to cattle by a connecting carrier, where the court in its charge exempted the initial carrier from liability for any damage to the cattle after they passed out of its possession, *Texas &c. R. Co. v. McNairy*, 42 Tex. Civ. App. 222, 94 S. W. 111. The charge that the measure of damages was the difference between the condition of the cattle as they should have arrived at a

certain point and their condition as they did arrive was not prejudicial to the defendant in misstating their destination as billed, where the place named in the charge and that designated by the bill were but a few miles apart. *101 Live Stock Co. v. Kansas City &c. R. Co.*, 100 Mo. App. 674, 75 S. W. 782. And a similar instruction to the one set out in the text was held not to be erroneous in failing to use the word "reasonable" before the words "without delay." *Farmers Bank v. Wabash R. Co.*, 119 Mo. App. 1, 95 S. W. 286. Nor is such an instruction erroneous as authorizing recovery of damages against one carrier caused by the negligence of another, in view of a previous charge that damages can only be recovered against each defendant for the injuries done by it. *Texas &c. R. Co. v. Currie*, 33 Tex. Civ. App. 277, 76 S. W. 810. A similar instruction in an action against an intermediate carrier for injury to stock by rough handling and delay while being transported from the point of shipment to an intermediate point was held not to be erroneous as authorizing the plain-

such an action, an instruction has been held to be proper which fixed the measure of damages as the difference between the market value of the cattle in their condition when they reached the

tiff to recover for injuries which occurred to the stock after leaving such intermediate point. *Texas &c. R. Co. v. Slaughter*, 37 Tex. Civ. App. 624, 84 S. W. 1085; *Missouri &c. R. Co. v. Chittim*, 24 Tex. Civ. App. 599, 60 S. W. 284. Such an instruction is not prejudicial to the defendant on the ground that the correct measure of damages is the difference in the market value of the cattle when they should have arrived by the use of ordinary care and the time when they did arrive, in view of another instruction making it the duty of the carrier to transport the cattle within the usual time necessary for transportation. *Missouri &c. R. Co. v. Southerland* (Tex. Civ. App.), 95 S. W. 747. And where the court after giving a similar instruction added, "and in addition, if any, the market value by the reason of loss in weight sustained, if any, during the time elapsing between the time that they did reach their destination and the time they should have reached it if transported and delivered with reasonable dispatch," the instruction was held not to be misleading, although not clear, double damages not having been assessed. *Missouri &c. R. Co. v. Storey* (Tex.), 75 S. W. 847. In the following cases will be found instructions as to the measure of damages held to be erroneous: *Chicago &c. R. Co. v. Halsell*, 36

Tex. Civ. App. 522, 81 S. W. 1241; *International &c. R. Co. v. Startz*, 42 Tex. Civ. App. 85, 94 S. W. 207; *Kansas City &c. R. Co. v. Barnett*, 69 Ark. 150, 67 S. W. 919, permitting recovery of particular items of damage. *International &c. R. Co. v. Startz*, 42 Tex. Civ. App. 85, 82 S. W. 1071, a charge as to speculative damages for injury to a horse sufficiently covered by another instruction given. *East Tennessee &c. R. Co. v. Herrman*, 92 Ga. 384, 17 S. E. 344, a charge held to be misleading. *Galveston &c. R. Co. v. Johnson* (Tex.), 29 S. W. 428, failure to restrict liability of damage occurring on the line of each carrier. *Missouri &c. R. Co. v. Liebold* (Tex.), 55 S. W. 368, an instruction exempting the carrier from liability if the cattle were damaged in any way by the plaintiff's failure to unload and properly feed and water them. *Missouri &c. R. Co. v. Chittim*, 24 Tex. Civ. App. 599, 60 S. W. 284, an instruction as to damages which occurred in part on different roads. *St. Louis &c. R. Co. v. Vaughan*, (Tex.), 41 S. W. 415. See also *Chicago &c. R. Co. v. Chestnut Bros.*, 28 Ky. L. 404, 89 S. W. 298, an instruction as to the measure of damages where cattle escaped from the carrier's pens. *Kansas City, &c. R. Co. v. Barnett*, 69 Ark. 150, 61 S. W. 919, an instruction including damage occurring after

destination and their market value if they had reached the destination by being transported with reasonable diligence.¹⁵ An instruction limiting recovery of damages which resulted from shrinkage to stock and loss of a better market is not inconsistent with an instruction denying plaintiff's right to recover for injuries which resulted during transportation.¹⁶ Nor is an instruction misleading which states that the measure of damages is the difference between the vendible value of stock at their destination in good condition and their vendible value in the condition in which they arrived, for failure to take into consideration the natural deterioration of the stock in transit, where the evidence tends to show the value of the stock in the condition in which they were delivered and their value if they had been properly cared for during transportation, and the court further instructed that the measure of damages is the difference between the vendible value of the stock at their destination in good condition, when transported in reasonable time, and their value at the time and in the condition they reached the destination.¹⁷ As to the measure of damages for injury to horses, it has been held that the court properly instructed that the jury might consider the difference in their fair market value when shipped and their fair market value after the injuries, together with money paid out by the plaintiff in his effort to cure the horses, the value of his time while so engaged, and the amount of plaintiff's loss by reason of such injuries, not exceeding the value of the horses, such instruction not being objectionable for failure to limit the value of the horses to the time immediately before and after the injuries, and as assuming that the plaintiff was put to medical expense in endeavoring to cure the horses.¹⁸ The measure of damages to cat-

delivery at destination and re-shipment. *Illinois Cent. R. Co. v. Holt*, 29 Ky. L. 135, 92 S. W. 540, an instruction held to be erroneous as permitting recovery for damages resulting from the voluntary detention of stock by the plaintiff. *San Antonio &c. R. Co. v. Woodley*, 20 Tex. Civ. App. 216, 49 S. W. 691.

¹⁵ *Gulf &c. R. Co. v. Beattie* (Tex.), 88 S. W. 367.

¹⁶ *Farmers Bank v. Wabash R. Co.*, 119 Mo. App. 1, 95 S. W. 286.

¹⁷ *Southern R. Co. v. Thomas*, 28 Ky. L. 951, 90 S. W. 1043.

¹⁸ *Chicago &c. R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. 68; *St. Louis &c. R. Co. v. Foster* (Tex.), 89 S. W. 450

the sustained during transportation was properly stated in a recent case, except that the term "market value" was not used, and it was held that such instruction was not misleading for failure to confine recovery to the difference in the "market value," the evidence being directed to the difference in the "market value."¹⁹ Nor is such instruction necessarily erroneous for failure to inform the jury that the carrier is not liable for injuries caused by inherent vice of the stock.²⁰ Upon conflicting evidence as to whether the disease of which horses died was caused by injuries received by them during transportation it was proper for the court to instruct that the jury can not assess any damages on account of injuries to or depreciation in the value of the stock, not due to the defendant's negligence.²¹ Where there is evidence that the price cattle brought in their shrunken condition was their full market value in such condition, the court properly instructed that the measure of damages on account of shrinkage during transportation is the difference in price the cattle would have brought in the market if they had been transported in reasonable time and the price they brought after delay.²² Where a shipper sues for delay in transportation of cattle, an instruction that the measure of damages is the difference between their market value at an intermediate station where they were sold and their market value at destination if they had been delivered without delay, was held not prejudicial in view of the fact that the place where they were sold was a better market than the market at destination.²³ Where the owner of horses had shipped them for delivery at a certain place at a certain time, but on account of delay in shipment they did not reach such place in proper time, and the owner was compelled to sell them to another person for a sum less than the contract price, and by fur-

¹⁹ *Gulf &c. R. Co. v. Terry* (Tex.), 89 S. W. 792

²⁰ *St. Louis &c. R. Co. v. Lovelady*, 36 Tex. Civ. App. 282, 81 S. W. 1040. But an instruction as to inherent vice should be given when properly requested in a proper case.

²¹ *Louisville &c. R. Co. v. Wathem*, 23 Ky. L. 2128, 66 S. W. 714.

²² *St. Louis &c. R. Co. v. Burns* (Tex.), 80 S. W. 104. Compare also *Houston &c. Ry. Co. v. Lewis* (Tex. Civ. App.), 185 S. W. 593.

²³ *Texas &c. R. Co. v. Scharbauer* (Tex.), 52 S. W. 590.

ther negligence of the carrier he was prevented from consummating the second sale and had to sell them at their market value in their depreciated condition, it was held that an instruction fixing the damage at the difference between the contract price at the point of delivery and the sum they subsequently brought at the second sale; and in case both sales were lost on account of the carrier's negligence, the measure of damages was the difference between the contract price and the market value of the stock, properly stated the measure of damages.²⁴ And in an action for damages for delay in shipment and delivery of a feather renovator for a fixed rental value in which there was evidence as to the rental value of the renovator together with horses and wagon, used in connection with it, it was held that the measure of damages is the full rental value of the renovator as determined from its character, capacity and running expenses, and it was error for the court, in the absence of instructions as to the manner of arriving at the rental value of the renovator, to refuse to instruct that recovery can not be had for any special benefit from the use of the renovator at the destination, and to charge that the rental value of the machine alone should be found, without trains, wagons and hands to operate it.²⁵ It has been held proper to instruct the jury to allow interest on damages recovered by the plaintiff.²⁶ An instruction that the measure of damages for injury to an automobile during transportation is the difference between its market value in its condition just prior to the injury and its condition on arrival at destination in its injured condition was held to be proper in view of another instruction that the carrier was liable only for such damages as were sustained by reason of defendant's negligence in

²⁴ Texas &c. R. Co. v. Stewart, 38 Tex. Civ. App. 595, 86 S. W. 631, see Texas &c. R. Co. v. Stewart, 43 Tex. Civ. App. 399, 96 S. W. 106.

²⁵ Texas &c. R. Co. v. Hassell, 23 Tex. Civ. App. 681, 58 S. W. 54.

²⁶ Gulf &c. R. Co. v. Graves,

45 Tex. Civ. App. 375, 101 S. W. 488. See also Ft. Worth &c. R. Co. v. Albin (Tex. Civ. App.), 185 S. W. 647; Houston &c. Ry. Co. v. Lewis (Tex. Civ. App.), 185 S. W. 593.

transporting it.²⁷ Where the court's charge to the jury in an action for damages for the shipment of berries clearly stated that if the berries were injured by reason of their tendency to deteriorate without negligence by the carrier in handling the berries, the railroad company was not liable, the charge was not rendered erroneous by the court terming the tendency to deteriorate as the act of God.²⁸ But it has been held error to charge that the measure of damages is the highest market value at the destination of the goods, less freight charges, since it makes the retail price including profits the measure of damages.²⁹ And it has been held error to instruct the jury to assess damages for unnecessary delay, without stating the rule for the assessment of damages.³⁰ So an instruction is erroneous in an action for failure to deliver coal at a place other than that first directed, which fixes the measure of damages as the value of the coal at the place where the carrier received it on its track for shipment, together with cost of transporting it to the place first directed, to which point it had been shipped, and the cost of the shipper's telegram to his agent to take charge of the coal.³¹ Where the owner of cattle shipped them to a certain place with the privilege if they were not disposed of to ship them on a through freight rate to another point, an instruction in an action to recover damages for loss in weight and the depreciation in the market value of the cattle as a result of delay in transporting them, and in improperly handling them, that the measure of damages as to the cattle shipped through to the place last named was the difference in the market value of the cattle in the condition in which they arrived at the first named place and the condition in which they should have arrived, was held erroneous.³²

²⁷ *Paterson v. Chicago &c. R.*, 95 Minn, 57, 103 N. W. 621.

²⁸ *Fockens v. United States Exp. Co.*, 99 Minn. 404, 109 N. W. 834.

²⁹ *Texas &c. R. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. 366.

³⁰ *Yazoo &c. R. Co. v. Christmas*, 89 Miss. 686, 42 So. 169.

³¹ *Little Rock &c. R. Co. v. Miller Coal Co.*, 66 Ark. 645, 51 S. W. 1054.

³² *Texas &c. R. Co. v. Nelson*, 38 Tex. Civ. App. 605, 86 S. W. 616. Where a shipper of cattle on account of delay in shipment shipped the cattle to another market, an instruction that if the car-

An instruction in an action for negligent delay in shipment and delivery of cattle was held to be erroneous as allowing double damages, which stated that the measure of damages is the difference between the market value of the cattle when they arrived and the market value when they should have arrived, and the damage they might have sustained by negligent delay in furnishing cars.³³ So, in an action for damages to sheep shipped, by shrinkage after delay in transportation, where different weights were given, but it did not appear which was taken as the basis of calculation, an instruction was held to be erroneous as allowing recovery of double damages, which authorized recovery of the shipper's expenses of feeding the sheep because of their condition when delivered.³⁴

rier exercised ordinary care in the transportation to the place of destination, or if the shipper sold the cattle at the second market for as much as they would have brought had there been no delay, the verdict should be for the defendant, except as to the extra expense of the shipper in taking the cattle to the second market, was held to be erroneous as inferentially instructing that the shipper might be held liable for the expense of shipping to the second market although there may not have been any unreasonable delay by the carrier; *St. Louis &c. R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938.

³³ *St. Louis &c. R. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673.

³⁴ *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642. An

instruction held not to authorize recovery of double damages. See *Atchison &c. R. Co. v. Nation & Slavens* (Tex.), 92 S. W. 823. See also, as to measure of damages generally, the following recent cases, *St. Louis &c. R. Co. v. Allen*, 119 Ark. 266, 175 S. W. 514; *Denver &c. R. Co. v. A. Peterson Grocery Co.*, 59 Colo. 125, 147 Pac. 663 (freight charges allowed), *Humphreys v. St. Louis &c. R. Co.*, 191 Mo. App. 710, 178 S. W. 233 (interest allowed as value of stock lost from date of filing suit); *Texas &c. Ry. Co. v. Martin Bros.* (Tex. Civ. App.), 175 S. W. 707; *Texas &c. Ry. Co. v. DeLong* (Tex. Civ. App.), 176 S. W. 874; *Pecos &c. Ry. Co. v. Holmes* (Tex. Civ. App.), 177 S. W. 505; *International &c. R. Co. v. Rhoden* (Tex. Civ. App.), 177 S. W. 984.

CHAPTER LXXXVI.

PLEADING AND EVIDENCE IN ACTIONS FOR PERSONAL INJURIES.

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§ 2790. (1756.) **Pleading—Existence of passenger relation.**—General rules and principles relative to actions for injuries to passengers have been stated already,¹ and we shall here consider only particular cases and phases of the subject. Since the duty of the carrier is not the same towards a trespasser on its cars as toward a passenger it is necessary for the injured passenger to allege or set out the facts showing that he was a passenger at

¹ See Chapter on Actions against Railroad Companies, especially § 2707. See also as to form of action and election between action *ex contractu* and *ex delicto*. *Patterson v. Augusta &c. R. Co.*, 94 Ga. 140, 21 S. E. 283; *Denver Tramway Co. v. Cloud*, 6 Colo. App. 445, 40 Pac. 779; *Willson v. Northern Pac. Ry. Co.*, 5 Wash.

621, 32 Pac. 468, 34 Pac. 146; *Atlantic &c. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485. In general it may be said that the complaint should show the relation of carrier and passenger the duty, the breach of duty by the defendant proximately causing the injury, and the damage.

the time of receiving his injuries.² It is not required that the relation should be alleged in express terms; it is enough if facts are set out from which that may legally be deduced.³ Thus it has been held in one case that the relation of carrier and passenger was sufficiently averred by an allegation that plaintiff took passage on a street car at a designated point to be carried to another designated point,⁴ and in another by an allegation that plaintiff while a passenger upon defendant's railroad was injured, etc.⁵ But an allegation of an injury "while plaintiff was engaged in or about becoming a passenger" was held insufficient to show that he was a passenger.⁶ And so was a bare allegation that plaintiff was on a car with sufficient money to pay his fare.⁷ Where the complaint alleges that the injured person was properly a passenger it is unnecessary to go further and state the points between which he was being carried at the time of the injury. But it has been held where the plaintiff alleged that he was a passenger between two named stations he was bound by this allegation and could not recover where the proof showed that he was a passenger between two other stations.⁸

² See *North Birmingham Ry. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18; *Smith v. Louisville &c. R. Co.*, 124 Ind. 394, 24 N. E. 753; *Breese v. Trenton Horse R. Co.*, 52 N. J. L. 250, 19 Atl. 204. And see as to complaint in action for refusing to accept and carry, *Birmingham &c. R. Co. v. Anderson*, 3 Ala. App. 424, 57 So. 103; *Dierig v. South Covington &c. St. R. Co.*, 24 Ky. L. 1825, 72 S. W. 355.

³ *Indiana &c. Traction Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203; *Chicago Union Trac Co. v. O'Brien*, 117 Ill. App. 183, affirmed in 219 Ill. 303, 76 N. E. 341; *Ohio &c. R. Co. v. Craucher*, 132 Ind. 275, 31 N. E. 941.

⁴ *Indiana &c. Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203.

⁵ *Birmingham R. &c. Co. v.*

Adams, 146 Ala. 267, 40 So. 385, 119 Am. St. 27.

⁶ *Birmingham R. &c. Co. v. Mason*, 137 Ala. 342, 34 So. 207. See also *Walsh v. Cullen*, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911n. Compare however *Schefers v. Union Depot Co.*, 126 Mo. 665, 29 S. W. 712.

⁷ *Barger v. North Chicago St. R. Co.*, 54 Ill. App. 284. See also for other similar allegations held insufficient, *Thompson v. Nashville &c. R. Co.*, 160 Ala. 590, 49 So. 340; *Conley v. Richmond &c. R. Co.*, 109 N. Car. 692, 14 S. E. 303.

⁸ *Wabash &c. R. Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111. But see *International &c. R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216.

An allegation that the plaintiff was admitted as a passenger on one of defendant's cars has been held not open to the objection that it stated a conclusion.⁹ The necessity of allegations showing the passenger relation is specially important where the injured person received his injuries while traveling on a freight train—such a train not being intended primarily for passenger transportation.¹⁰ In such a case it has been held that the complaint should expressly plead the facts showing plaintiff's right to ride on the train, whether by established user, the rules and regulations of the company, or the like.¹¹

§ 2791. (1757.) Pleading—Injuries to passengers generally.—It is an elementary rule of pleading in negligence cases that the complaint must affirmatively show that the negligence of defendant was the proximate cause of the injury for which damages are sought.¹² It is not necessary for the pleader to ex-

⁹ *Ohio &c. R. Co. v. Craucher*, 132 Ind. 275, 31 N. E. 941. See also *Birmingham &c. R. Co. v. Moore*, 148 Ala. 115, 42 So. 1024; *Culberson v. Empire Coal Co.*, 156 Ala. 416, 47 So. 237; *Alabama &c. R. Co. v. Sampley*, 169 Ala. 372, 53 So. 142; *Rice v. Chicago &c. R. Co.*, 153 Mo. App. 35, 131 S. W. 374; *Clark v. North Pac. &c. Co.*, 74 Ore. 470, 144 Pac. 472.

¹⁰ See *Dalton v. Louisville &c. R. Co.*, 22 Ky. L. 97, 56 S. W. 657; *Powell v. East Tennessee &c. R. Co.*, (Miss.), 8 So. 738.

¹¹ *Smith v. Louisville &c. R. Co.*, 124 Ind. 394, 24 N. E. 753. See also *Pennsylvania Co. v. Dean*, 92 Ind. 459. But compare *Culberson v. Empire Coal Co.*, 156 Ala. 416, 47 So. 237; *Whitehead v. St. Louis &c. R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *International &c. R. Co. v. Irvine*, 64 Tex. 529, 535; *International &c. R. Co. v. Downing*, 16 Tex. Civ. App. 643,

41 S. W. 190, aff'd in 93 Tex. 643. And see, generally, 3 Elliott Ev. § 1898; ante, § 2387, et seq.

¹² *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Chicago &c. R. Co. v. Thomas*, 147 Ind. 35, 46 N. E. 73; *Lake Erie &c. R. Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. 394; *Dugan v. St. Paul &c. R. Co.*, 40 Minn. 544, 42 N. W. 538; *Minnuci v. Philadelphia &c. R. Co.*, 68 N. J. L. 432, 53 Atl. 229; *Fahr v. Manhattan R. Co.*, 9 Misc. 57, 29 N. Y. S. 1; 3 Elliott Ev. §§ 1900, 2496, 2497. See also *Birmingham R. &c. Co. v. Weathers*, 164 Ala. 23, 51 So. 303; *Floody v. Great Northern R. Co.*, 104 Minn. 474, 116 N. W. 943; *Benjamin v. Metropolitan &c. St. R. Co.*, 245 Mo. 598, 151 S. W. 91; *Fremont &c. R. Co. v. Hagblad*, 72 Nebr. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254n, 9 Ann. Cas. 1096.

pressly aver the nature of the contract or the duties of the carrier. The court will judicially take notice of the duties which belong to the contract of carriage where the relation of carrier and passenger is alleged to exist.¹³ Neither is it necessary, as a rule, to set out the names of the negligent employes or their duties in the operation of the train.¹⁴ An allegation of plaintiff's age is usually unnecessary.¹⁵ In a street railway case it has been held that the complaint should show that the place where the injuries were received while boarding or alighting from a car was at a station provided for passengers, or at a place where it was usual or customary to receive passengers, or that plaintiff was invited or knowingly permitted to attempt to board the car at that point.¹⁶ An allegation that the plaintiff attempted to board a car a short distance south of where defendant's line crossed another railroad does not raise the inference that the cars were at a standstill as required by law at crossings since the train may have been a southbound train or within less than the statutory distance from the crossing.¹⁷ Where it is claimed that the passenger received his injuries while alighting from a car at the conductor's command it has been held that the complaint should allege that it was unsafe for persons to alight under the circumstances; and that an allegation that the conductor recklessly and wantonly caused the person to leave the car has

¹³ *Birmingham &c. R. Co. v. Adams* 146 Ala. 267, 40 So. 385, 119 Am. St. 27; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322; *Atlantic &c. R. Co. v. Laird*, 58 Fed. 760. But compare *Greinke v. Chicago City R. Co.*, 234 Ill. 564, 85 N. E. 327.

¹⁴ *Kansas City &c. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207; *Louisville &c. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572. See also *Mills v. Central of Ga. R. Co.*, 140 Ga. 181, 78 S. E. 816, Ann. Cas. 1914C, 1098n; *Rinard v. Omaha &c. Ry. Co.*, 164 Mo. 270, 64 S.

W. 124; *Bolin v. Southern R. Co.*, 65 S. Car. 222, 43 S. E. 665. But compare *Savannah &c. R. Co. v. Wall*, 96 Ga. 328, 23 S. E. 197.

¹⁵ *Galveston &c. R. Co. v. Thornsberry* (Tex.), 17 S. W. 521.

¹⁶ *North Birmingham St. R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18. See also *St. Louis &c. R. Co. v. Wright* 105 Ark. 269, 150 S. W. 706. But compare *Birmingham &c. R. Co. v. Moore*, 148 Ala. 115, 42 So. 1024.

¹⁷ *North Birmingham St. R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18.

been held not sufficient.¹⁸ Where the complaint shows an injury during transportation as a passenger it is not required that it should be alleged that the accident occurred at a place between the point of departure and his destination.¹⁹ An averment that the car in which plaintiff was riding was derailed through the negligence of the railway company and its servants whereby the plaintiff was injured, has been held sufficiently specific without alleging any particular acts of negligence.²⁰

§ 2792. (1758.) **Pleading—Injuries from failure to heat cars.**—The injury to the health of a passenger from a failure to properly heat a car has been held sufficiently shown to withstand a general demurrer by an allegation that plaintiff suffered a severe illness through the wrongful and negligent failure of the defendant to have its cars properly heated and that this illness resulted in a serious physical injury to the plaintiff. But the complaint should show the nature of the train: whether freight or passenger. And where it is alleged that the attention of the company's agent was called to the condition of the car, the complaint should show whether the agent referred to was in any way connected with the operation of the train.²¹

¹⁸ *Jefferson v. Birmingham R. &c. Co.*, 116 Ala. 294, 22 So. 546, 38 L. R. A. 458, 67 Am. St. 116. See also *Alabama &c. R. Co. v. Humphries*, 169 Ala. 369, 53 So. 1013; *Selma &c. R. Co. v. Campbell*, 158 Ala. 438, 48 So. 378.

¹⁹ *International &c. R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216.

²⁰ *Gulf &c. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. 345. See also *Gulf &c. R. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104. (But compare *St. Louis &c. R. Co. v. Pearce*, 159 Ala. 141, 49 So. 247.) And see generally for examples of general arguments held sufficient;

Richmond City R. Co. v. Scott, 86 Va. 902, 11 S. E. 404; *Winter v. Central Iowa R. Co.* 80 Iowa 443, 45 N. W. 737; *Carmanty v. Mexican &c. R. Co.*, 5 La. Ann. 703; *Coudy v. St. Louis &c. R. Co.*, 85 Mo. 79; *San Antonio Trac. Co. v. Williams*, 34 Tex. Civ. App. 372, 78 S. W. 977. But compare *Central R. Co. v. Van Horn*, 38 N. J. L. 133.

²¹ *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006. But see *Wilburn v. St. Louis &c. R. Co.*, 36 Mo. App. 203. Compare also *Bulloch v. Missouri &c. Ry. Co.* (Tex. Civ. App.), 171 S. W. 808. See where passenger was allowed to recover for injury to

§ 2793. (1759.) **Pleading—Injuries to street and interurban railway passengers.**—An allegation of negligence on the part of the street railway company is sufficient to embrace the negligence of the company's servants.²² A complaint for injuries caused by alighting at an unsafe place need not minutely describe the place nor need it set out what constitutes a safe place.²³ Neither is it necessary in a complaint for injuries caused by a sudden jerk of the car to allege in detail by what means the jerk was caused.²⁴ An allegation that the car on which the plaintiff was a passenger was "about to collide with" a locomotive was held a sufficient averment that the collision was so imminent as to justify a passenger in leaping from the car.²⁵ That the negligence of the carrier was the proximate cause of the injury has been held sufficiently covered by an allegation that the motorman negligently brought the car to a sudden stop so that a fellow passenger was thrown against plaintiff causing the injury complained of.²⁶ That the operatives of the car acted within the scope of their employment has been held sufficiently alleged by an averment that the defendant through and by its servants in charge of the car, negligently ran the car inflicting the injuries.²⁷ The issue of the negligence of a motorman in disregarding a signal was held to

health caused by rain coming in upon her because car was out of repair. *Texas Midland R. Co. v. Sikes* (Tex. Civ. App.), 185 S. W. 412.

²²*Birmingham R. &c. Co. v. Moore*, 148 Ala. 115, 42 So. 1024.

²³*Montgomery St. R. Co. v. Mason*, 133 Ala. 508, 32 So. 261. See also *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573, 77 S. W. 314; *Stewart v. International &c. R. Co.*, 53 Tex. 289, 37 Am. Rep. 753.

²⁴*Georgia &c. Elec. Co. v. Reeves*, 123 Ga. 697, 51 S. E. 610. See also *Kentucky &c. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338.

²⁵*Selma St. R. Co. v. Owen*, 132 Ala. 420, 31 So. 598. But compare *Birmingham R. &c. Co., v. Butler*, 135 Ala. 388, 33 So. 33.

²⁶*McCauley v. Rhode Island Co.*, 25 R. I. 558, 57 Atl. 376. See also *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201.

²⁷*Indianapolis &c. R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201. See also *Birmingham R. &c. Co. v. Turner*, 154 Ala. 542, 45 So. 671; *Lindsay v. Oregon &c. R. Co.*, 13 Idaho 477, 90 Pac. 984, 12 L. R. A. (N. S.) 184n; *Indianapolis &c. R. Co. v. Barnes*, 35 Ind. App. 485, 74 N. E. 583; *Austin v. St. Louis &c. R. Co.*, 149 Mo. App. 397, 130 S. W. 385.

have been raised by an allegation that plaintiff rang the bell giving thereby the usual signal to stop, and that though he did this repeatedly, the motorman negligently failed and refused to stop, whereupon plaintiff attempted to alight while the car was in motion and was injured.²⁸ A complaint has been held to state a cause of action which alleged that the plaintiff became a passenger on the defendant's cars and that the defendant did not use proper care to see that the plaintiff should be carried safely; that it negligently ran its cars so near to a viaduct that there was not room enough, unless standing very close to the car, when riding on the footboard, to be carried in safety, and that the plaintiff did not know of the existence of the fixed structure and was not warned of it by the defendant, and, while riding on the footboard, and using due care and caution for his safety, was unavoidably struck and injured.²⁹ The negligent derailment of a street car has been held well pleaded by a complaint which alleged that the car negligently approached a switch at a dangerous rate of speed and negligently ran into the switch, and that by reason thereof the car left the track, thereby negligently throwing a passenger from her seat and injuring her.³⁰ Contributory negligence has been held sufficiently negated by an allegation that all of plaintiff's acts were without negligence on his part contributing to the injury.³¹ The variance between a complaint definitely fixing the place of the accident and evidence

²⁸ *Fuller v. Denison &c. R. Co.*, 32 Tex. Civ. App. 399, 74 S. W. 940. See also *Hammond &c. R. Co. v. Antonia*, 41 Ind. App. 335, 83 N. E. 766.

²⁹ *West Chicago St. R. Co. v. Marks*, 182 Ill. 15, 55 N. E. 67, affg. 82 Ill. App. 185. See also *Brunnchow v. Rhode Island Co.*, 26 R. I. 211, 58 Atl. 656.

³⁰ *Indiana &c. Co. v. McKinney* 39 Ind. App. 86, 78 N. E. 203. Pleading injury to passenger by derailment or collision in general terms

is usually sufficient. *Southern Pac. Co. v. Hogan*, 13 Ariz. 34, 108 Pac. 240, 29 L. R. A. (N. S.), 813n; *New York &c. R. Co. v. Callahan*, 40 Ind. App. 223, 81 N. E. 670; *Sherman v. Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287n.

³¹ *Citizens St. R. Co. v. Huffer*, 26 Ind. App. 575, 60 N. E. 316. See also as to specific averment, *Cincinnati &c. R. Co. v. Peters*, 80 Ind. 168.

that it was within the zone of the place specified though not at the exact spot described has been held not fatal.⁸²

§ 2794. (1760.) Pleading—Ejection of passengers.—The complaint in an action for wrongful ejection must allege that the plaintiff surrendered or offered to surrender, his ticket to the conductor or that he tendered the usual fare.⁸³ It is not enough to allege only the purchase of the ticket.⁸⁴ Where the recovery is sought for a wilful, violent and forcible ejection the complaint should set out the facts constituting the wilfulness or the complaint will be open to the objection that it pleads a legal conclusion.⁸⁵ One claiming to have been wrongfully expelled from a moving train and receiving injuries is not required to allege the rate of speed, and it has been held that he need not prove such rate even if pleaded.⁸⁶ It is not usually necessary to allege that the passenger, at the time of his expulsion, was complying with all the reasonable rules of the company, nor to allege that he was not about to violate any such reasonable rule at the time of his expulsion.⁸⁷ One removed from a car on the ground that the train did not stop at the station named in the passenger's ticket should allege that the rules of the company provided that the train should stop at such station, or the like, and it is incumbent upon the plaintiff to show that he was rightfully on the train.⁸⁸ It has been held that a complaint in an action for

⁸² *McCaffery v. St. Louis &c. R. Co.*, 192 Mo. 144, 90 S. W. 816. For cases of variance held fatal see *File v. Wilmington City R. Co.* (Penn. Dela.), 80 Alt. 623; *Lemay v. Springfield St. R. Co.*, 210 Mass. 63, 96 N. E. 79, 37 L. R. A. (N. S.) 43n; *Bartley v. Metropolitan St. R. Co.*, 148 Mo. 124, 49 S. W. 840; *Pierce v. Great Falls &c. R. Co.*, 22 Mont. 445, 56 Pac. 867.

⁸³ *Wilson v. Southern Ry. Co.*, 143 Ga. 189, 84 S. E. 445.

⁸⁴ *White v. Evansville &c. R. Co.*, 133 Ind. 480, 33 N. E. 273. So

where he sues for failure or refusal to carry him as a passenger, *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62. But see *Chicago &c. R. Co. v. Spirk*, 51 Nebr. 167, 70 N. W. 926.

⁸⁵ *McGee v. Reynolds*, 117 Ala. 413, 23 So. 68.

⁸⁶ *Illinois &c. R. Co. v. Davenport*, 177 Ill. 110, 52 N. E. 266.

⁸⁷ *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 5 So. 633, 3 L. R. A. 733, 23 Am. St. 506.

⁸⁸ *Chicago &c. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611. See also *Pittsburgh &c. R. Co. v. Haislup*,

injuries to one ejected from a train while in an almost helpless condition need not allege the cause of his helpless condition or the motives which influenced the company in making the ejection.³⁹ A complaint has been held to state a good cause of action under this head which averred that the defendant was operating a railroad upon which passenger trains were run; that the plaintiff purchased from the defendant, for a reward, a ticket which entitled him to be carried as a passenger on one of the defendant's trains; and that after having purchased said ticket he boarded the train, to be carried to a station on the defendant's road, and, although the plaintiff tendered to the conductor on said train the ticket so purchased, the said conductor, in breach of the duty owing the plaintiff as a passenger, wrongfully and forcibly ejected him from the train.⁴⁰ Another complaint held to show that the ejected person was a passenger and was ejected with unnecessary force to his injury alleged that on a certain day plaintiff purchased a ticket entitling him to a ride as a passenger between two certain points, and that he boarded a train at one of the points to go to the other, and while riding thereon, defendant, by its servants, wrongfully and purposely assaulted him and ejected him from the car, and in so doing he was thrown from and run over by the car, causing injuries set out in detail.⁴¹

§ 2795. (1761.) **Pleading—Injuries at crossings.**—Since the law imposes a different standard of care upon the railroad company towards persons upon its tracks dependent on whether the person was rightfully on the track,⁴² the complaint in an action

³⁹ Ind. App. 394, 79 N. E. 1035; *White v. Evansville &c. R. Co.*, 133 Ind. 480, 33 N. E. 273; *Drew v. Wabash R. Co.*, 129 Mo. App. 459, 107 S. W. 478; *Barnum v. Baltimore &c. R. Co.*, 5 W. Va. 10.

³⁹ *Macon &c. R. Co. v. Moore*, 125 Ga. 810, 54 S. E. 700.

⁴⁰ *McGhee v. Cashin*, 130 Ala. 561, 30 So. 367.

⁴¹ *Pittsburgh &c. R. Co. v. Haislup*, 39 Ind. 394, 79 N. E. 1035. See also *Baltimore &c. R. Co. v. Norris*, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. 166. And see where plaintiff was riding on a pass, *Louisville &c. R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

⁴² *Illinois Cent. R. Co. v. Chicago &c. Co.*, 79 Ill. App. 623.

for injuries at a highway crossing should show that the plaintiff was a traveler at the time he was injured, and in that ordinary use of the highway which entitled him to the exercise of ordinary care on the part of the railroad company.⁴³ It should be clearly set out that the crossing was a public crossing, where the right to recover depends thereon. An allegation that the plaintiff's injury was received "at or near" a private crossing, has been held to mean, that he was injured at a place on the track but not at a public crossing.⁴⁴ But it has been held that an averment that the crossing was a traveled road was sufficient where it was alleged that the road had been used for a long time and the use had been acquiesced in by defendant though the length of such use and acquiescence was not definitely stated.⁴⁵ It is not required that all the particulars of the negligent acts causing the injury should be set out in detail.⁴⁶ A general allegation of negligence will ordinarily suffice,⁴⁷ and the plaintiff will be allowed to prove any fact within the scope of the complaint which tends to show that the defendant was negligent in the

⁴³Chicago &c. R. Co. v. McCandish, 167 Ind. 648, 79 N. E. 903. For complaint held sufficient in this respect see Cleveland &c. R. Co. v. Starks, 174 Ind. 345, 92 N. E. 54.

⁴⁴Davis v. Chesapeake &c. R. Co., 25 Ky. L. 342, 75 S. W. 275.

⁴⁵Armstrong v. New York &c. R. Co., 20 R. I. 791, 29 Atl. 448. See also Coulter v. Great Northern R. Co., 5 N. Dak. 568, 67 N. W. 1046; Clampit v. Chicago &c. R. Co., 84 Iowa 71, 50 N. W. 673. For complaint held not sufficient to show that it was an extra-hazardous crossing, see Lake Shore &c. R. Co. v. Barnes, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778n.

⁴⁶East Line &c. R. Co. v. Brinker, 68 Tex. 500. 3 S. W. 99; Nash-

ville &c. R. Co. v. Higgins, 29 Ky. L. 89, 92 S. W. 549; Chicago &c. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280; Central of Georgia &c. R. Co. v. Edmondson, 135 Ala. 336, 33 So. 480; Louisville &c. R. Co. v. Dick, 25 Ky. L. 1831, 78 S. W. 914. But see Chicago &c. R. Co. v. Harwood, 90 Ill. 425.

⁴⁷Nashville &c. R. Co. v. Higgins, 29 Ky. L. 89, 92 S. W. 549. See also as to other averments held unnecessary, Johnson v. Atlantic &c. R. Co., 59 Fla. 302, 51 So. 851, 138 Am. St. 126, 20 Ann. Cas. 1093; Beeson v. Vandalia R. Co., 161 Ill. App. 267; Barnberg v. Atlantic &c. R. Co., 72 S. Car. 389, 51 S. E. 988; Norfolk &c. R. Co. v. Holmes Admr., 109 Va. 407, 64 S. E. 46.

running of its train at the particular time and place.⁴⁸ Thus, a complaint has been held sufficient against demurrer which alleged that the company through its servants "negligently and carelessly ran" a train against plaintiff injuring him.⁴⁹ So it has been held that a complaint alleging that the train approached the crossing where plaintiff was injured without any care, and without exercising any diligence whatever, was broad enough to allow a recovery on proof of any negligence shown in the running of the train as it approached the crossing, notwithstanding the complaint also averred that the whistle was not blown, nor the bell rung.⁵⁰ In all cases, however, the complaint must show a casual connection between the negligence of the company and the injuries.⁵¹ And the rule is the same as to violations of statutes or ordinances in running the train. The complaint must show a causal connection between the violation and the injuries.⁵² But the allegation as to proximate cause will generally be regarded as sufficient after verdict if it appears inferentially though it is not directly averred.⁵³ And if a good cause of action is otherwise stated a demurrer to the declaration will not be sustained merely because it did not charge that an or-

⁴⁸ *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590; *Southern R. Co. v. Douglass*, 144 Ala. 351, 39 So. 268; *Missouri &c. R. Co. v. Settle*, 19 Tex. Civ. App. 357, 47 S. W. 825. Evidence that neither the engine whistle nor bell was sounded is admissible under the general allegation and the engineer carelessly and negligently ran the engine. *Winter v. Central Iowa R. Co.*, 80 Iowa 443, 45 N. W. 737.

⁴⁹ *Southern R. Co. v. Douglass*, 144 Ala. 351, 39 So. 268

⁵⁰ *Missouri &c. R. Co. v. Settle*, 19 Tex. Civ. App. 357, 47 S. W. 825.

⁵¹ *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Ohio &c. R. Co. v. Engerer*, 4 Ind. App.

261, 30 N. E. 924; *Greenwaldt v. Lake Shore &c. R. Co.*, 165 Ind. 219, 74 N. E. 1081.

⁵² *Wilson v. Louisville &c. R. Co.*, 146 Ala. 285, 40 So. 941, 8 L. R. A. (N. S.) 987n; *Pittsburgh &c. R. Co. v. Conn.*, 104 Ind. 64, 3 N. E. 636; *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Evansville &c. R. Co. v. Berndt*, 172 Ind. 697, 88 N. E. 612; *Baltimore &c. R. Co. v. Musgrave*, 24 Ind. App. 295, 55 N. E. 496; *Cox v. Illinois Cent. R. Co.*, 142 Ky. 478, 134 S. W. 911, 32 L. R. A. (N. S.) 831; *Wright v. Boston &c. R. Co.*, 129 Mass. 440.

⁵³ *Lynch v. St. Joseph &c. R. Co.*, 111 Mo. 601, 19 S. W. 1114.

dinance claimed to have been violated was the proximate cause of the injury.⁵⁴ The failure to signal by whistle or bell the approach of the train to a crossing as required by law has been held sufficiently covered by an allegation that the train was running at a high rate of speed without complying with the statute as to signals at crossings, and that by reason of this negligence, the injuries complained of were caused.⁵⁵ But it has been held that a violation of a statute requiring the sounding of either the bell or whistle on the approach of a train to a crossing is not charged in a complaint, which alleges a failure to sound the whistle and ring the bell.⁵⁶ A complaint for injuries caused by an animal taking fright at an object on the right of way near a crossing should show that the object in question was by its nature calculated to frighten horses of ordinary gentleness.⁵⁷ In jurisdictions where contributory negligence is an affirmative defense it has been held that the plaintiff need not allege that he did not see or hear the approaching train.⁵⁸

§ 2796. (1762.) **Pleading—Wilful and wanton injury at railroad crossing.**—Wilful and wanton injury to a traveler at a crossing which will allow a recovery notwithstanding contributory negligence has been held well pleaded by an allegation that defendant's employes in charge of its train "did recklessly and wantonly propel said engine and cars against plaintiff's intestate who was in the act of crossing" a highway crossing and killed her.⁵⁹ In another case an allegation that defendant ran a train

⁵⁴ *Southern R. Co. v. Stockdon*, 106 Va. 693, 56 S. E. 713.

⁵⁵ *Southern R. Co. v. Posey*, 124 Ala. 486, 26 So. 914.

⁵⁶ *Highland Ave. &c. R. Co. v. South*, 112 Ala. 642, 20 So. 1003; *Terry v. St. Louis &c. R. Co.*, 89 Mo. 586, 1 S. W. 746.

⁵⁷ *Norfolk &c. R. Co. v. Gee*, 104 Va. 806, 52 S. E. 572. See also *Louisville &c. R. Co. v. Armstrong*, 32 Ky. L. 252, 105 S. W. 473.

⁵⁸ *Bamberg v. Atlantic Coast*

Line R. Co., 72 S. Car. 389, 51 S. E. 988.

⁵⁹ *Southern R. Co. v. Crenshaw*, 136 Ala. 573, 34 So. 913. But see *Denver &c. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582. For other complaints held sufficient as to wanton injury, see *Central of Ga. Ry. Co. v. Chambers*, 194 Ala. 152, 69 So. 518; *Birmingham &c. Ry. &c. Co. v. Carpenter*, 194 Ala. 141, 69 So. 626.

backwards in a violent manner without notice or warning or lights or signals, which fact constituted wilfulness and recklessness, was held to sufficiently set forth the character of defendant's negligence.⁶⁰ But, in most jurisdictions, wilfulness rather than mere negligence, should be clearly alleged, and it has been held that a charge of wilfulness is not sustained by evidence of mere negligence,⁶¹ and even that proof of wilful injury can not be made under a charge of mere negligence.⁶²

§ 2797. (1763.) Pleading—Injuries to trespassers on tracks or premises.—As a general rule the complaint in an action by one injured while on the tracks of a railroad company as a trespasser should show that after the train operatives discovered his peril they could have avoided injuring him.⁶³ This allegation of knowledge of a perilous situation by the trainman in position to avoid injuring him should be clearly averred.⁶⁴ A

⁶⁰ *Bolin v. Southern R. Co.*, 65 S. Car. 222, 43 S. E. 665. But compare *Southern Ry. Co. v. Jarvis*, 11 Ala. App. 635, 66 So. 936; *Neyman v. Alabama So. R. Co.*, 172 Ala. 606, 55 So. 509, Ann. Cas. 1913E, 232; *Baltimore &c. R. Co. v. Young*, 153 Ind. 163, 54 N. E. 791.

⁶¹ *Indiana &c. R. Co. v. Overton*, 117 Ind. 253, 20 N. E. 147; *Belt R. Co. v. Mann*, 107 Ind. 89, 7 N. E. 893; *Highland Ave. &c. R. Co. v. Winn*, 93 Ala. 306, 9 So. 509. See also *Southern Ry. Co. v. Jarvis*, 11 Ala. App. 635, 66 So. 936; *Chicago &c. R. Co. v. Dickson*, 88 Ill. 431; *Cleveland &c. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445.

⁶² *Pennsylvania Co. v. Smith*, 98 Ind. 46. See also *Wilson v. Chippewa &c. R. Co.*, 120 Wis. 636, 98 N. W. 536, 66 L. R. A. 912; *McClellan v. Chippewa &c. R. Co.*, 110

Wis. 326, 85 N. W. 1018. But see *Louisville &c. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130. See generally as to distinction in theory between wilfulness and negligence: *Proctor v. Southern R.*, 64 S. Car. 491, 42 S. E. 426; ante, §§ 1671, 1672, 1788, 1789; Note to *Rideout v. Winnebago Trac. Co.*, 123 Wis. 297, 101 N. W. 672, in 69 L. R. A. 601.

⁶³ *Hortenstein v. Virginia &c. R. Co.*, 102 Va. 914, 47 S. E. 996. A complaint based on such discovered peril and subsequent negligence of the company need not aver that the plaintiff was not a trespasser. *Louisville &c. R. Co. v. Abernathy*, 192 Ala. 629, 69 So. 57.

⁶⁴ *Underwood v. Western &c. R. Co.*, 105 Ga. 48, 31 S. E. 123. For complaint held sufficient as to discovered peril, see *Texas &c. R. Co. v. Hernandez*, 49 Tex. Civ. App. 360, 108 S. W. 765.

mere allegation that a brakeman saw the person on the track in a perilous position and signaled to the engineer to stop the train, and took off his hat and halloed to him was held insufficient to show that the engineer knew that any one was in danger.⁶⁵ Where wilful and wanton injury is charged it is not usually necessary that the plaintiff should allege that he exercised care for his own safety. It is elementary that contributory negligence is not a defense to actions for injuries thus inflicted.⁶⁶ It has been held that wantonness was well pleaded by an allegation that the engine was pushed forward or backed down on the injured person without giving any warning of its approach and that defendant knew his dangerous position and that the act was wilful and wanton and with knowledge of such dangerous position.⁶⁷ Where the person sues for injuries received while using the right of way as a path and claims that he was a licensee thereon he should allege that the place was generally used by the public as a path with the knowledge and acquiescence of the railroad company,⁶⁸ if such is the ground upon which he claims to be a licensee. An allegation that the plaintiff was standing on the railroad platform at the time of his injury, in the pursuit of his lawful business and without default on his part, has been

⁶⁵ *Evans v. Pittsburgh &c. R. Co.*, 142 Ind. 264, 41 N. E. 537. See also *Barnes v. Texas &c. Ry. Co.* (Tex. Civ. App.), 177 S. W. 214.

⁶⁶ *Pittsburgh &c. R. Co. v. Kinnare*, 203 Ill. 388, 67 N. E. 826. See also *Louisville &c. R. Co. v. Johnson*, 162 Ala. 665, 50 So. 300; *Ritter v. Atlantic &c. R. Co.*, 101 S. Car. 8, 85 S. E. 51. And see as to last clear chance, *Louisville &c. R. Co. v. Abernathy*, 192 Ala. 629, 69 So. 57; *Saxon v. Central of Ga. Ry. Co.*, 192 Ala. 434, 68 So. 313; *Pennsylvania Co. v. Reesor*, 60 Ind. App. 636, 108 N. E. 983; *Jones v. Mac-*

kay Tel. & Cable Co., 137 La. 121, 68 So. 379.

⁶⁷ *Pittsburgh &c. R. Co. v. Kinnare*, 203 Ill. 388, 67 N. E. 826. Backing a train without lookout at a much used crossing is held not to amount to such wantonness or gross negligence, and not to authorize a recovery notwithstanding contributory negligence, in *Rouse v. Blair*, 185 Mich. 632, 152 N. W. 204.

⁶⁸ *Smalley v. Southern R. Co.*, 57 S. Car. 243, 35 S. E. 489; *Dorn v. Georgia &c. R. Co.*, 58 S. Car. 364, 36 S. E. 654. As elsewhere shown there is conflict as to duty to trespassers and licensees.

held to show that he was not a trespasser but a licensee, though he did not expressly declare himself to be such.⁶⁹

§ 2798. (1764.) **Pleading—Street and interurban railway injuries.**—The complaint should set out the negligent act causing plaintiff's injury,⁷⁰ but this does not demand minute particularity of description. It has, for example, been held that negligence was sufficiently set out by an allegation that plaintiff suffered the alleged injuries as the proximate consequence of the negligence of defendant, through its employees, in the management and control of its cars.⁷¹ So, negligence was held to be sufficiently alleged to withstand a special demurrer by an averment that the servants of the street railroad company, so carelessly and improperly drove and managed a train of cars operated by an endless cable, that the motor and car ran into plaintiff's carriage with great force and violence, crushing and destroying the same and rendering it of no value.⁷² Where, however, the complaint sets out particular acts of negligence in such a way as to exclude the idea that plaintiff intends to rely on general negligence his proof will be limited to the specific acts pleaded.⁷³ It has been held that an excessive ringing of the gong as an act of negligence need not be charged specially, but may be proved under a general averment of negligence.⁷⁴ And likewise that a failure to sound signals on approach to crossings is sufficiently covered by an averment that the car was run at an excessive speed and that no care or diligence was exercised by the defendant.⁷⁵

⁶⁹ *Norfolk &c. R. Co. v. Wood*, 99 Va. 156, 37 S. E. 846. See however on this general subject, ante, §§ 1785-1788, 1789, 1795.

⁷⁰ *Sommers v. St. Louis Transit Co.*, 108 Mo. App. 319, 83 S. W. 268; *Chicago City R. Co. v. Barker*, 209 Ill. 321, 70 N. E. 624. See *Indianapolis Traction &c. Co. v. Pressell*, 39 Ind. App. 472, 77 N. E. 357.

⁷¹ *Birmingham &c. Elec. Co. v. Baker*, 132 Ala. 507, 31 So. 618.

⁷² *Chicago &c. R. Co. v. Jennings*,

157 Ill. 274, 41 N. E. 629. And see to substantially the same effect. *Birmingham Ry. &c. Co. v. Bason*, 191 Ala. 618, 68 So. 49.

⁷³ *Bartley v. Metropolitan St. R. Co.*, 148 Mo. 124, 49 S. W. 840. See also ante, § 2707, where numerous cases in support of the general proposition are cited.

⁷⁴ *Benjamin v. Holyoke St. R. Co.*, 160 Mass. 3, 35 N. E. 95, 39 Am. St. 446.

⁷⁵ *Citizens St. R. Co. v. Albright*,

Where a violation of speed ordinances is charged the complaint must show that such violation was the proximate cause of injury.⁷⁶ It has been held not improper to charge in the same count negligence in law because of a violation of a speed ordinance, and negligence in fact by reason of the circumstances existing and apparent at the time in question. Under such a count it is held that a finding for plaintiff will be sustained by proof of either allegation.⁷⁷ And so there has been held no repugnancy in a complaint, one count of which, alleged that the motorman failed to keep a vigilant watch, and another of which alleged that he failed to stop the car in the shortest time and space possible.⁷⁸ It is not essential that the name of the motorman causing the injury should be set out.⁷⁹ An intentional injury has been held sufficiently pleaded by an allegation that the company wantonly caused or allowed the car to run against the injured person and thereby wantonly and intentionally caused his injuries.⁸⁰ The question of the ownership of a street railway line by the defendant is not reached, in Illinois, by a plea of the general issue. This issue can only be raised by a special plea denying that defendant owned or operated the same.⁸¹

§ 2799. (1765.) Pleading—Collision between steam and street cars at crossings.—A complaint in an action by a street car

14 Ind. App. 433, 42 N. E. 238. See also *Mobile Light & R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509; *Razor v. Bloomington &c. Ry. &c. Co.*, 190 Ill. App. 451; *Koenig v. Union Depot R. Co.*, 173 Mo. 698, 73 S. W. 637, for additional illustrations and examples of the admissibility of various specific acts of negligence under a general charge of negligence.

⁷⁶ *Campbell v. St. Louis Transit Co.*, 121 Mo. App. 406, 99 S. W. 58.

⁷⁷ *Quincy Horse &c. Co. v. Gnuse*, 38 Ill. App. 212; *San Antonio's Traction Co. v. Upsom*, 31 Tex. Civ. App. 50, 71 S. W. 565.

⁷⁸ *McQuade v. St. Louis &c. R. Co.*, 200 Mo. 150, 98 S. W. 552. See also *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363, 73 S. W. 379.

⁷⁹ *Birmingham R. &c. Co. v. Stable Co.*, 119 Ala. 615, 24 So. 558, 72 Am. St. 955. See also *Mills v. Central of Ga. R. Co.*, 140 Ga. 181, 78 S. E. 816, Ann. Cas. 1914C, 1098 and note.

⁸⁰ *Birmingham R. &c. Co. v. Jones*, 146 Ala. 277, 41 So. 146.

⁸¹ *Chicago Union Trac. Co. v. Jerka*, 227 Ill. 95, 81 N. E. 7. See generally the chapter on Street Railway Negligence.

passenger for injuries in a collision at a railroad crossing—the law requiring trains to stop one hundred feet before crossing another railroad and not to proceed until the way is known to be clear—has been upheld as sufficiently specific in regard to defendant's negligence where it alleged that the operatives of the car negligently ran the same on the railroad crossing without first knowing that the track was clear and that by reason of such negligence plaintiff was injured.⁸² Other decisions upon the general subject are cited below.⁸³

§ 2800. (1766.) **Pleading—Injuries to servants.**—The complaint, in an action by an employe against the company for damages for personal injuries, must distinctly allege that the injured person was in the employ of the railroad company at the time of receiving his injuries,⁸⁴ and must usually show that he was engaged in the performance of duties within the scope of his employment.⁸⁵ But somewhat general allegations in regard to these subjects are held sufficient in most jurisdictions,⁸⁶ and it is usually sufficient if the facts are so alleged as to show that the plaintiff was in the employ of the defendant and injured by

⁸² *Montgomery St. R. Co. v. Lewis*, 148 Ala. 134, 41 So. 736.

⁸³ See *Pittsburgh &c. R. Co. v. Spencer*, 98 Ind. 186; *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722; also ante, §§ 1535, 1536, 1612, 1613, 1615, 1616.

⁸⁴ *Gulf &c. R. Co. v. Gorman*, 6 Tex. Civ. App. 230, 25 S. W. 992; *Wendell v. Pennsylvania R. Co.*, 57 N. J. L. 467, 31 Atl. 720. See also *Walton v. Lindsey Lumber Co.*, 145 Ala. 661, 39 So. 670; *St. Louis &c. R. Co. v. Brantley*, 168 Ala. 579, 53 So. 305; *Wabash R. Co. v. Beedle*, 173 Ind. 437, 90 N. E. 760; *Indiana Iron Co. v. Cray*, 19 Ind. App. 565, 48 N. E. 803.

⁸⁵ *West Chicago St. R. Co. v. Coit*, 50 Ill. App. 640; *Cleveland*

&c. R. Co. v. Perkins, 171 Ind. 307, 86 N. E. 405; *Cleveland &c. R. Co. v. Heineman*, 46 Ind. App. 388, 90 N. E. 899; *Stagg v. Edward Western Tea &c. Co.*, 169 Mo. 489, 69 S. W. 391. But it need not give the name of the negligent employe causing the injury. *Louisville &c. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443. See also to same effect ante, § 2798n. 79.

⁸⁶ *Green v. Bessemer Coal &c. Co.*, 162 Ala. 609, 50 So. 289; *Kansas City &c. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88; *Fearon v. Mullins*, 35 Mont. 232, 88 Pac. 794; *Di Marcho v. Builders' Iron Foundry*, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

its negligence while engaged in the performance of his duties within the scope of such employment even though there is no averment in express terms of such employment, and the scope thereof.⁸⁷ An allegation that plaintiff while returning home from his work on a railroad bicycle furnished by the railroad, and used at its instance, was run down by a train, was held not to show that he was at the time of his injury an employe in the service of the railroad company.⁸⁸ But it has been held that a variance between an allegation that plaintiff was an employe of a railroad company and proof that he was employed by its lessee and injured through the lessor's negligent construction of the road, was immaterial as the defendant could not have been misled thereby to his prejudice.⁸⁹ The complaint must always show that the negligence of the railroad company was the proximate cause of the injury.⁹⁰ The acts complained of as a breach of the employer's duty must be set out. It is not enough to charge a duty and a breach of duty generally, as that would amount merely to a conclusion of law.⁹¹ But great particu-

⁸⁷ See *Southern R. Co. v. West*, 4 Ga. App. 672, 62 S. E. 141; *American Car &c. Co. v. Hill*, 226 Ill. 227, 80 N. E. 784; *Poor v. Madison River &c. Co.*, 38 Mont. 341, 99 Pac. 947. But compare *Chicago &c. R. Co. v. Hamilton*, 42 Ind. App. 512, 85 N. E. 1044.

⁸⁸ *Wabash R. Co. v. Erb*, 36 Ind. App. 650, 73 N. E. 939, 114 Am. St. 392; *Bowles v. Indiana R. Co.*, 27 Ind. App. 672, 62 N. E. 94, 81 Am. St. 279.

⁸⁹ *Lee v. Southern &c. R. Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 57 Am. St. 140n.

⁹⁰ *Evansville &c. R. Co. v. Krapf*, 143 Ind. 647, 36 N. E. 901; *Cleveland &c. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485; *Wabash R. Co. v. Beedle*, 173 Ind. 437, 90 N. E. 760. South-

ern R. Co. v. Sittasen, 166 Ind. 257, 76 N. E. 973; *Eckles v. Norfolk &c. R. Co.*, 96 Va. 69 25 S. E. 545. For complaint held sufficient, see *Gordon v. Chicago &c. R. Co.*, 129 Iowa 747, 106 N. W. 177. See generally ante, § 1877. *Merriweather v. Sayre Min. Co.*, 161 Ala. 441, 49 So. 916; *Gordon v. Chicago &c. R. Co.*, 129 Iowa 747, 106 N. W. 177; *Seal v. Virginia &c. Cement Co.*, 108 Va. 806, 62 S. E. 795.

⁹¹ *Sargent Co. v. Baublis*, 215 Ill. 428, 74 N. E. 455; *Chicago &c. R. Co. v. Banker*, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542n, 14 Ann. Cas. 375; *Pittsburgh &c. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, and cases there cited; *Cetofonte v. Camden Coke Co.*, 78 N. J. L. 662, 75 Atl. 913, 27 L. R. A. (N. S.) 1058. But compare

larity is not demanded. A general averment of a defect in a particular tool or appliance,⁹² or that the railroad company had failed to keep its track in a reasonably safe condition, or to inform employes of obstructions on the track,⁹³ is ordinarily regarded as sufficient, at least in the absence of a motion to make more specific or certain. So a complaint alleging that an injury to a brakeman was caused by a defect in car couplings, together with a failure to have a sufficient number of brakemen to operate the train and by the negligence of the conductor, whose orders the brakeman was bound to obey, has been held sufficiently particular as to the defects and the negligence causing the injury.⁹⁴ So it has been held that a complaint for injuries to a railroad brakeman need not state the name of the conductor in charge of the train on which he was working, nor the number of the car nor any specific description of it.⁹⁵ And where it is claimed that an employe has continued to work on a promise to repair a defective appliance it has been held unnecessary for the complaint to state what officer or agent made the promise.⁹⁶ Other illustrations and examples of general allegations as to negligence held sufficient will be found in the cases cited below.⁹⁷ Good pleading would seem to require a trainman suing for injuries caused

Louisville &c. R. Co. v. Jones, 130 Ala. 456, 30 So. 586; *Pittsburgh &c. R. Co. v. Schaub*, 136 Ky. 652, 124 S. W. 885; *Cristanelli v. Saginaw Min. Co.*, 154 Mich. 423, 117 N. W. 910.

⁹²*Orth v. St. Paul &c. R. Co.*, 43 Minn. 208, 45 N. W. 151; *Galveston &c. R. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066; *Galveston &c. R. Co. v. Abbey*, 29 Tex. Civ. App. 211, 68 S. W. 293; *Preston v. St. Johnsbury &c. R. Co.*, 64 Vt. 280, 25 Atl. 486; *Missouri &c. R. Co. v. Barnes*, 42 Tex. Civ. App. 626, 95 S. W. 714.

⁹³*Illinois Cent. R. Co. v. Leis-*

ure, 28 Ky. L. 768, 90 S. W. 269; *Southern R. Co. v. Blandford*, 105 Va. 373, 54 S. E. 1.

⁹⁴*Georgia &c. R. Co. v. Probst*, 85 Ala. 203, 4 So. 711.

⁹⁵*Texas Cent. R. Co. v. Powell*, 38 Tex. Civ. App. 157, 86 S. W. 21. But see *Brown v. Pennsylvania R. Co.*, 142 Fed. 909.

⁹⁶*Burch v. Southern Pac. Co.*, 140 Fed. 270.

⁹⁷*Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 192, 213, 40 So. 280; *Walsh v. Western R. Co.*, 34 Fla. 1, 15 So. 686; *Chesapeake &c. R. Co. v. Melton*, 110 Va. 728, 67 S. E. 346.

by striking a pole at the side of the track to set out how near it was to the track, and an allegation that it was "too near the track" has been held too indefinite.⁹⁸ If plaintiff claims that certain other appliances than the one causing his injury could have been used with less danger, it has been held that he must allege that they are practicable for the purpose.⁹⁹ Furthermore, the complaint must usually allege or state facts showing that the defendant had actual or constructive knowledge of the defect causing the injury,¹ and in some jurisdictions, that plaintiff was ignorant thereof.² But the allegation of knowledge of a defect is not generally required where the defect is a defect of construction.³ It is well settled that the

⁹⁸ *Blackstone v. Central &c. R. Co.*, 105 Ga. 380, 31 S. E. 90.

⁹⁹ *Pittsburgh &c. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218.

¹ *Evansville &c. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355; *Lake Shore &c. R. Co. v. Kurtz*, 10 Ind. App. 60, 35 N. E. 201; *Lake Erie &c. R. Co. v. McHenry*, 10 Ind. App. 525, 37 N. E. 186; *Cleveland &c. R. Co. v. Lindsay*, 33 Ind. App. 404, 70 N. E. 283; *Atchison &c. R. Co. v. Tindall*, 57 Kans. 719, 48 Pac. 12; *Crane v. Missouri &c. R. Co.*, 87 Mo. 588; *Grover v. New York &c. R. Co.*, 76 N. J. L. 237, 69 Atl. 1082; *Norfolk &c. R. Co. v. Jackson*, 85 Va. 498, 8 S. E. 370; ante, §§ 1874 and 2708. But see *Galveston &c. R. Co. v. Udalle*, (Tex. Civ. App.), 91 S. W. 330; *O'Connor v. Illinois Cent. R. Co.*, 83 Iowa 105, 48 N. W. 1002; *Clippard v. St. Louis Transit Co.*, 202 Mo. 432, 101 S. W. 44; *Chicago &c. R. Co. v. Kellogg*, 55 Nebr. 748, 76 N. W. 462.

² Ante, §§ 1878 and 2708; *Baltimore &c. R. Co. v. Hunsucker*, 33

Ind. App. 27, 70 N. E. 556; *Cleveland &c. R. Co. v. Lindsay*, 33 Ind. App. 404, 70 N. E. 283; *Mad River &c. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312. A general allegation that he had no knowledge is usually held to include both actual and constructive knowledge. *Louisville &c. R. Co. v. Miller*, 140 Ind. 685, 40 N. E. 116; *Cleveland &c. R. Co. v. Bossett*, 44 Ind. App. 245, 87 N. E. 158; *Louisville &c. R. Co. v. Stewart*, 163 Ky. 164, 173 S. W. 757. See also *Denver &c. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681. But specific facts alleged may overcome this general allegation. *Shaver v. Home Tel. &c. Co.*, 36 Ind. App. 233, 75 N. E. 288, 114 Am. St. 373; *Cleveland &c. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485, and the allegation must be as broad as the allegation of the master's knowledge; *Cleveland &c. R. Co. v. Morrey*, 172 Ind. 513, 88 N. E. 932.

³ *Chicago &c. R. Co. v. Hines*, 33 Ill. App. 271; *Linguist v*

general allegation of the absence of knowledge will be overcome by allegations from which it is evident that the servant must have known of the defects or dangers, or had the same means or opportunity for such knowledge as the master had.⁴ Rules of the railroad company have been held admissible without being pleaded.⁵

§ 2801. (1767.) **Pleading—Assumption of risks—Promise to repair.**—As already shown there is some conflict as to which party must plead assumption or non-assumption of risks and has the burden of proof upon that question.⁶ The complaint in an action for injuries due to defects in the appliance which were obvious and which the master had promised to remedy but had failed to do so for an unreasonable time, should show that the plaintiff was injured while he had a reasonable expectation that his employer would keep his promise.⁷ The defendant is not required to plead assumption of risk where the fact that the risk was assumed sufficiently appears on the face of the complaint;⁸

Hodges, 248 Ill. 491, 94 N. E. 94; Louisville &c. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Hollingsworth v. Davis &c. Copper Co., 38 Mont. 143, 99 Pac. 142.

⁴ Louisville &c. R. Co. v. Kemper, 147 Ind. 561, 47 N. E. 214; Sheets v. Chicago &c. R. Co., 139 Ind. 682, 39 N. E. 154; Ames v. Lake Shore &c. R. Co., 135 Ind. 363, 35 N. E. 117. See also cases last cited in note 1, *infra*.

⁵ Galveston &c. R. Co. v. Garrett, 44 Tex. Civ. App. 406, 98 S. W. 932.

⁶ See ante, §§ 1874, 1878, 2708. Also Great Northern R. Co. v. Ckotzy, 196 Ala. 25, 71 So. 335; Strait v. City of Rock Hill, 104 S. Car. 116, 88 S. E. 469 (both holding it an affirmative defense which defendant must plead).

⁷ Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 337, 9 Am. St. 806. See generally the elaborate note in 40 L. R. A. 781; also ante § 1857, and Elie v. Cowles Co., 82 Conn. 236, 73 Atl. 258; Consolidated Coal Co. v. Bokamp, 181 Ill. 9, 54 N. E. 567; Burns v. Windfall Mfg. Co., 146 Ind. 261, 45 N. E. 188; Luper v. Atchison &c. R. Co., 86 Kans. 712, 122 Pac. 106, Ann. Cas. 1913C, 498 and note.

⁸ Smith v. Armour &c. Co., 37 Tex. Civ. App. 633, 84 S. W. 675. This would often make the complaint bad on demurrer. See Griffith v. Lexington &c. R. Co., 124 Ga. 553, 53 S. E. 97. Bolden v. Central of Ga. R. Co., 130 Ga. 456, 60 S. E. 1047; Walker v. Wehking, 29 Ind. App. 62, 63 N. E. 128; Nivert v. Wabash R. Co., 232 Mo. 626,

nor can the plaintiff ordinarily recover if it appears from his own evidence.⁹ It has been held a sufficient plea of assumption of risk to allege that the dangers which resulted in the injuries of the plaintiff—a brakeman, injured while coupling cars—were incident to his occupation and the service for which he was employed.¹⁰ Another case holds the defense to have been sufficiently raised by allegations that the plaintiff—a brakeman—knew at the time he entered the defendant's employment and at the time of the accident, that an unusual, heavy and continuous rainfall had rendered the defendant's roadbed defective and that the same might get out of line, though the defendant exercised the greatest care to maintain the same, and that the plaintiff's injury was one of the risks he voluntarily assumed.¹¹ It would seem better pleading to set out that the plaintiff knew or knew and appreciated the particular risk.¹² It has been held that the defendant can not set up both assumption of risk and contributory negligence as defenses in a single plea. Such a plea it is held would be bad for duplicity.¹³ And it is generally held that a mere allegation of freedom from fault or from contributory negligence is not equivalent to an allegation of lack of knowledge or non-assumption of risk.¹⁴

135 S. W. 33; Missouri Pac. R. Co. v. Baxter, 42 Nebr. 793, 60 N. W. 1044.

⁹ Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; Iowa Gold Mining Co. v. Diefenthaler, 32 Colo. 391, 76 Pac. 981; White v. Lewiston & Co. R. Co., 94 App. Div. 4, 87 N. Y. S. 901. See also Dokan v. G. W. Chase & Co., 197 Mo. 238, 94 S. W. 944; New York & Co. R. Co. v. Vizvari, 210 Fed. 118, L. R. A. 1915C, 9n.

¹⁰ Adams v. San Antonio & Co. R. Co., 34 Tex. Civ. App. 413, 79 S. W. 79. But see Vohs v. Shorthill & Co., 130 Iowa 538, 107 N. W. 417, 419.

¹¹ Price v. St. Louis & Co. R. Co.,

38 Tex. Civ. App. 309, 58 S. W. 858. But a mere allegation that he "assumed the risk of injuries upon entering said employment" is not sufficient. Vohs v. Shorthill & Co., 130 Iowa 538, 107 N. W. 417.

¹² Southern R. Co. v. McGowan, 149 Ala. 440, 43 So. 378.

¹³ Kansas City & Co. R. Co. v. Thornhill, 141 Ala. 215, 37 So. 412. But in many jurisdictions both defenses might be set up, at least in separate paragraphs of answer.

¹⁴ Louisville & Co. R. Co. v. Corps, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636n; Cleveland & Co. R. Co. v. Bossert, 44 Ind. App. 245, 87 N. E. 158; Hesse v. Columbus & Co. R. Co., 58 Ohio St. 167, 50 N. E. 354;

§ 2802. (1768.) **Pleading — Fellow-servant rule.**—A complaint alleging an injury to the plaintiff through the negligence of another servant should aver the facts which take the case out of the general fellow-servant rule.¹⁵ Where the facts set out plainly show that the relation of fellow servant does not exist then an express denial in so many words is unnecessary.¹⁶ Where the recovery is grounded on the fact that the fellow servant causing the injury was incompetent or unfit, the complaint should allege that the railroad company was negligent in employing him or in retaining him in its service after knowledge of his unfitness or incompetency, and that the injury complained of was caused by such unfitness or incompetency.¹⁷ Great par-

Brainard v. Van Dyke, 71 Vt. 359, 45 Atl. 758. But compare *Cristanelli v. Saginaw Min. Co.*, 154 Mich. 423, 117 N. W. 910; *Henry v. Fitchburg R. Co.*, 65 Vt. 436, 26 Atl. 485.

¹⁵ *Clyde v. Richmond &c. R. Co.*, 59 Fed. 394; *Schillinger Bros. Co. v. Smith*, 225 Ill. 74, 80 N. E. 65; *East St. Louis &c. R. Co. v. Dwyer*, 41 Ill. App. 522; *Indianapolis &c. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. 200; *Chicago &c. R. Co. v. Barker*, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542n, 14 Ann. Cas. 375; *Hagins v. Cape Fear &c. R. Co.*, 106 N. Car. 537, 11 S. E. 590; *Laporte v. Cook*, 20 R. I. 261, 38 Atl. 700. See also *Dwyer v. American Exp. Co.*, 82 Wis. 307, 52 N. W. 304, 33 Am. St. 44; *Carolan v. Southern Pac. Co.*, 84 Fed. 84; *Mann v. O'Sullivan*, 126 Cal. 61, 58 Pac. 375, 77 Am. St. 149; *Roberts & Schaeffer Co. v. Jones*, 82 Ark. 188, 101 S. W. 165; *Bennett v. Chicago City R. Co.*, 243 Ill. 420, 434, 90 N. E. 735 (but failure to so allege is not ground for

arresting judgment after verdict); *Weaver v. W. L. Goulden Log Co.*, 116 La. 468, 40 So. 798; *McCarthy v. Bristol &c. Co., Ir. L. R.* 10 C. L. 384.

¹⁶ *Chicago &c. R. Co. v. Swan*, 176 Ill. 424, 52 N. E. 916; *Chicago City R. Co. v. Leach*, 80 Ill. App. 354; *Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801, 37 Am. St. 191. See also *Alabama &c. R. Co. v. Brock*, 161 Ala. 351, 49 So. 453; *Chicago &c. R. Co. v. Swan*, 176 Ill. 424, 52 N. E. 916; *Louisville &c. R. Co. v. Miller*, 140 Ind. 685, 40 N. E. 116.

¹⁷ *Elwell v. Hacker*, 86 Maine 416, 30 Atl. 64; *Collier v. Steinhart*, 51 Cal. 116; *Sullivan v. Toledo &c. R. Co.*, 58 Ind. 26; *Slattery v. Toledo &c. R. Co.*, 23 Ind. 82; *Dow v. Kansas &c. R. Co.*, 8 Kans. 642. See also *Louisville &c. R. Co. v. Lile*, 154 Ala. 556, 45 So. 699; *Lake St. El. R. Co. v. Fitzgerald*, 136 Ill. App. 281; *South Cov. &c. R. Co. v. Brown*, 31 Ky. L. 1072, 104 S. W. 703; *Doyle v. Melendy*, 85 Vt. 297, 81 Atl. 1129.

ticularity as to incompetency is not required. A general allegation of unfitness and of knowledge of that fact by the railroad company is generally considered sufficient.¹⁸ Thus, it has been held that an allegation in a complaint that the engine causing the injuries complained of was being run by a fireman of little or no experience in the management of an engine, was sufficient to advise the company that it would be obliged to defend for failure to keep a competent engineer.¹⁹ It is not necessary that the complaint should state the names and positions of the officials having notice of the incompetency of the negligent servant.²⁰ But the charge of incompetency must not be too indefinite. An allegation that certain employes were negligent and careless has been held not to charge incompetency.²¹ On the question of the injured servant's want of knowledge of this incompetency the complaint should speak clearly. It is not enough to allege that plaintiff was "wholly unacquainted" with the negligent fellow servant.²² And so as to the allegation of the master's negligence in employment of an unfit servant. Thus, an allegation that the master retained the servant in his employ after knowledge that he was unfit to be so retained was held not equivalent to an allegation that the master employed an unfit servant without proper inquiry as to his fitness. These allegations tender distinct issues, and although proof of either may be sufficient to make out an action against the railroad company, yet proof of one of them will not be responsive to the other.²³ The inade-

¹⁸ *Johnston v. Canadian &c. R. Co.*, 50 Fed. 886; *Christian v. Columbus &c. R. Co.*, 90 Ga. 124, 15 S. E. 701; *Helfrich v. Williams*, 84 Ind. 553; *Indiana &c. R. Co. v. Daily*, 110 Ind. 75, 10 N. E. 631; *Lake Shore &c. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Wabash &c. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661; *Chicago &c. R. Co. v. Beatty*, 13 Ind. App. 604, 40 N. E. 753. See also *Woodward Iron Co. v. Curl*, 153 Ala. 215, 44 So. 969.

¹⁹ *Norfolk &c. R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884, 44 Am. St. 906.

²⁰ *Lake Shore &c. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

²¹ *Kelly v. Cable Co.*, 13 Mont. 411, 34 Pac. 611.

²² *Lake Shore &c. R. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630. See also ante, § 1854. But compare *First Nat. Bank v. Chandler*, 144 Ala. 286, 39 So. 822, 113 Am. St. 39.

²³ *Union Pac. R. Co. v. Young*, 8 Kans. 658.

quacy of the force employed on a particular work should be alleged where it is claimed that the injuries resulted from this cause.²⁴ A complaint was held to sufficiently present this issue which alleged that defendant did not use its trains, provide servants, etc., so as to avoid extraordinary risks to its employes, and that by reason of the negligent use of its cars, engines, etc., and by failure to employ a sufficient number of servants, the extraordinary risk was not avoided.²⁵ Great particularity is not required in the allegation that the negligent act was that of a vice-principal,²⁶ but the complaint should show that some duty of the master had been violated by the vice-principal in order to make the master liable.²⁷ It is unnecessary to allege that the master had knowledge of the incompetency of one acting as his vice-principal in order to let in proof that the injury occurred by the negligence and incompetency of such vice-principal.²⁸

§ 2803. (1769.) Pleading—Rules for regulation of employes.—It would seem the better practice for the plaintiff to specially plead the failure of the railroad company to promulgate rules intended for the protection of employes if he intends to rely on that breach of duty for the recovery.²⁹ But it has been held that this matter is sufficiently covered by the general allegation of carelessness and negligence in the complaint.³⁰ It has also been held that a railroad company, in support of a plea of contributory negligence, in an action for the death of an engineer

²⁴ *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 65, 42 S. W. 1062. See also *Alabama &c. R. Co. v. Vail*, 142 Ala. 134, 38 So. 124, 110 Am. St. 23.

²⁵ *Harper v. Norfolk &c. R. Co.*, 36 Fed. 102. See also *Supple v. Agnew*, 191 Ill. 439, 61 N. E. 392.

²⁶ *Mealman v. Union &c. R. Co.*, 37 Fed. 189, 2 L. R. A. 192.

²⁷ *New Pittsburgh Coal Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7, 43 Am. St. 327.

²⁸ *Harris v. Balfour Quarry Co.*, 137 N. Car. 204, 49 S. E. 95.

²⁹ *Voss v. Delaware &c. R. Co.*, 62 N. J. L. 59, 41 Atl. 224.

³⁰ *Wild v. Oregon &c. R. Co.*, 21 Ore. 159, 27 Pac. 954. See also *Texas &c. R. Co. v. Cumpston*, 15 Tex. Civ. App. 493, 40 S. W. 546; *Galveston &c. R. Co. v. Karrer* (Tex. Civ. App.), 70 S. W. 328. And compare generally *Reagan v. St. Louis &c. R. Co.*, 93 Mo. 348, 6 S. W. 371, 3 Am. St. 542; *Rut-*

caused by cars being run against his engine while he was inspecting it, may prove a rule making it the duty of an engineer going into a dangerous place about his engine to notify all persons working about the train, though the rule is not pleaded.³¹ It seems clear that a complaint by an employe for injuries, in which the only negligence alleged is the failure of the railroad company to adopt and promulgate reasonable rules and regulations is unsupported by evidence merely that the plaintiff never saw, and was never informed of or furnished with any rules.³²

§ 2804. (1770.) **Pleading—Injuries to trainmen from low overhead bridges.**—Generally a complaint in an action for this species of injury will be regarded as sufficient if it charges: (1) That a bridge of this description was erected or maintained by the railroad company; (2) that the railroad company knew of its insufficient height and that it was dangerous and unsafe for its brakemen to perform their duties while passing thereunder; (3) that the injured employe was ignorant of the fact that the bridge was too low and that it was dangerous for him to attempt the performance of the duty imposed on him as a brakeman while passing under the bridge; and (4) that the plaintiff while in the defendant's employ as brakeman, in his proper place and at his post of duty, was struck by the bridge, under which the train was running, and received the injuries described.³³ As elsewhere shown, however, there is some difference as to the rule in different jurisdictions.³⁴

§ 2805. (1771.) **Pleading — Contributory negligence.** — In jurisdictions where contributory negligence is regarded as an affirmative defense to be specially pleaded it is generally held

ledge v. Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38.

³¹ Gibson v. Burlington &c. R. Co., 107 Iowa 596, 78 N. W. 190. See also ante, § 1843.

³² Corcoran v. Delaware &c. R. Co., 47 N. Y. St. 147, 19 N. Y. S. 994.

³³ Baltimore &c. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627. See also Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84.

³⁴ See ante, § 1827.

that the pleading should state the facts upon which the conclusion of contributory negligence is predicated. It is not enough to merely state that the plaintiff or person killed or injured was guilty of negligence contributing to his injury, as that would be a conclusion of law.³⁵ A plea is too general which merely charges that the injuries occurred from the plaintiff's own carelessness and negligence.³⁶ In a jurisdiction in which the burden is upon the defendant it has been held that the defendant must plead contributory negligence if he relies on that defense, though the plaintiff alleges freedom from contributory negligence in the complaint. This allegation is regarded as surplusage, and hence the issue is not raised by a general denial.³⁷ But, even though the defendant has the burden of proof, a complaint may be subject to demurrer if in stating the plaintiff's cause of action it does so in such a way as to show that he is guilty of contributory negligence and that no other reasonable inference can be drawn from the facts alleged.³⁸ In many jurisdictions where the plaintiff is required to negative contributory negligence a complaint is regarded as sufficient if it alleges that plaintiff was without fault or was free from contributory negligence without setting out the facts unless particular facts in

³⁵*Charping v. Toxaway Mills Co.*, 70 S. Car. 470, 50 S. E. 186. See also *Denver &c. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681; *Postal Tel. &c. Co. v. Hulsey*, 115 Ala. 193, 22 So. 854; *Hudson v. Wabash &c. R. Co.*, 101 Mo. 13, 14 S. W. 15. See *Southern Ry. Co. v. Shelton*, 136 Ala. 191, 34 So. 194; *Mobile Elec. Co. v. Sanges*, 169 Ala. 341, 53 So. 176, *Ann Cas.* 1912B, 461; *Alabama &c. R. Co. v. Brock*, 161 Ala. 351, 49 So. 453. In some jurisdictions, however, contributory negligence may be pleaded generally just as freedom from contributory negligence may be alleged in general terms in most jurisdictions in which the plaintiff

is required to plead it. See *Louisville &c. R. Co. v. Wolfe*, 80 Ky. 82; *Chicago &c. R. Co. v. Oyster*, 58 Nebr. 1, 78 N. W. 359.

³⁶*Newport &c. Turnpike Co. v. Pirmann*, 26 Ky. L. 933, 82 S. W. 976; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 41 Am. Rep. 318; *Murray v. Gulf &c. R. Co.*, 73 Tex. 2, 11 S. W. 125.

³⁷*Orient Ins. Co. v. Northern Pac. R. Co.*, 31 Mont. 502, 78 Pac. 1036. But compare *Hutchings v. Mills Mfg. Co.*, 68 S. Car. 512, 47 S. E. 710.

³⁸*National Motor &c. Co. v. Kellum*, 184 Ind. 457, 109 N. E. 196. See also *Murray v. Gulf &c. R. Co.*, 73 Tex. 2, 11 S. W. 125.

other portions of the complaint negative this conclusion or show contributory negligence.³⁹ If the complaint denies contributory negligence generally and at the same time pleads a special state of facts which show that there was contributory negligence, these special facts will control, and the pleading will be bad on the demurrer.⁴⁰ The complaint need not negative contributory negligence in actions for willful or wanton injuries, since contributory negligence is not a defense to such actions.⁴¹ The general denial and the plea of contributory negligence are not generally regarded as inconsistent. The authorities hold that a case may be tried upon either or both defenses.⁴² The allegation of contributory negligence is not considered an implied admission of negligence on defendant's part so as to dispense with proof of such negligence by plaintiff⁴³

§ 2806. (1772.) **Pleading—Damages.**—The complaint should clearly and definitely set out the injuries received for which damages are claimed.⁴⁴ And where, for any reason, this can not be

³⁹ 1 Thomp. Neg. (2d ed.) 375; Louisville &c. R. Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714; Blackstone v. Central of Ga. R. Co., 105 Ga. 380, 31 S. E. 90; Pennsylvania R. Co. v. O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Pope v. Great Northern R. Co., 94 Minn. 429, 103 N. W. 331. See also ante § 2708.

⁴⁰ Spencer v. Ohio &c. R. Co., 130 Ind. 181, 29 N. E. 915; Gay v. Essex Elec. St. R. Co., 159 Mass. 242, 34 N. E. 258; Russell v. Riverside &c. Mills, 24 R. I. 591, 54 Atl. 375; Parrott v. New Orleans &c. R. Co., 62 Fed. 562; Peirce v. Oliver, 18 Ind. App. 87, 47 N. E. 485.

⁴¹ Continental Ins. Co. v. Clark, 126 Iowa 274, 100 N. W. 524.

⁴² Louisville &c. R. Co. v. Pearce, 142 Ala. 680, 39 So. 72; Leavenworth Light &c. Co. v. Waller, 65

Kans. 514, 70 Pac. 365; Millan v. Southern Ry. Co., 54 S. Car. 485, 32 S. E. 539. And a plea of contributory negligence is not required to expressly admit or allege that defendant was also negligent. Charping v. Toxaway Mills, 70 S. Car. 470, 50 S. E. 186.

⁴³ McDonald v. Montgomery St. R. Co., 110 Ala. 161, 20 So. 317; Fowler &c. Co. v. Brooks, 65 Kans. 861, 70 Pac. 600. But compare Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84.

⁴⁴ Hess v. Metropolitan St. R. Co., 27 Misc. 823, 57 N. Y. S. 222; Norfolk &c. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606; City Delivery Co. v. Henry, 139 Ala. 161, 34 So. 389; Palmer v. Waterloo, 138 Iowa 296, 115 N. W. 1017; Louisville &c. R. Co. v. Gaugh, 133 Ky. 467, 118

done the complaint should set out the fact.⁴⁵ The general rule stated does not, however, require great particularity as to damages following the injuries. A sufficient pleading of an injury in general terms will allow the admission of evidence as to all specific injuries directly resulting from the act causing such injury.⁴⁶ Thus, it has been held that an allegation, in a complaint for injuries sustained in alighting from a train, that plaintiff's mind had become injuriously affected, was a statement of fact, and sufficient, without setting out in detail the manner in which plaintiff's mind was affected.⁴⁷ If, however, the pleader specifies particular damages as resulting from the principal injury, his proof will usually be limited to such specific injuries.⁴⁸ The plaintiff is not, of course, required to prove all the damages alleged by him, but may recover for such as he establishes.⁴⁹

§ 2807. (1773.) Pleading—General and special damages.— Special damages, by which is meant those damages which do

S. W. 276. See also *Chiles v. Drake*, 59 Ky. 146, 74 Am. Dec. 406.

⁴⁵ *Dallas Consolidated &c. Co. v. Ison*, 37 Tex. Civ. App. 219, 83 S. W. 408.

⁴⁶ *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; *Oolitic Stone Co. v. Ridge*, 174 Ind. 558, 91 N. E. 944; *Bolte v. Third Ave. R. Co.*, 38 App. Div. 234, 56 N. Y. S. 1038; *Radjaviller v. Third Ave. R. Co.*, 58 App. Div. 11, 68 N. Y. S. 617; *Sherman &c. R. Co. v. Bell* (Tex. Civ. App.), 58 S. W. 147; *Missouri &c. Ry. Co. v. Smith*, (Tex. Civ. App.), 172 S. W. 750. As to the right of the jury to infer that the alleged negligence caused the injury, from evidence making it probable, see *Atwood v. Washington &c. Co.*, 79 Wash. 427, 140 Pac. 343, and authorities there cited.

⁴⁷ *Central &c. R. Co. v. McNab*, 150 Ala. 332, 43 So. 222.

⁴⁸ *Blackman v. Mauldin*, 164 Ala. 337, 51 So. 23, 27 L. R. A. (N. S.) 670; *Louisville &c. R. Co. v. Ellerhorst*, 33 Ky. L. 605, 110 S. W. 823; *Arnold v. Maryville*, 110 Mo. App. 254, 85 S. W. 107; *Partello v. Missouri Pac. R. Co.* (Mo. App.), 107 S. W. 473; *Johnson v. St. Louis &c. R. Co.*, 192 Mo. App. 1, 178 S. W. 239; *Gorman v. New York &c. R. Co.*, 128 App. Div. 414, 113 N. Y. S. 219; *Houston &c. R. Co. v. Gerald*, 60 Tex. Civ. App. 151, 128 S. W. 166. But compare *Birmingham R. &c. Co. v. Brown*, 150 Ala. 327, 43 So. 342; *Louisville &c. R. Co. v. Lee*, 140 Ky. 91, 130 S. W. 813; *Moore v. St. Louis Trans. Co.*, 226 Mo. 689, 126 S. W. 1013.

⁴⁹ *Williams v. Houston Electric Co.*, (Tex. Civ. App.), 85 S. W. 1160.

not necessarily result from the defendant's negligent act and are not implied or presumed, as distinguished from damages which are the natural and necessary result of such act, must be pleaded.⁵⁰ On this subject an able writer has said: "The primary and principal object of pleading is the formation of an issue; in other words, to apprise the court and the opposite party of the facts constituting the cause of action or the ground of defense, as the case may be. Hence, arises the distinction between general and special damages. If the damages are of a character so inseparable from the injury that the law presumes that they will follow and flow from it as the natural and necessary consequence of it, there is no occasion for such special averments, but where such damages, although the natural consequence of the injury, do not flow from it, as a necessary consequence, they must be alleged, in order that the defendant may know that it is intended to hold him liable for them, and be prepared to defend to the best advantage. Therefore, 'special damage must be stated with great particularity in order that the defendant may be enabled to meet the charge if it be false; and if it be not, so stated, it can not be given in evidence.'"⁵¹ General damages as thus defined have been held to include such damages, for example, as loss of time and wages,⁵² impairment of earning power

⁵⁰ See generally *Kircher v. Larchwood*, 120 Iowa 578, 95 N. W. 184; *Chicago v. O'Brennan*, 65 Ill. 160; *Beath v. Rapid R. Co.*, 119 Mich. 512, 28 N. W. 537; *VanBuskirk v. Quincy &c. R. Co.*, 131 Mo. App. 357, 111 S. W. 832; *Geoghegan v. Third Ave. R. Co.*, 51 App. Div. 369, 64 N. Y. S. 630; *Keefe v. Lee*, 197 N. Y. 68, 90 N. E. 344, 27 L. R. A. (N. S.) 837n; *Reed v. Metropolitan St. R. Co.*, 69 App. Div. 103, 74 N. Y. S. 573; *Maynard v. Oregon R. Co.*, 43 Ore. 63, 72 Pac. 590; *Croco v. Oregon Short*

Line R. Co., 18 Utah 311, 54 Pac. 985, 44 L. R. A. 285.

⁵¹ 6 *Thomp. Neg.* (2d ed.) § 7601.

⁵² *Slaughter v. Metropolitan St. R. Co.*, 116 Mo. 269, 23 S. W. 760; *Mason v. St. Louis*, 75 Mo. App. 1; *Hopkins v. Atlantic &c. R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Delaware &c. R. Co. v. Jones*, 128 Pa. St. 308, 18 Atl. 330; *Missouri &c. R. Co. v. Vance*, (Tex. Civ. App.), 41 S. W. 167; *El Paso &c. R. Co. v. Barrett*, 46 Tex. Civ. App. 14, 101 S. W. 1025, 121 S. W. 570.

in case of permanent injuries,⁵³ pain and suffering,⁵⁴ impairment of general health,⁵⁵ the aggravation of an existing injury,⁵⁶ the impairment of hearing following an injury to the spine,⁵⁷ the impairment of eyesight resulting from internal injuries to head,⁵⁸ the permanency of the injury,⁵⁹ and the loss of service to a husband following an injury to his wife.⁶⁰ But in other cases loss of time and earnings, and some of the other damages mentioned are held to be special damages which must be specially pleaded in so far at least as they depend upon the peculiar facts of the

⁵³ *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. 175; *Texas &c. R. Co. v. Bowlin*, (Tex.), 32 S. W. 918; *Galveston &c. R. Co. v. Smith*, (Tex. Civ. App.), 28 S. W. 110; *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860.

⁵⁴ *Colorado Springs &c. R. Co. v. Marr*, 26 Colo. App. 48, 141 Pac. 142; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Louisville &c. R. Co. v. Dickey*, 31 Ky. L. 894, 104 S. W. 329; *Schuler v. Third Ave. R. Co.*, 1 Misc. 351, 20 N. Y. S. 683; *Missouri &c. R. Co. v. Box*, (Tex. Civ. App.), 93 S. W. 135; *Pecos &c. Ry. Co. v. Huskey*, (Tex. Civ. App.), 166 S. W. 493.

⁵⁵ *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389; *Denver &c. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146; *Smith v. Minneapolis &c. R. Co.*, 26 Minn. 419, 4 N. W. 797; *Hanse v. Brooklyn Elev. R. Co.*, 66 Hun 384, 21 N. Y. S. 230; *Van Cleve v. St. Louis &c. R. Co.*, 124 Mo. App. 224, 101 S. W. 632.

⁵⁶ *Campbell v. Los Angeles Trac-tion Co.*, 137 Cal. 565, 70 Pac. 624; *Connersville v. Snider*, 31 Ind. App.

218, 67 N. E. 555; *Indiana &c. Trac. Co. v. Jacobs*, 167 Ind. 85, 78 N. E. 325.

⁵⁷ *Missouri &c. R. Co. v. Hawk*, 30 Tex. Civ. App. 142, 69 S. W. 1037.

⁵⁸ *Bodie v. Charleston &c. R. Co.*, 61 S. Car. 468, 39 S. E. 715; *Stembridge v. Southern R. Co.*, 65 S. Car. 440, 43 S. E. 968; *West Chicago &c. R. Co. v. Levy*, 82 Ill. App. 202. See also *Missouri &c. Ry. Co. v. Smith*, (Tex. Civ. App.), 172 S. W. 750.

⁵⁹ *Lake Shore &c. R. Co. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Indianapolis &c. R. Co. v. Pitzer*, 109 Ind. 176, 6 N. E. 310; *Ohio &c. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Montgomery v. Lansing &c. R. Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287; *Tyler v. Third Ave. R. Co.*, 18 Misc. 167, 41 N. Y. S. 523; 3 Elliott Ev. § 1976. But compare *Central Ky. Trac. Co. v. Chapman*, 130 Ky. 342, 113 S. W. 438.

⁶⁰ *Texas &c. R. Co. v. Burnett*, 80 Tex. 536, 16 S. W. 320. See also 3 Elliott Ev. § 1975, et seq., for full consideration of the subject and reference to other cases.

particular case.⁶¹ Special damages have been held to include such damages as loss of time of a special value,⁶² the expense of hiring a substitute while the injured person is incapacitated,⁶³ nursing and physicians' bills,⁶⁴ the cost of an artificial limb made necessary by an amputation.⁶⁵

§ 2808. (1774.) Pleading — Exemplary damages. — Exemplary damages are usually only recoverable where willful injury, or the like, is alleged and proved.⁶⁶ The facts showing this willfulness should be stated with sufficient distinctness to inform the defendant that he is required to meet that issue. But where the complaint alleges a state of facts which, if proved, would, under the law, entitle the plaintiff to exemplary damages, these damages may be recovered, though not demanded as such in express terms.⁶⁷ This would seem a correct rule in all jurisdic-

⁶¹ *Union Trac. Co. v. Sullivan*, 38 Ind. App. 513, 528, 76 N. E. 116, and numerous cases there cited; *Cleveland &c. R. Co. v. Case*, 174 Ind. 369, 91 N. E. 238; *Lexington R. Co. v. Britton*, 130 Ky. 676, 114 S. W. 295; *McHenry Coal Co. v. Taylor*, 165 Ky. 144, 176 S. W. 976; *Snickles v. St. Joseph*, 155 Mo. App. 308, 136 S. W. 752; *McDonald v. St. Louis &c. R. Co.*, 165 Mo. App. 75, 146 S. W. 83; *Galveston &c. R. Co. v. Henefy* (Tex. Civ. App.), 115 S. W. 57.

⁶² *Louisville &c. R. Co. v. Mason*, 24 Ky. L. 1623, 72 S. W. 27; *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680, 49 Atl. 180. See also *Chicago &c. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Baldwin v. Western &c. R. Co.*, 4 Gray (Mass.), 333.

⁶³ *Haszlacher v. Third Ave. R. Co.*, 26 Misc. 865, 56 N. Y. S. 380;

Gumb v. Twenty-third St. R. Co., 114 N. Y. 411, 21 N. E. 993.

⁶⁴ *Stowe v. La Conner &c. Co.*, 39 Wash. 28, 80 Pac. 856, 81 Pac. 97; *Missouri &c. R. Co. v. Smith*, (Tex. Civ. App.), 82 S. W. 787. See also *Louisville &c. R. Co. v. Barnwell*, 131 Ga. 791, 63 S. E. 501; *Pittsburgh &c. R. Co. v. Lynch*, 43 Ind. App. 177, 87 N. E. 40. *Contra*, *Biddle v. Riley*, 118 Ark. 206, 176 S. W. 134, L. R. A. 1915F, 992n; *Hopkins v. Atlantic &c. R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

⁶⁵ *Southern Pac. Co. v. Hall*, 100 Fed. 760.

⁶⁶ *Duke v. Postal Tel. Cable Co.*, 71 S. Car. 95, 50 S. E. 675; *Tuscaloosa Belt R. Co. v. Maxwell Bros.*, 171 Ala. 318, 54 So. 620; *Arkansas &c. R. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. 130.

⁶⁷ *Wilkinson v. Searcy*, 76 Ala. 176; *Alabama &c. R. Co. v. Arnold*, 84 Ala. 159, 4 So. 359, 5 Am.

tions where exemplary damages are not considered special damages. An allegation characterizing the act of a railroad company by which the plaintiff was injured as reckless has been held equivalent to describing it as willful so as to justify the allowance of exemplary damages therefor.⁶⁸ A South Carolina statute expressly provides that the plaintiff in an action for actual and exemplary damages shall not be required to make a separate statement of his damages under each head.⁶⁹ The Missouri practice seems to require that the complaint where exemplary damages are claimed shall particularly state the amount of such damages.⁷⁰

§ 2809. (1775.) **Plea of release of damages by acceptance of benefits in a relief association.**—A plea that an employe by the acceptance of benefits from a railroad relief association released the railroad company from liability for personal injuries has been held insufficient where it did not show any obligation on the part of the company to contribute to the association, or that it had contributed any of its funds to its support, or that a beneficiary would have a right to sue the company in case of a shortage in the treasury of the association. The plea, it was said, should

St. 354; *Sparks v. McCreary*, 156 Ala. 382, 47 So. 332, 22 L. R. A. (N. S.) 1224n; *Savannah &c. R. Co. v. Holland*, 82 Ga. 257, 10 S. E. 200, 14 Am. St. 158; *Southern R. Co. v. Phillips*, 119 Ga. 146, 45 S. E. 967; *Gustafson v. Wind*, 62 Iowa 284, 17 N. W. 523; *Davis v. Seeley*, 91 Iowa 583, 60 N. W. 183, 51 Am. St. 356; *Jacobs v. Louisville &c. R. Co.*, 10 Bush. (Ky.) 264; *Southern Express Co. v. Brown*, 67 Miss. 260, 7 So. 318, 8 So. 425, 19 Am. St. 306; *Taylor v. Holman*, 45 Mo. 371; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; *Shoemaker v. Sonju*, 15 N. Dak. 518, 108 N. W. 42, 11 Ann. Cas. 1173; *Schofield v. Ferrers*, 46 Pa.

St. 438; *Glover v. Charleston &c. R. Co.*, 57 S. Car. 228, 35 S. E. 510; *Stembridge v. Southern R. Co.*, 65 S. Car. 440, 43 S. E. 968; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Patteson v. Chesapeake &c. R. Co.*, 94 Va. 16, 26 S. E. 393; *Wood v. American &c. Bank*, 100 Va. 306, 40 S. E. 931; *Richmond &c. Co. v. Robinson*, 100 Va. 394, 41 S. E. 719. But see *Galveston &c. R. Co. v. Legierse*, 51 Tex. 189.

⁶⁸ *Pickett v. Southern R. Co.*, 69 S. Car. 445, 48 S. E. 466.

⁶⁹ S. Car. Acts of 1898. See *Machen v. Western Union Tel. Co.*, 63 S. Car. 363, 41 S. E. 448.

⁷⁰ *Lamberson v. Long*, 66 Mo. App. 253.

set out the arrangement between the company and the association with sufficient fullness to enable the court to pass upon the fairness and validity of the arrangement.⁷¹

§ 2810. (1776.) **Presumptions and burden of proof as to existence of passenger relation.**—The plaintiff seeking a recovery for a breach of the carrier's duty to carry him safely has the burden of proof to show that he was a passenger at the time of receiving his injuries.⁷² The rule is the same in the case of an alleged wrongful ejection from the train,⁷³ and the plaintiff to recover as a passenger must prove that he was received or accepted by the defendant as a passenger either expressly or impliedly.⁷⁴ But a person riding on a train, in the proper place

⁷¹ Chicago &c. R. Co. v. Miller, 76 Fed. 439; Chicago &c. R. Co. v. McGraw, 22 Colo. 363, 45 Pac. 383. See ante, §§ 2079-2088, 2707. And see generally as to pleading a release, Bird v. Randall, 3 Burr. 1345; Loveman v. Birmingham R. &c. Co., 149 Ala. 515, 43 So. 411; Klair v. Philadelphia &c. R. Co., 2 Boyce (Del.) 274, 78 Atl. 1085; Chicago &c. Trac. Co. v. O'Connell, 224 Ill. 428, 79 N. E. 622; Parker v. Providence &c. Co., 17 R. I. 376, 21 Atl. 543, 14 L. R. A. 414, 33 Am. St. 869; Robinson v. St. Johnsbury &c. R. Co., 80 Vt. 129, 66 Atl. 814, 12 Ann. Cas. 1060. As to release and repudiation by infant, see Britton v. South Penn. Oil Co., 73 W. Va. 792, 81 S. E. 525, 528. And as to pleadings repudiating or attacking release, see generally Louisville &c. R. Co. v. Huffstutler, 162 Ala. 619, 50 So. 146; Freeman v. St. Louis &c. R. Co., 138 Mo. App. 322, 122 S. W. 1; Logan v. United R. Co., 166 Mo. App. 490, 148 S. W. 444.

As to validity and effect of contracts for or acceptance of relief benefits and release of damages and when invalid under Act of Congress or state statutes, see note to Pittsburgh &c. R. Co. v. Carmody, (188 Ky. 588, 22 S. W. 1070) in A. L. R. 469, 477-495.

⁷² Alabama &c. R. Co. v. Bates, 149 Ala. 487, 43 So. 98; Birmingham Ry. &c. Co. v. Washington, 192 Ala. 617, 69 So. 65; Creed v. Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693; Chicago &c. R. Co. v. Houston, 95 Ill. App. 350; Texas &c. R. Co. v. Black, 87 Tex. 160, 27 S. W. 118. See also Birmingham &c. R. Co. v. Sawyer, 156 Ala. 199, 47 So. 67, 19 L. R. A. (N. S.) 717n; Broyles v. Central of Ga. R. Co., 166 Ala. 616, 52 So. 81, 139 Am. St. 50.

⁷³ Central &c. R. Co. v. Cannon, 106 Ga. 828, 32 S. E. 874.

⁷⁴ McLarin v. Atlantic &c. R. Co., 85 Ga. 504, 11 S. E. 840; Illinois Central R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R. A.

for passengers, is generally, in the absence of countervailing circumstances, presumed to be a passenger, and rightfully on the train.⁷⁵ And it has been held that the presumption applies to persons riding on freight trains which are shown to have the custom of carrying passengers.⁷⁶ The presumption is not ordinarily applied, however, to persons injured while traveling on trains which do not usually carry passengers.⁷⁷ And the presumption may be rebutted by proper evidence.⁷⁸

§ 2811. (1777.) Presumptions and burden of proof of ownership of road or engine causing injury.—The plaintiff has the burden of proof that the defendant railroad company owned or operated the railroad on which his injuries were received where that is made an issue by the pleadings.⁷⁹ On that issue it has been held that the evidence of common reputation is competent and may suffice in the absence of other evidence.⁸⁰ There is a presumption that an engine operated over the tracks of a railroad belongs to the railroad company operating the line,⁸¹ and

148, 61 Am. St. 68n; *Janny v. Great Northern R. Co.*, 63 Minn. 380, 65 N. W. 450; *Arkansas &c. R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550; *Southern R. Co. v. Smith*, 86 Fed. 292.

⁷⁵ *Louisville &c. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 57 Am. St. 120; *Buffett v. Troy &c. R. Co.*, 36 Barb. (N. Y.) 420, affirmed in 40 N. Y. 168; *Pennsylvania R. Co. v. Brooks*, 57 Pa. St. 339, 98 Am. Dec. 229; *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139, 27 Am. Rep. 693; *People v. Douglass*, 87 Cal. 281, 25 Pac. 417. See also *Moore v. St. Louis &c. R. Co.*, 67 Ark. 389, 55 S. W. 161, 163, citing § 2387, ante.

⁷⁶ *Buffett v. Troy &c. R. Co.*, 36 Barb. (N. Y.) 420, affirmed in 40 N. Y. 168. See also *Woolery v.*

Louisville &c. R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114.

⁷⁷ *Atchison &c. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822; *Eaton v. Delaware &c. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513.

⁷⁸ *People v. Douglass*, 87 Cal. 281, 25 Pac. 417; and see *Central R. Co. v. Wolff*, 74 Ga. 664. See also upon this general subject, ante §§ 2498, 2707, 2790.

⁷⁹ *Citizens' St. R. Co. v. Stockdell*, 159 Ind. 25, 62 N. E. 21, (an extreme case in some respects); *Indianapolis St. R. Co. v. Lawn*, 30 Ind. App. 515, 66 N. E. 508. See also *Kunzmann v. New York &c. R. Co.*, 6 Misc. 440, 27 N. Y. S. 132.

⁸⁰ *Chicago &c. R. Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050.

⁸¹ *Brooks v. Missouri Pac. R.*

the fact that the engine or car causing the injuries bore the name of the company sued has been held sufficient evidence of its ownership,⁸² though it was on the tracks of another railroad company at the time of the accident.⁸³ The fact that the company sent physicians to examine the injured person after the accident, and paid them for this work, may be shown on cross-examination of such physicians, and it seems that, as tending to prove an admission, such evidence may be considered as tending to show that the defendant company owned, operated or controlled the road.⁸⁴ It has been said that "when a railroad company owns a railroad in operation, bearing the name of the company, and which presumably the company constructed, the presumption is that such company operates it, and to relieve itself from liability for injuries to persons upon such road, caused by the negligence of the employes operating the same the burden is upon it to show that it does not operate the same."⁸⁵

§ 2812. (1778.) Presumptions and burden of proof—Street and interurban car collisions with travelers.—It is well settled that a traveler injured in a collision with a street or interurban car has

Co., 98 Mo. App. 166, 71 S. W. 1083.

⁸² East St. Louis &c. R. Co. v. Altgen, 210 Ill. 213, 71 N. E. 377; Chicago R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Baermann v. Chicago &c. R. Co., 153 Wis. 235, 140 N. W. 1119.

⁸³ East St. Louis &c. R. Co. v. Altgen, 210 Ill. 213, 71 N. E. 377. Compare also Reidman v. Brooklyn &c. R. Co., 28 App. Div. 540, 51 N. Y. S. 196. In a recent federal case in New York it is held that, even under a lease authorized by statute not expressly exempting the lessor from liability for the lessee's negligence, the lessor is not liable for torts of the lessee in the operation of the system.

Pennsylvania Co. v. New York City Ry. Co., 229 Fed. 367, following Miller v. New York &c. Ry. Co., 125 N. Y. 118, 26 N. E. 35, and distinguishing Railroad Co. v. Brown, 17 Wall (U. S.) 445, 21 L. ed. 675, and Chicago &c. R. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. ed. 521. This general question and other conflicting authorities on both sides have already been considered in another volume of this work.

⁸⁴ Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

⁸⁵ Ferguson v. Wisconsin Central R. Co., 63 Wis. 145, 23 N. W. 123. This statement is, perhaps, a little too strong.

the burden of proving the negligent operation of the car, and that this negligence was proximate cause of his injuries.⁸⁶ And where it appears that the plaintiff has negligently exposed himself on the track it is incumbent on him to show that the motorman, by the exercise of reasonable care, could have avoided injuring him, notwithstanding his contributory negligence.⁸⁷ It has been held, however, that the escape of electricity from a street railway in such quantities as to cause injury to persons or animals using the streets is presumptive proof of negligence in the operation of the railway. The court said that such a case gives the plaintiff the right to say "*res ipsa loquitur*."⁸⁸ In the absence of evidence on the question there is a presumption that street railroad tracks are laid in public highways, and hence that a traveler struck by the cars and injured was not a trespasser on the tracks.⁸⁹ In a case where the injuries received in a collision on a bridge were shown to be caused by a defect therein, it was held that the plaintiff in an action against a street railroad company for such injuries had the burden of showing that the defendant, and not the town, was responsible for the repair of the bridge.⁹⁰

§ 2813 (1779). Presumptions and burden of proof as to incompetency of fellow servants.—The injured employe has the burden of proving the railroad company's negligence in the employment of fellow servants.⁹¹ It will be presumed, in the

⁸⁶ *Weldon v. People's R. Co.*, (Del.) 65 Atl. 589; *Heidelbaugh v. People's R. Co.*, (Del.) 65 Atl. 587; *Wood v. Wilmington City R. Co.*, Penn. 4 Del. 369, 64 Atl. 246; *Thomas v. Citizens' &c. R. Co.*, 132 Pa. St. 504, 19 Atl. 286; *Rombach v. Crescent City R. Co.*, 50 La. Ann. 473, 23 So. 604.

⁸⁷ *Solatinow v. Jersey City &c. R. Co.*, 70 N. J. L. 154, 56 Atl. 235. See also *Taillon v. Mears*, 29 Mont. 161, 74 Pac. 421.

⁸⁸ *Trenton Passenger R. Co. v.*

Cooper, 60 N. J. L. 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. 592.

⁸⁹ *Vincent v. Norton &c. R. Co.*, 180 Mass. 104, 61 N. E. 822.

⁹⁰ *Wagner v. Lehigh Traction Co.*, 212 Pa. St. 132, 61 Atl. 814.

⁹¹ *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740, 102 Am. St. 839. See also *McGuire v. Lehigh Val. R. Co.*, 215 Pa. St. 618, 64 Atl. 825; *W. R. Trigg Co. v. Lindsay*, 101 Va. 193, 43 S. E. 349.

absence of evidence on this point, that the railroad company made proper inquiries as to the fitness of the employe before hiring him.⁹² It has been held that incompetency of the servant causing the injury will not be presumed from the fact of the accident alone,⁹³ and it certainly raises no presumption that the master failed to make reasonable inquiries or efforts as to his qualifications or fitness.⁹⁴ It has been held, however, that a railroad company was chargeable with knowledge that an engineer was intemperate in the use of intoxicants, though its only knowledge was that of the foreman of its round-house, whose duty it was to look after the engines and men.⁹⁵

§ 2814 (1780). Presumptions and burden of proof—Promulgation of rules.—The rule is well settled that a railroad employe claiming that his injuries were due to the failure of the company to make and promulgate rules for the protection of employes has the burden of proving affirmatively the want of such rules. It is presumed, in the absence of anything to the contrary, that such rules as were necessary were made and promulgated.⁹⁶ It has also been held that it will be presumed that an employe was furnished a copy of the rules where these rules were printed on the back of the time tables used by train

⁹² Roblin v. Kansas City &c. R. Co., 119 Mo. 476, 24 S. W. 1011; Sullivan v. New York &c. R. Co., 62 Conn. 209, 25 Atl. 711; Stafford v. Chicago &c. R. Co., 114 Ill. 244, 2 N. E. 185; Ohio &c. R. Co. v. Dunn, 138 Ind. 18, 36 N. E. 702; Piehl v. Albany R. Co., 19 App. Div. 471, 46 N. Y. S. 257.

⁹³ Mobile &c. R. Co. v. Godfrey, 155 Ill. 78, 39 N. E. 590.

⁹⁴ Still v. San Francisco &c. R. Co., 154 Cal. 559, 98 Pac. 672, 20 L. R. A. (N. S.) 322n, 129 Am. St. 117; Long v. McCabe, 52 Wash. 422, 100 Pac. 1016.

⁹⁵ Williams v. Missouri &c. R. Co., 109 Mo. 475, 18 S. W. 1098.

Compare also Pearson v. Alaska &c. S. S. Co., 51 Wash. 560, 99 Pac. 753, 130 Am. St. 1117.

⁹⁶ Brady v. Chicago &c. R. Co., 114 Fed. 100, 57 L. R. A. 712; Manning v. Manchester Mills, 70 N. H. 582, 49 Atl. 91; Hill v. Boston &c. R. Co., 72 N. H. 518, 57 Atl. 924; Rose v. Boston &c. R. Co., 58 N. Y. 217; Potter v. New York &c. R. Co., 136 N. Y. 77, 32 N. E. 603; Corcoran v. New York R. Co., 58 App. Div. 606, 103 N. Y. St. 73. See also Pilkinton v. Gulf &c. R. Co., 70 Tex. 226, 7 S. W. 805; Galveston &c. R. Co. v. Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. 894.

men, and it was the duty of certain officials to see that these time tables were delivered to such trainmen.⁹⁷ Although the burden is generally upon the plaintiff to show negligent failure to make and promulgate rules, it has been held that he need not prove exactly what rules should have been made to meet the particular case.⁹⁸

§ 2815 (1781). Burden of proof where injury received while disobeying rule of employer.—An employe injured while disobeying a rule of the company or an order of a superior can not ordinarily, at least, recover if such disobedience proximately contributed to the injury. It has accordingly been held that he has the burden of proving that it did not thus contribute.⁹⁹ But this may not be the rule in all jurisdictions.¹ It is not our purpose in this work to take up at length the subject of expert testimony or opinion evidence. On this subject it is sufficient, in passing, to say in the language of one of the courts that “The general rule is that the opinions of witnesses, except upon question of art, science and skill, are not admissible. But the rule has its

⁹⁷ *Frounfelker v. Delaware &c. R. Co.*, 74 App. Div. 224, 77 N. Y. S. 470. See also *Robichaud v. New York &c. R. Co.*, 220 Mass. 250, 107 N. E. 975; *Texas &c. R. Co. v. Moore*, 8 Tex. Civ. App. 289, 27 S. W. 962; *LaCroy v. New York &c. R. Co.*, 132 N. Y. 570, 30 N. E. 391. But compare *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. 252, 25 Am. St. 47; *Chicago &c. R. Co. v. Oyster*, 58 Nebr. 1, 78 N. W. 359. As elsewhere shown, in some jurisdictions, although there is sharp conflict among the authorities, it is held to be the duty of an employe to acquaint himself with rules properly promulgated and he is charged with notice thereof whether he has actual knowledge or not.

⁹⁸ *Texas &c. R. Co. v. Cumpston*, 15 Tex. Civ. App. 493, 40 S. W. 546.

⁹⁹ *Prather v. Richmond &c. R. Co.*, 80 Ga. 427, 9 S. E. 530, 12 Am. St. 263.

¹ See as to which party has burden of proving the rule in particular cases. *Raleigh &c. R. Co. v. Allen*, 106 Ga. 572, 32 S. E. 622; *Pittsburgh &c. R. Co. v. Powers*, 74 Ill. 341. And as to when admissible and how proved, see *Memphis &c. R. Co. v. Askew*, 90 Ala. 5, 7 So. 823; *Mosnat v. Chicago &c. R. Co.*, 114 Iowa 151, 86 N. W. 297; *Gibson v. Burlington &c. R. Co.*, 107 Iowa 596, 78 N. W. 190; *Devoe v. New York &c. R. Co.*, 174 N. Y. 1, 66 N. E. 568.

exceptions. Where the facts are of such a character as to be incapable of being presented with their proper force to anyone but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusions, judgment or opinion.”²

§ 2816 (1782). Expert testimony and competency of experts.—We have already, in various connections, referred to expert testimony, and we simply call attention here to some of the more important and recent decisions upon the subject. Among others the following have been held proper subjects of expert testimony: The distance in which moving trains or cars can be stopped,³ the safety of unblocked switch frogs,⁴ the value of the hammer test to discover defects in cars wheels,⁵ the necessity of placing tell-tales at overhead bridges,⁶ the time required to make up

² *Bates v. Sharon*, 45 Vt. 474. See also *Atchison &c. R. Co. v. Miller*, 39 Kans. 419, 18 Pac. 486; *Chicago &c. R. Co. v. Gillison*, 72 Ill. App. 207; *Cookson v. Pittsburg &c. R. Co.*, 179 Pa. St. 184, 36 Atl. 194; *Birmingham &c. R. Co. v. Wilmer*, 97 Ala. 165, 11 So. 886; *East Tenn. &c. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

³ *Alabama &c. R. Co. v. Linn*, 103 Ala. 134, 15 So. 508; *Wallace v. North Alabama Traction Co.*, 145 Ala. 682, 40 So. 89; *Howland v. Oakland &c. St. R. Co.*, 110 Cal. 513, 42 Pac. 983; *Chicago R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Indianapolis St. R. Co. v. Seerley*, 35 Ind. App. 467, 72 N. E. 169; *Schlereth v. Missouri &c. R. Co.*, 115 Mo. 87, 21 S. W. 1110; *Mammerburg v. Metropolitan St. R. Co.*, 62 Mo. App. 563; *Meng v. St. Louis*

&c. R. Co., 108 Mo. App. 553, 84 S. W. 213. See also ante § 2711.

⁴ *Schroeder v. Chicago &c. R. Co.*, 128 Iowa 365, 103 N. W. 985. See also *Louisville &c. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. 714; *Hamilton v. Rich Hill Min. Co.*, 108 Mo. 364, 18 S. W. 977; *Norfolk &c. Ry. Co. v. Gillespie*, 224 Fed. 316 (experienced roadmaster and section foreman may testify as to degree of curve requiring a guard rail).

⁵ *Pittsburgh &c. R. Co. v. Shepard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. 732. See also *Silveria v. Iversaw*, 128 Cal. 187, 60 Pac. 687.

⁶ *Pittsburgh &c. R. Co. v. Lamphere*, 137 Fed. 20. Compare also *Louisville &c. R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84.

trains and get under way,⁷ the proper method of placing switch points,⁸ the duty of an engineer to look back to see if everything is all right, and that he has the whole of his train before he shuts off steam before going down grade,⁹ the duty of a fireman to notify an engineer of signals given by a brakeman about to couple a car to a tender where the engineer can not see the brakeman,¹⁰ what is a sufficient number of brakeman to man a train,¹¹ the proper position of a brakeman on kicked cars.¹² The opinions of expert witnesses are, however, usually inadmissible where all the facts can be ascertained and made intelligible to the jury or upon the very subject for decision. Under this principle it has been held that witnesses are not permitted to state their opinions as to whether a certain act was carefully or negligently done,¹³ or whether the injured party was acting within the line of his duty at the time of receiving his injury,¹⁴

⁷ *Chicago &c. R. Co. v. Kapp*, 37 Tex. Civ. App. 203, 83 S. W. 233.

⁸ *Buckalew v. Quincy &c. R. Co.*, 107 Mo. App. 575, 81 S. W. 1176.

⁹ *Lake Shore &c. R. Co. v. Terry*, 14 O. C. C. 536, 7 O. Dec. 597.

¹⁰ *Brown v. Louisville &c. R. Co.*, 111 Ala. 275, 19 So. 1001.

¹¹ *Union &c. R. Co. v. Novak*, 61 Fed. 573.

¹² *Reifsnyder v. Chicago &c. R. Co.*, 90 Iowa 76, 57 N. W. 692. See also *Price v. Richmond R. Co.*, 38 S. Car. 199, 17 S. E. 732.

¹³ *Atchison &c. R. Co. v. Myers*, 63 Fed. 793; *Louisville &c. R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84; *Alabama &c. R. Co. v. Tapia*, 94 Ala. 226, 10 So. 236; *Warden v. Louisville &c. R. Co.*, 94 Ala. 277, 10 So. 276, 14 L. R. A. 552; *Louisville &c. R. Co. v. Bouldin*, 110 Ala. 185, 20 So. 325; *Little Rock &c. R. Co. v. Shoecraft*, 56 Ark. 465, 20 S. W.

272; *East Tennessee &c. R. Co. v. Wright*, 76 Ga. 532; *Louisville &c. R. Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646; *McKean v. Burlington &c. R. Co.*, 55 Iowa 192, 7 N. W. 505; *Gutridge v. Missouri &c. R. Co.*, 94 Mo. 468, 7 S. W. 476, 4 Am. St. 392; *Tillett v. Norfolk &c. R. Co.*, 118 N. Car. 1031, 24 S. E. 111; *Johnston v. Oregon &c. R. Co.*, 23 Ore. 94, 31 Pac. 283; *Nutt v. Southern Pac. Co.*, 25 Ore. 291, 35 Pac. 653; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. St. 15; *International &c. R. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236. Or what was the cause of the accident. *Lee v. Toledo &c. R. Co.*, 190 Ill. App. 383.

¹⁴ *Grand Rapids &c. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135. Or in the exercise of due care, *Hudson v. Georgia Pac. R. Co.*, 85 Ga. 203, 11 S. E. 605. See also *Elliott v. Chicago &c. R. Co.*, 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363;

or whether, under the circumstances of a particular case, it was safe for a passenger to stand on the footboard of a street car.¹⁵ Whether or not a witness offered as an expert has such qualifications and special knowledge as to warrant his testifying as an expert is primarily a question of fact for the determination of the trial court, and its decision upon this point will be conclusive on appellate courts unless it appears from the record to have been erroneous or to have been founded upon some error in law.¹⁶ It is not absolutely required that the witness offered as an expert should, at the time of giving his testimony, be actively engaged in the particular line of work about which he testifies. For this reason a conductor having formerly served as a brakeman may state his opinion as to whether the train could have been stopped by the brakes quicker than it was.¹⁷ So, a former railroad engineer may testify as to his experience and observation concerning the escape of sparks from a locomotive, although his testimony may be affected by the length of his absence from the service and the change in operation meanwhile.¹⁸ It has been held that a person who has worked for years in different railroad yards which had switches connecting with each other at one end is competent as an expert to testify with respect to the reasonableness of a rule governing the manner of working in a yard having switches connecting with each other at both ends.¹⁹ But it has also been held that a brakeman of something over two and one-half years' experience, and a fireman of about the same experience, were not qualified as experts to estimate the speed of a train at the time it was

McCarragher v. Rogers, 120 N. Y. 526, 24 S. E. 812; *Johnston v. Oregon R. Co.*, 23 Ore. 94, 31 Pac. 283.

¹⁵ *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142. See also *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732.

¹⁶ *Atlantic Coast Line v. Crosby*, 53 Fla. 400, 43 So. 318; *Horne v. Consolidated & Co.*, 114 N. Car. 375, 57 S. E. 19; *Perkins v. Stick-*

ney, 132 Mass. 217; *Hess v. Shurtleff*, 74 N. H. 114, 65 Atl. 377.

¹⁷ *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372.

¹⁸ *Martz v. Cincinnati & C. R. Co.*, 12 Ohio C. C. 144. See also *Norfolk & C. Ry. Co. v. Gillespie*, 224 Fed. 316.

¹⁹ *Fremont v. Boston & C. R. Co.*, 111 App. Div. 831, 98 N. Y. S. 179, affirmed 80 N. E. 1109.

wrecked, based wholly on observations of the conditions surrounding the wreck.²⁰

§ 2817 (1783). **Photographs as evidence.**—Photographs of persons, objects and scenes, when relevant and properly verified by proof showing their correctness, are admissible to aid the jury where an actual view is impracticable,²¹ or is incapable of verbal description.²² The correctness and accuracy of the photograph must be shown before it is admissible.²³ It has been held that this proof may be made by any person familiar with the subject of the photograph and competent to testify to its correctness.²⁴ Where the picture of a scene is taken after the happening of the accident it must be shown that there has been no material change in the appearance of the place between the time of the happening of the accident and the taking of the

²⁰ *Cook v. Stimson Mill Co.*, 41 Wash. 314, 83 Pac. 419. See also *Ballard v. New York &c. R. Co.*, 126 Pa. St. 141, 19 Atl. 35.

²¹ *Illinois &c. R. Co. v. Hayer*, 225 Ill. 613, 80 N. E. 316; *Wabash R. Co. v. Prast*, 101 Ill. App. 167; *Miller v. Louisville &c. R. Co.*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. 416; *Omaha &c. R. Co. v. Beeson*, 36 Nebr. 361, 54 N. W. 557; *Goldsboro v. Central R. Co.*, 60 N. J. L. 49, 37 Atl. 433; *Dederichs v. Salt Lake City R. Co.*, 14 Utah, 137, 46 Pac. 656, 35 L. R. A. 802. See also *Alberti v. New York &c. R. Co.*, 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765; *Cooper v. St. Paul &c. R. Co.*, 54 Minn. 379, 56 N. W. 42; 1 Elliott Ev. § 217.

²² *Cirello v. Metropolitan Exp. Co.*, 88 N. Y. S. 932. See also in support of the general proposition that photographs, models and diagrams shown to be correct are

admissible. *Lake Erie &c. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573; *Bach v. Iowa Cent. R. Co.*, 112 Iowa 241, 83 N. W. 959; *Wimber v. Iowa Cent. R. Co.*, 114 Iowa 551, 87 N. W. 505; *Turner v. Boston &c. R. Co.*, 158 Mass. 261, 33 N. E. 520.

²³ *Huston &c. R. Co. v. Cluck* (Tex. Civ. App.), 84 S. W. 852; *Stone v. Lewiston &c. R. Co.*, 99 Maine 243, 59 Atl. 56; *Sellers v. State*, 91 Ark. 175, 120 S. W. 840; *Chicago &c. R. Co. v. Crose*, 113 Ill. App. 547; *United States v. Ortiz*, 176 U. S. 422, 20 Sup. Ct. 466, 44 L. ed. 529. So as to model, *Mitchell v. J. S. Schofield's Sons Co.*, 16 Ga. App. 686, 85 S. E. 978.

²⁴ *Roosevelt Hospital v. New York Elev. R. Co.*, 50 N. Y. St. 456, 21 N. Y. S. 205. See also *Carlson v. Benton*, 66 Nebr. 486, 92 N. W. 600; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445.

photograph.²⁵ Photographs taken long after the occurrence of the accident and after material changes have been made are said to have but slight, if any, probative value, and are generally rejected.²⁶ It is not necessary that the opposite party should be notified of the intention to take the photograph.²⁷ The courts do not look with favor on photographs of men in assumed postures and things in assumed positions offered to illustrate some contention of one of the parties.²⁸ Thus, one court has held that though a photograph of the car in which a passenger was riding at the time of the accident may be received to explain the physical facts surrounding the injury, yet a photograph of another vehicle of the same pattern was not admissible.²⁹ The rules as to ordinary photographs as evidence apply, in the main at least, to X-ray photographs.³⁰ Thus, the testimony of a witness

²⁵ *Kansas City &c. R. Co. v. Smith*, 90 Ala. 25, 8 So. 43, 24 Am. St. 753; *Chicago &c. R. Co. v. Crose*, 214 Ill. 602, 73 N. E. 865, 105 Am. St. 135; *Sample v. Chicago &c. R. Co.*, 233 Ill. 564, 84 N. E. 643; *Chicago &c. R. Co. v. Lawrence*, 96 Ill. App. 635; *Wimber v. Iowa &c. R. Co.*, 114 Iowa 551, 87 N. W. 505; *Columbia &c. R. Co. v. State*, 105 Md. 34, 65 Atl. 625; *Parshall v. New York &c. R. Co.*, 50 N. Y. St. 502; *Stott v. New York &c. R. Co.*, 50 N. Y. St. 500, 21 N. Y. S. 353 (fact of erection of gates between time of accident and taking of photograph held not to render photograph inadmissible); *Maynard v. Oregon R. &c. Co.*, 46 Ore. 15, 78 Pac. 983. In some cases where conditions have changed only in part it seems that photographs may be admissible as to the part unchanged in connection with evidence of that fact and proper explanation.

²⁶ *Chicago &c. R. Co. v. Corson*, 101 Ill. App. 115, affirmed in 196 Ill. 98, 64 N. E. 739; *Cleveland &c. R. Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869; *Hampton v. Norfolk &c. R. Co.*, 120 N. Car. 534, 27 S. E. 96, 35 L. R. A. 808.

²⁷ *Hawkins v. Missouri &c. R. Co.*, 36 Tex. Civ. App. 633, 83 S. W. 52. See also *Augusta &c. R. Co. v. Dorsey*, 68 Ga. 228.

²⁸ *Babb v. Oxford Paper Co.*, 99 Maine 298, 59 Atl. 290.

²⁹ *People's Passenger R. Co. v. Green*, 56 Md. 84.

³⁰ *Smith v. Grant*, (Colo.), 29 Chic. Leg. N. 145; *Geneva v. Burnett*, 65 Nebr. 464, 91 N. W. 275, 101 Am. St. 628 (admitted as best evidence obtainable to show condition of internal tissues of body); *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; 2 Elliott Ev. § 1228. See also notes to *State v. Matheson*, 130 Iowa 440, 103 N. W. 137, 114 Am. St. 427n, in 8 Ann. Cas. 430, and *Prescott &c.*

that he was a post-graduate physician and surgeon, and had twelve years' experience in the practice of his profession, and was experienced in the matter of making X-ray views, and that he made the original negatives and prints therefrom, and that the same were correct representations of what they purported to be, has been held sufficient preliminary proof to authorize the admission in evidence of such X-ray photographs.⁸¹ And in a number of cases such photographs have been held admissible, on proper proof of their accuracy and correctness, to show the nature and extent of the injury.⁸²

§ 2818 (1784). Evidence—Whether injured person was a **passenger**.—A person riding in a car plainly intended for the transportation of passengers is presumed rightfully there and to be a passenger, and when the carrier claims that he was a trespasser, it has been held that the carrier must prove affirmatively that he was a trespasser.⁸³ The reasons for this rule seem especially strong in the case of passengers on street rail-

R. Co. v. Franks, 111 Ark. 83, 163 S. W. 180, in Ann. Cas. 1916A, 773, 776.

⁸¹ Chicago City R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716. See also Chicago &c. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796, 104 Am. St. 213; Miller v. Mintun, 73 Ark. 183, 83 S. W. 918.

⁸² Prescott &c. R. Co. v. Franks, 111 Ark. 83, 163 S. W. 180, Ann. Cas. 1916A, 773n; Haywood v. Dering Coal Co., 145 Ill. App. 506; Eckels v. Boylan, 136 Ill. App. 258; Judyejko v. Chicago City R. Co., 166 Ill. App. 140. See also Baltimore &c. R. Co. v. Whitacre, 124 Md. 411, 92 Atl. 1060; Dean v. Wabash R. Co., 229 Mo. 425, 129 S. W. 953; Chicago &c. R. Co. v. Upton, 194 Fed. 371.

⁸³ Bryant v. Chicago &c. R. Co.,

53 Fed. 997; Anderson v. Missouri &c. Ry. Co., 196 Mo. 442, 93 S. W. 394, 113 Am. St. 748; Creed v. Pennsylvania R. Co., 86 Pa. 139; Pennsylvania R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229. But see Alabama &c. R. Co. v. Bates, 149 Ala. 487, 43 So. 98, where it is held that the burden of proof that the injured person was a passenger was on plaintiff where the injuries occurred while he was boarding a car standing at a station. And the ruling stated in the text cannot well mean more than that where the plaintiff has introduced evidence giving rise to the presumption the burden is upon the carrier to introduce evidence to meet it.

way cars where the fare is collected after transportation has commenced.³⁴ The rule is without application in the case of a train manifestly designed only for freight, even if a caboose is attached, as this car is primarily intended for the use of the trainmen.³⁵ Under the rule that the passenger relation attaches as soon as a person enters on the carrier's premises where passengers are received, with the intent to become a passenger, evidence showing such intention on the part of one injured on the carrier's premises, is generally admissible.³⁶ In the case of injuries to persons traveling on freight trains in violation of rules, forbidding such transportation, evidence has been held admissible to prove the general and open disregard of this rule by the carrier both before and after the accident in question.³⁷ In a case of injuries to a drover by being struck by an overhead bridge while on top of a freight train, it was held proper to admit evidence of the custom of the cattle men to walk along the top of cars while caring for their stock, and that the railroad company was aware of such custom, and acquiesced in it.³⁸ So, it has been held that evidence of a custom among conductors to allow shippers to ride on stock cars is admissible to show au-

³⁴ *Bartlett v. New York &c. R. Co.*, 57 N. Y. Super. Ct. 348, 8 N. Y. S. 309, affirmed 130 N. Y. 659, 29 N. E. 1033.

³⁵ *Atchison &c. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822. See also *Eaton v. Delaware &c. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Texas &c. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.), 55 S. W. 517; *Houston &c. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98.

³⁶ *Chicago &c. R. Co. v. Chancellor*, 165 Ill. 438, 46 N. E. 269; *Chicago &c. R. Co. v. Huston*, 196 Ill. 480, 63 N. E. 1028. See also

Louisville &c. R. Co. v. Mason, 4 Ala. App. 353, 58 So. 963.

³⁷ *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.), 40 S. W. 631. See also *Houston &c. R. Co. v. Norris*, (Tex. Civ. App.), 41 S. W. 708. But see as to rules for employes not being admissible either for or against the company, *Merchants &c. Co. v. Chicago &c. Ry. Co.*, 170 Iowa 378, 150 N. W. 720; *Fonda v. St. Paul &c. Ry. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. 341; *Virginia Ry. &c. Co. v. Godsey*, 117 Va. 167, 83 S. E. 1072, 1073, and authorities there cited.

³⁸ *Chicago &c. R. Co. v. Carpenter*, 56 Fed. 451.

thority in a conductor to waive a contract stipulation requiring the shipper to ride in the caboose.³⁹

§ 2819 (1785). **Evidence—Tickets—Best and secondary—Parol.**—The nature of railroad tickets has been considered, and the conflict in decisions noted, in another chapter.⁴⁰ In a jurisdiction in which the court is inclined to treat a ticket as a mere token and not a contract, it has lately been held that the plaintiff, in an action against the company for damages for injuries caused by his failure to furnish him proper accommodations and protection as a passenger, could introduce parol evidence to show the class of his ticket, where he had surrendered to the company and served proper notice to produce it.⁴¹ In another

³⁹ *Missouri &c. R. Co. v. Cook*, 8 Tex. Civ. App. 376, 27 S. W. 769, affirmed 12 Tex. Civ. App. 203, 33 S. W. 669. But see ante § 2391 et seq.

⁴⁰ See, especially, ante, §§ 2415, 2417, 2418. See also *Montgomery Trac. Co. v. Fitzpatrick*, 149 Ala. 511, 43 So 136; *Shelton v. Erie R. Co.*, 73 N. J. L. 558, 66 Atl. 403, 118 Am. St. 704, 9 Ann. Cas. 883, (a carefully considered case, overruling *Perine v. North Jersey St. R. Co.*, 69 N. J. L. 230, 54 Atl. 799). *Arnold v. Rhode Island Co.*, 28 R. I. 118, 163, 66 Atl. 60, 125 Am. St. 721n; *Saunders v. Atlantic &c. R. Co.*, 101 S. Car. 11, 85 S. E. 167; *Melody v. Great Northern R. Co.*, 25 S. Dak. 606, 127 N. W. 543, 30 L. R. A. (N. S.) 568, Ann. Cas. 1912C, 727n; *Gulf &c. R. Co. v. McCormick*, 45 Tex. Civ. App. 425, 100 S. W. 202.

It is held in *Van Zant v. Kansas City &c. Ry. Co. (Mo.)*, 232 S. W. 696, that the carrier's liability to an interstate passenger in an action in a

state court is to be determined under the state law unless superseded by Act of Congress and that the Act of Congress of June 29, 1906, forbidding free passes except to persons therein specified does not render the state law against the validity of stipulations in a free pass against the liability of the carrier for negligence inapplicable. Compare also *Southern Pac. Co. v. Schuyler*, 227 U. S. 601, 57 L. Ed. 662, 33 Sup. Ct. 277, 43 L. R. A. (N. S.) 901; *Clark v. Railway (Ind.)*, 119 N. E. 539.

⁴¹ *McCollum v. Southern Pac. Co.*, 31 Utah 494, 88 Pac. 663. The court distinguished *Wiseman v. Northern Pac. R. Co.*, 20 Ore. 425, 26 Pac. 272, 23 Am. St. 135, in which the general rule is stated as follows: "Where the cause of action or defense is founded upon an alleged writing, and both the execution and contents of the writing are denied, and the alleged writing is shown to be in the possession of a person residing outside of the state, secondary evi-

recent case it was held that conclusive force should be given to the intrinsic effect of a ticket to pay the fare expressed on its face, even though, as a matter of fact, it was a limited ticket and enough had been paid to obtain an unlimited ticket.⁴² And in other cases, a ticket has been considered "documentary evidence of a right to be transported,"⁴³ and such a writing that its contents can not be proved by oral evidence without sufficiently accounting for the non-production of the ticket.⁴⁴ But, as already shown, in many jurisdictions a ticket is considered as in the nature of a token, voucher or receipt, and parol evidence is held admissible, in a proper case, to prove the true contract.⁴⁵

§ 2820. (1786). Evidence—Injury to passenger on carrier's premises.—Evidence of facts such as would charge the company with knowledge of a defect in its premises likely to cause injury,

dence of its contents is not admissible, unless proper effort is made to obtain the original." Referring to the rule thus laid down, the court, in the Utah case, said: "While there is much force in the argument of counsel why the foregoing rule should prevail, it cannot be given application unless the case wherein it is sought to enforce it falls within the rule. This case, as we have endeavored to show, does not do so for at least three reasons: (1) The case is not one where the cause of action is distinctly based upon a written contract, but is an action for tort. (2) Railroad tickets are not, as a general rule, deemed to be contracts in writing and there is nothing in the evidence in this case which takes it out of the general rule. (3) The coupon surrendered to appellant was a distinct and separate ticket for

the purposes of this case, which was surrendered to appellant in this state, and notice was duly served upon it, giving it an opportunity to produce the same, and thus protect itself against secondary evidence."

⁴² *Shelton v. Erie R. Co.*, 73 N. J. L. 558, 66 Atl. 403, 118 Am. St. 704, 9 Ann. Cas. 883.

⁴³ *International &c. R. Co. v. Ing*, 29 Tex. Civ. App. 398, 68 S. W. 722.

⁴⁴ *Memphis &c. R. Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5, 7 Am St. 776.

⁴⁵ Ante, §§ 2415, 2417, 2418; 3 Elliott Ev. § 1899; note in Ann. Cas. 1912C, 730; *Louisville &c. R. Co. v. Fish*, (Ky.), 127 S. W. 519, 43 L. R. A. (N. S.) 854, and note; *Smith v. Southern R. Co.*, 88 S. Car. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708, and note.

had it exercised the diligence required of carriers in this regard, may be shown. Thus, it has been held proper to admit evidence of statements of a member of a railroad commission to an official of the railroad company as to the depot and its platform to show notice of its condition to the company.⁴⁶ And where a passenger was injured by a defect in the defendant's premises he was using to reach or leave a train it was held proper to admit evidence that other passengers customarily took the same route to show that he was not using an unfrequented way.⁴⁷

§ 2821 (1787). **Evidence—Injuries to passengers in boarding or alighting from cars.**—Evidence of the previous habits of the passenger in boarding or alighting from trains as to his caution or the opposite is not generally admissible, as such evidence does not show whether care was exercised at the particular time and that is the sole question for the jury.⁴⁸ Where the injury was caused by the premature starting of a train while the passenger was in the act of alighting from or boarding the car, it has been held proper to show the customary stopping time at the particular station,⁴⁹ and, as showing the reason for a shorter stop than usual, that the train was behind time.⁵⁰ So,

⁴⁶ *Smoak v. Savannah &c. R. Co.*, 65 S. Car. 299, 43 S. E. 662. See also *F. Bimel Co. v. Harter*, 51 Ind. App. 267, 98 N. E. 360.

⁴⁷ *Brooks v. New York &c. R. Co.*, 21 Wkly. Dig. (N. Y.) 464; *McDonald v. Chicago &c. R. Co.*, 29 Iowa 170.

⁴⁸ *Eaton v. Boston &c. R. Co.*, 67 N. H. 422, 40 Atl. 112; *Lake Erie &c. R. Co. v. Morain*, 36 Ill. App. 632, affirmed 140 Ill. 117, 29 N. E. 869. See also *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209, 41 L. R. A. (N. S.) 683n, Ann. Cas. 1913D, 1250n, (citing 1 Elliott Ev. § 173), and note.

⁴⁹ *Gulf &c. R. Co. v. Rowland*,

82 Tex. 166, 18 S. W. 96; *Chesapeake &c. R. Co. v. Reeves*, 11 Ky. L. 14, 11 S. W. 464. So a passenger has been permitted to show her inexperience and lack of knowledge of time allowed passengers to alight. *Indianapolis So. R. Co. v. Emmerson*, 52 Ind. App. 403, 98 N. E. 895. But compare *Dilburn v. Louisville &c. R. Co.*, 156 Ala. 228, 47 So. 210.

⁵⁰ *Killian v. Georgia R. &c. Co.*, 97 Ga. 727, 25 S. E. 384. But compare *Hearn v. Wilmington City R. Co.*, 24 Del. 271, 76 Atl. 629; *Johnson v. Wilmington City R. Co.*, 7 Penn. (Del.), 5, 76 Atl. 961, (holding that evidence that train

testimony of other passengers as to what they had time to do immediately upon getting off the train and before regaining the same, which was then moving off, has been held competent on the issue as to how long the train stopped.⁵¹ Where the action is for an injury from being thrown from a car by its coming to a sudden stop on striking a defect in the track while running at a high rate of speed, evidence that other persons than plaintiff were thrown from the car and injured has been held admissible to overcome the claim of the defendant that plaintiff's injuries were caused by his negligence in jumping from the car when in motion.⁵² So, in an action for injuries received in jumping from a car to avoid a collision it has been held proper to show that other passengers also jumped. Such evidence is regarded as a part of the *res gestae*.⁵³ In an action for injuries to a passenger in alighting from a moving train on discovering that he was on the wrong train, evidence was held admissible that there were no signs to direct passengers to their proper trains, as this tended to show negligence in the management of the station.⁵⁴ In the case of injuries to an alighting passenger by being struck by a train on an adjoining parallel track it has been held that it may be shown, in rebuttal of a claim of contributory negligence, that passengers had been accustomed to alight from that side of the train, as such evidence tends to charge the company with notice of that fact and im-

was late is irrelevant as bearing on question of speed at particular time.)

⁵¹ *Central &c. R. Co. v. McNab*, 150 Ala. 332, 43 So. 222.

⁵² *Fogel v. San Francisco &c. R. Co.*, 110 Cal. xvii, 42 Pac. 565. Compare also *Johnstone v. Seattle &c. R. Co.*, 45 Wash. 154, 87 Pac. 1125.

⁵³ *Twomley v. Central Park &c. R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162. And evidence that the conductor told passengers to jump

for their lives is admissible on the question of care of a passenger who jumped. *Waniovek v. United R. Co.*, 17 Cal. App. 121, 118 Pac. 947.

⁵⁴ *Jones v. Baltimore &c. R. Co.*, 21 D. C. 346.

As to liability of carrier for misinformation as to time of departure, places of stopping and destination of trains, and the like, see *Weeks v. Great Northern Ry. Co. (N. Dak.)*, 175 N. W. 726, 8 A. L. R. 1178 and note reviewing numerous authorities.

poses upon it the duty to run its train on parallel tracks accordingly,⁵⁵ and it would seem proper to show that passengers could have been prevented from alighting on that side of the track by the use of guards or gates.⁵⁶ It has been held competent to show that the place where a passenger was injured while alighting from a street car was recognized as a stopping place by a custom of the company.⁵⁷ The fact that passengers alight at other dangerous points without injury is not material on the question whether a street railway company is to be charged with negligence in stopping at a dangerous place to allow passengers to alight.⁵⁸ And it has also been held that the carrier is not entitled to show that others of the party with the plaintiff, who was injured in alighting, alighted without accident.⁵⁹

§ 2822 (1788). **Evidence—Injuries to passengers in course of transportation.**—Where it is claimed that the injury sued upon was caused by a defect in the track plaintiff may generally show the existence of other like defects in the immediate vicinity of the place of the accident,⁶⁰ but not at other places remote therefrom.⁶¹ This latter evidence is sometimes received

⁵⁵ *Illinois Central R. Co. v. Davidson*, 76 Fed. 517, 1 Chic. L. J. 583.

⁵⁶ *Atlanta &c. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41.

⁵⁷ *Birmingham R. &c. Co. v. Enslin*, 144 Ala. 343, 39 So. 74. See also *Lexington R. Co. v. Herring*, 29 Ky. L. 794, 96 S. W. 558; *Norfolk &c. Term. Co. v. Rotolo*, 195 Fed. 231.

⁵⁸ *Mobile &c. R. Co. v. Walsh*, 146 Ala. 295, 40 So. 560.

⁵⁹ *Merryman v. Chicago &c. R. Co.*, 135 Iowa 591, 113 N. W. 357.

⁶⁰ *Alabama &c. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. 65; *Jacksonville &c. R. Co. v. Southworth*, 32 Ill. App. 307, affirmed 135 Ill. 250, 25 N. E. 1093;

Whittlesey v. Burlington &c. R. Co., 121 Iowa 597, 90 N. W. 516, 97 N. W. 66; *Union Pacific R. Co. v. Hand*, 7 Kans. 380; *Murphy v. New York &c. R. Co.*, 66 Barb. (N. Y.) 125; *Nashville &c. R. Co. v. Johnson*, 83 Tenn. 677; *Texas &c. R. Co. v. DeMilley*, 60 Tex. 194; *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318. So, it has been held that defective condition of a car may be shown by evidence that it had repeatedly left the track while being carefully operated. *East St. Louis &c. R. Co. v. Zink*, 229 Ill. 180, 82 N. E. 283.

⁶¹ *Louisville &c. R. Co. v. Fox*, 74 Ky. 496; *Pattee v. Chicago &c. R. Co.*, 5 Dak. 267, 38 N. W. 435; *Hipsley v. Kansas City &c. R. Co.*,

not for the purpose of proving a defect at the place of the accident, but to show such a generally bad condition as will charge the company with notice and as showing negligence in allowing the condition to continue.⁶² In one case where it was claimed that the accident was caused by the breaking of a wheel due to the excessive speed of the train over a rough and uneven track, it was held proper to admit evidence of the condition of the track for such a distance as the excessive speed was shown to have been kept up.⁶³ Evidence of the subsequent condition of the track at the place of the accident is not admissible unless it is shown to be the same as at the time of the accident.⁶⁴ Where the question is as to negligence in the use of particular equipment evidence as to the cost of the equipment is without relevancy.⁶⁵ The railroad company will not be allowed to show it had furnished its passengers with a more expensive road and equipment than its business would justify.⁶⁶ So, on the ground that the evidence had a tendency to prejudice the jury it has been held erroneous to admit testimony of witnesses as to the comparative equipment of passenger trains of the defendant railroad company, used on a branch line, where such injury occurred, and the trains used on the main lines as to being modern and up to date.⁶⁷ The intoxication of either

88 Mo. 348; *Read v. New York &c. R. Co.*, 45 N. Y. 574; 3 Elliott Ev. § 2512.

⁶² *Chicago &c. R. Co. v. Kinnare*, 76 Ill. App. 394; *Texas &c. R. Co. v. DeMilley*, 60 Tex. 194; *Texas &c. R. Co. v. Johnson*, 86 Tex. 421, 25 S. W. 417.

⁶³ *Jacksonville &c. R. Co. v. Southworth*, 32 Ill. App. 307, affirmed 135 Ill. 250, 25 N. E. 1093.

⁶⁴ *Cunningham v. Fairhaven &c. R. Co.*, 72 Conn. 244, 43 Atl. 1047; *Chicago &c. R. Co. v. Lewis*, 48 Ill. App. 274; *Henderson v. Chicago &c. R. Co.*, 73 Ill. App. 57; *Keatley v. Illinois Cent. R. Co.*, 94 Iowa 685, 63 N. W. 560; *Swad-*

ley v. Missouri &c. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. 366; *Weldon v. Omaha &c. R. Co.*, 93 Mo. App. 668, 67 S. W. 698; *Jones v. New York &c. R. Co.*, 20 R. I. 210, 37 Atl. 1033; *Sills v. Ft. Worth &c. R. Co.*, (Tex. Civ. App.) 28 S. W. 908; *Dunbar v. Central Vt. R. Co.*, 79 Vt. 474, 65 Atl. 528.

⁶⁵ *Grand Rapids &c. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Gulf &c. R. Co. v. Southwick*, (Tex. Civ. App.), 30 S. W. 592.

⁶⁶ *Gulf &c. R. Co. v. Southwick*, (Tex. Civ. App.), 30 S. W. 592.

⁶⁷ *Atlantic &c. R. Co. v. Crosby*, (Ala.), 43 So. 318.

of the parties—the trainmen or the passenger—may be shown,⁶⁸ and since this fact is susceptible of proof by direct evidence, evidence of intoxication at other times either before or after the accident is generally refused.⁶⁹ But evidence of a general reputation of an engineer or trainmen, charged with negligence, for drunkenness is sometimes admitted for the purpose of showing incompetency and the negligence of the railroad company in retaining such servant in its employ.⁷⁰ Evidence as to the degree of care previously exercised by the company in the selection of competent train operatives is not admissible where the question in issue is the negligence of such operatives at the time of the accident.⁷¹ The decisions are not in harmony on the question of the admissibility of rules for the government of the trainmen in the operation of the train. One line of decision allows the admission of the rules on the theory that the rules show a recognition of the necessity of their enforcement to prevent accidents, and as being in a sense a part of the *res gestae*.⁷² Other decisions hold these rules inadmissible unless the injured passenger knew of their existence at the time of the injury and relied on their observance,⁷³ and especially where they impose

⁶⁸ *Northern R. Co. v. Craft*, 69 Fed. 124; *Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55, 4 N. E. 410; *Pennsylvania R. Co. v. Brooks*, 57 Pa. 339, 98 Am. Dec. 229; *Pennsylvania R. Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860.

⁶⁹ *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102; *Townsend v. Briggs*, (Cal.), 32 Pac. 307; *Northern Pac. R. Co. v. Craft*, 69 Fed. 124.

⁷⁰ *Baltimore &c. R. Co. v. Henthorne*, 73 Fed. 634; *Gilman v. Eastern R. Co.*, 95 Mass. 433, 90 Am. Dec. 210; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860, 7 L. R. A. 591; *Williams v. Missouri &c. R. Co.*, 109 Mo. 475, 18 S. W. 1098.

⁷¹ *Augusta &c. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706.

⁷² *Frizzell v. Omaha St. R. Co.*, 124 Fed 176; *Atlantic &c. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41; *Lake Shore &c. R. Co. v. Ward*, 35 Ill. App. 423, affirmed 135 Ill. 511, 26 N. E. 520; *Baltimore &c. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *O'Neill v. Lynn*, 155 Mass. 371, 29 N. E. 630; *Cincinnati &c. R. Co. v. Altemeier*, 60 Ohio St. 10, 53 N. E. 300. Compare also *Blumenthal v. Union Elec. Co.*, 129 Iowa 322, 105 N. W. 588; *Crowley v. Boston Elev. R. Co.*, 204 Mass. 241, 90 N. E. 532; *Larson v. Boston Elev. R. Co.*, 212 Mass. 262, 98 N. E. 1048.

⁷³ *Central R. &c. Co. v. Skellie*,

a higher degree of care on employes than the law demands.⁷⁴ The fact that plaintiff had an accident insurance policy and had collected on it has no tendency to show contributory negligence of the passenger and the evidence of that fact is not admissible on that issue.⁷⁵

§ 2823 (1789). **Evidence—Wrongful ejection of passengers.**—A person seeking a recovery of damages for wrongful ejection as a passenger has the burden of proof to show that he was rightfully a passenger at the time he was expelled from the train.⁷⁶ To show his good faith, it has been held that the plaintiff may prove that he made an ineffectual attempt to procure a ticket before entering the car from which he was expelled for not having a ticket.⁷⁷ This contention of good faith may be met by evidence, on the part of the railroad company that plaintiff had no money with him at the time of his ejection.⁷⁸ But the defendant can not show that on other occasions the plaintiff had done acts indicating an attempt to avoid payment of

90 Ga. 694, 16 S. E. 657; Illinois Cent. R. Co. v. Downs, 122 Ill. App. 545; Louisville &c. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Illinois Cent. R. Co. v. Proctor, 122 Ky. 92, 89 S. W. 714; Fonda v. St. Paul R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. 341; O'Keefe v. Eighth Ave R. Co., 33 App. Div. 324, 53 N. Y. S. 940. See also post § 2826n, 29.

⁷⁴ Isackson v. Duluth St. R. Co., 75 Minn. 27, 77 N. W. 433; Alabama Great Southern R. Co. v. Clarke, 136 Ala. 450, 34 So. 917. See also Virginia Ry. &c. Co. v. Dodsey, 117 Va. 167, 83 S. E. 1072.

⁷⁵ Missouri &c. R. Co. v. Flood, 35 Tex. Civ. App. 197, 79 S. W. 1106.

⁷⁶ Georgia Central R. Co. v. Cannon, 106 Ga. 828, 32 S. E. 874.

An interurban railway company may adopt a rule reserving its cars for the use of interurban passengers and one wishing to become an urban passenger may be refused. Campbell v. Milwaukee Elec. Ry. &c. Co., 169 Wis. 171, 170 N. W. 937, 6 A. L. R. 628.

⁷⁷ Perkins v. Missouri &c. R. Co., 55 Mo. 201. See also Brown v. Central &c. R. Co., 128 Ga. 635, 58 S. E. 163; Forsee v. Alabama &c. R. Co., 63 Miss. 66, 56 Am. Rep. 801; Cleveland &c. R. Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429; Bowsher v. Chicago &c. R. Co., 113 Iowa 16, 84 N. W. 958.

⁷⁸ Atchison &c. R. Co. v. Cunniffe, (Tex. Civ. App.), 57 S. W. 692. But compare Southern R. Co. v. Bunnell, 138 Ala. 247, 36 So. 380.

fare.⁷⁹ The plaintiff may show the existence of the relation of carrier and passenger and other facts constituting his cause of action by relevant and proper evidence,⁸⁰ but, as in other cases, irrelevant and immaterial evidence is inadmissible.⁸¹ Evidence as to what employes are authorized to eject persons from trains is admissible in a proper case,⁸² and it has been held that this fact may be testified to by persons familiar with the operation of the particular railroad.⁸³ Evidence is admissible that the person actually ejecting the passenger represented himself to be a conductor or brakeman and was dressed in the uniform of such trainmen,⁸⁴ but it has been held that declarations of a brakeman, when ejecting a person from a train, were not admissible to prove that he acted under the orders of the conductor.⁸⁵ On

⁷⁹ *English v. Delaware &c. Co.*, 4 Hun (N. Y.), 683. See, however, *Powell v. St. Louis &c. R. Co.*, (Mo. App.), 129 S. W. 963.

⁸⁰ See as to evidence to show the relation, *Coine v. Chicago &c. R. Co.*, 123 Iowa 458, 99 N. W. 134, (receipt for ticket); *Wells v. Boston &c. R.* 82 Vt. 108, 71 Atl. 1103, 137 Am. St. 987, (may show ticket taken up by one conductor and refusal to accept such statement and ejection by another conductor). See also *Lake Erie &c. R. Co. v. Matthews*, 13 Ind. App. 355, 41 N. E. 842. As to evidence admissible as part of *res gestae* or the like see *Alabama &c. R. Co. v. Frazier*, 93 Ala. 45, 9 So. 303, 30 Am. St. 28n; *Alabama &c. R. Co. v. Tapia*, 94 Ala. 226, 10 So. 236; *Morris v. Atlantic Ave. R. Co.*, 116 N. Y. 552, 22 N. E. 1097; *Weber v. Southern R. Co.*, 65 S. Car. 356, 43 S. E. 888; *Southern Kans. R. Co. v. Wallace*, (Tex. Civ. App.), 152 S. W. 873.

⁸¹ *Sage v. Evansville &c. R. Co.*,

134 Ind. 100, 33 N. E. 771; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53, 47 N. W. 312; *Brian v. Oregon &c. R. Co.*, 40 Mont. 109, 105 Pac. 489, 25 L. R. A. (N. S.) 459n, 20 Ann. Cas. 311. See also *Southern R. Co. v. Bunnell*, 138 Ala. 247, 36 So. 380; *St. Louis &c. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225; *Lyons v. Texas &c. R. Co.*, (Tex. Civ. App.), 36 S. W. 1007; *Clark v. Great Northern R. Co.*, 31 Wash. 658, 72 Pac. 477.

⁸² *Gulf &c. R. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495.

⁸³ *Marion v. Chicago &c. R. Co.*, 64 Iowa 568, 21 N. W. 86. See also *St. Louis &c. R. Co. v. Hendricks*, 48 Ark. 177, 2 S. W. 783, 3 Am. St. 220.

⁸⁴ *Lampkins v. Vicksburg &c. R. Co.*, 42 La. Ann. 997, 8 So. 530; *Hughes v. New York Cent. &c. R. Co.*, 36 N. Y. Super. Ct. 222; *Hoffman v. New York Central &c. R. Co.*, 44 N. Y. Super. Ct. 1.

⁸⁵ *Lyons v. Texas &c. R. Co.*, (Tex. Civ. App.) 36 S. W. 1007.

this question it has been held proper to admit evidence that the brakeman accomplishing the ejection deported himself as a brakeman on defendant's train and acted as a brakeman between certain points on the road.⁸⁶ Where the case as made by plaintiff is one in which punitive damages may be allowed, evidence on the part of the conductor that at the time he ejected plaintiff he believed that plaintiff had not surrendered his ticket and that he believed it to be his duty to put plaintiff off if he did not pay his fare, has been held competent upon the question of damages.⁸⁷ Other questions relating to this general subject, and especially as to the effect of tickets, mistakes in tickets, and the like have been considered elsewhere.⁸⁸

§ 2824. (1790.) Evidence—Street and interurban railway injuries to travelers on street.—Where the speed of the car causing the injury is shown,⁸⁹ it has been held that ordinances fixing the maximum speed of street cars are admissible,⁹⁰ though not declared on as a ground of action.⁹¹ It is not required that experts should testify as to the speed of the cars. This testimony may be given by any intelligent person accustomed to observing the movement of cars and other objects.⁹² Evidence that a car was running very rapidly at other places on the same trip has been held admissible to support a claim that at the time of an accident it was behind its schedule and was trying to make up time.⁹³ And evidence of the length of the car's trip, and of the

⁸⁶ *St. Louis &c. R. Co. v. Hendricks*, 48 Ark. 177, 2 S. W. 783, 3 Am. St. 220.

⁸⁷ *Yates v. New York &c. R. Co.*, 67 N. Y. 100.

⁸⁸ See ante, §§ 2415, 2417, 2486, 2487.

⁸⁹ *Mathieson v. Omaha St. R. Co.*, 3 Nebr. (unoff.) 743, 92 N. W. 639.

⁹⁰ *Eckhard v. St. Louis Transit Co.*, 190 Mo. 593, 89 S. W. 602.

⁹¹ *Oates v. Union R. Co.*, 27 R. I. 499, 63 Atl. 675. See also *Mobile*

Light & R. Co. v. Burch, 12 Ala. App. 421, 68 So. 509.

⁹² *Eckington &c. R. Co. v. Hunter*, 6 App. Cas. (D. C.) 287, 23 Wash. L. 401; *Penny v. Rochester R. Co.*, 7 App. Div. 595, 40 N. Y. S. 172; *Brown v. Rosedale St. R. Co.*, (Tex. Civ. App.), 15 S. W. 120; *Ehrmann v. Nassau Electric R. Co.*, 23 App. Div. 21, 48 N. Y. S. 379.

⁹³ *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

schedule time for making such trip may be admitted to show the average rate of speed, as a basis of comparison with the speed at the time of the accident.⁹⁴ But it has been held that testimony of a witness "that the motorman tried to stop the car" should be refused as it is but the statement of a conclusion.⁹⁵ Where the question is not as to the competency of the motorman but solely whether he was negligent, evidence as to his competency and general character is without issue and inadmissible.⁹⁶ Thus generally it can not be shown that a motorman had been in previous accidents.⁹⁷ On the question of negligence in running a car at night evidence has been admissible as to the known habits of the public to use the trackway for driving and walking.⁹⁸ It has also been held that the condition of the track in the vicinity of the place of a derailment may be shown to charge the company with notice of a bad condition of the track generally.⁹⁹

§ 2825. (1791.) Evidence—Street and interurban railway injuries—Whether traveler used proper care for his own safety.—Evidence as to the custom of a street railway company in running its cars on a double track system is admissible on the question of the care exercised by a person using the track and struck by a car running in the opposite direction from that customarily followed.¹ So, in a case where the driver of a carriage in a funeral procession was struck by a street car, and it appeared that there

⁹⁴ *Central R. Co. v. Almon*, 147 Ill. 471, 35 N. E. 725.

⁹⁵ *San Antonio Traction Co. v. Kumpf*, (Tex. Civ. App.), 99 S. W. 863.

⁹⁶ *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Wooster v. Broadway &c. R. Co.*, 72 Hun 197, 25 N. Y. S. 378, 55 N. Y. St. 174.

⁹⁷ *American Ice Co. v. New York City R. Co.*, 50 Misc. 183, 98 N. Y. S. 219.

⁹⁸ *Rascher v. East Detroit R. Co.*, 90 Mich. 413, 51 N. W. 463, 30 Am. St. 447.

⁹⁹ *Houston City St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621, 43 S. W. 1028. But see *Cunningham v. Fairhaven &c. R. Co.*, 72 Conn. 244, 43 Atl. 1047.

¹ *North Chicago St. R. Co. v. Irwin*, 202 Ill. 345, 66 N. E. 1077. It has also been held that a traveler may explain what he saw and how the situation appeared to him when crossing in front of the car by which he was struck. *Macchi v. Portland R. &c. Co.*, 76 Ore. 215, 148 Pac. 72.

was a custom in the town in question to allow funeral processions to cross street railway tracks without interruption, it was held that this custom, though not binding on the company, could be shown as bearing on the question of the driver's contributory negligence in approaching the track without giving the attention demanded of ordinary users of the street.² On the question whether one driving along street railway tracks actively listened for the approach of cars from behind, evidence has been held insufficient to establish this fact which merely showed that the injured traveler had good hearing, and did not hear the approaching car.³ On the question whether the injured person looked for cars as she approached the track, her testimony that she was in the habit of looking when crossing the street, together with the testimony of another witness that she did look, was held sufficient to sustain a finding in her favor although she could not remember whether she looked or not.⁴ On the issue whether the signals were sounded by the motorman, as claimed by him, it is proper to receive the contradictory evidence of witnesses who were in a position to have heard such signals if they had been given.⁵ On the question whether the contributory negligence of a driver of a vehicle was to be imputed to one injured in a collision with a street car while riding with him; it has been held proper to show that the driver was habitually careless, to the knowledge of the injured person.⁶

§ 2826 (1792). Evidence—Injuries at railroad crossings.—The person injured at a crossing should usually show whether

² *White v. Wilmington R. Co.*, 6 Penn. Del. 105, 63 Atl. 931.

³ *Belford v. Brooklyn Heights R. Co.*, 86 App Div. 388, 83 N. Y. S. 836.

The question as to the duty of travelers about to cross an interurban railway track has already been considered in another chapter, but see also *Saylor v. Union Trac. Co.*, 40 Ind. App. 381, and numerous cases cited in opinion.

⁴ *Cowan v. Third Ave. R. Co.*,

56 Hun 644, 9 N. Y. S. 610. Evidence as to whether the plaintiff knew the distance within which a street car could be stopped was held immaterial on the question of contributory negligence in *Blair v. Calhoun*, 87 Wash. 154, 151 Pac. 259.

⁵ *Frank v. St. Louis Transit Co.*, 99 Mo. App. 323, 73 S. W. 239.

⁶ *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152.

or not it was a public crossing, as the law usually imposes a different degree of responsibility where the accident occurs at private and other crossings.⁷ On this question it has been held that it may be shown that the company recognized the crossing as a public one by the erection of cattle guards,⁸ and signboards,⁹ thereat. On the question of the care called for in the operation of trains over a particular crossing it has been held proper to show its nature and surroundings its extensive use by the public,¹⁰ and that it was located in a thickly populated district.¹¹ But it has been held that evidence of the number of persons killed at a crossing was not admissible to show the dangerous character of the crossing,¹² and that one struck while crossing a track at a place other than a crossing may not show that this was the only available place to cross because of the impossibility of the regular street crossing.¹³ Expert witnesses are not required to testify on

⁷ *Chicago &c. R. Co. v. Heinrich*, 157 Ill. 388, 41 N. E. 860. See also *Ross v. Kanawha &c Ry. Co.*, 76 W. Va. 197, 85 S. E. 180, ante §§ 1646, 1647 et seq.

⁸ *Baltimore &c. R. Co. v. Faith*, 175 Ill. 58, 51 N. E. 807.

⁹ *Louisville &c. R. Co. v. Hubbard*, 148 Ala. 45, 41 So. 814. See also ante § 1647.

¹⁰ *Highland Ave. &c. R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566; *Louisville &c. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35; *Union Stockyards &c. Co. v. Karlik*, 170 Ill. 403, 48 N. E. 1008; *Chicago &c. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *O'Conner v. Illinois &c. R. Co.*, 77 Ill. App. 22; *English v. Southern Pac. R. Co.*, 13 Utah, 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. 772.

See also *Pittsburgh &c. Co. v. Tatman* (Ind. App.) 122 N. E. 357; *Baker v. Hodges* (Tex. Civ. App.), 231 S. W. 844.

¹¹ *Overtoom v. Chicago &c. R. Co.*, 181 Ill. 323, 54 N. E. 898; *Chicago &c. R. Co. v. Johnson*, 61 Ill. App. 464; *Cohen v. Chicago &c. R. Co.*, 104 Ill. App. 314; *Harrington v. Erie R. Co.*, 79 App Div. 26, 79 N. Y. S. 930; *English v. Southern &c. R. Co.*, 13 Utah 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. 772; *Abbott v. Dwinnell*, 74 Wis. 514, 43 N. W. 496. See also *Texas &c. Ry. Co. v. Eddleman*, (Tex. Civ. App.), 175 S. W. 775.

¹² *Tiffin v. St. Louis &c. R. Co.*, 78 Ark. 55, 93 S. W. 564.

¹³ *Reinhardt v. Chicago Junction R. Co.*, 235 Ill. 576, 85 N. E. 605. But see *Galveston &c. R. Co. v. Matula*, (Tex.), 19 S. W. 376. It has been held that one injured by the bringing together of an open train at a crossing may show that others had passed between the cars shortly before he made the attempt. *Weaver v. Southern R. Co.*, 76 S. Car. 49, 56 S. E. 657,

the issue of the speed in running trains over crossings. This question calls for a fact and not an opinion and any intelligent person accustomed to observing moving objects is competent to testify on this issue although the weight to be given to his answer will depend upon his opportunity to observe the movement of the train.¹⁴ A witness may state that a car was running fast although he may not be able to tell exactly how fast.¹⁵ Nor does it disqualify him that he can not tell the speed in miles per hour,¹⁶ or does not know how many feet or rods there are in a mile.¹⁷ It has been held not improper to show the speed of the train at the crossing next before the one where the accident occurred, it appearing that it would be almost impossible to slacken the speed meanwhile.¹⁸ In a case where it was claimed that the

121 Am. St. 934. See also *Central of Ga. Ry. Co. v. Chambers*, 194 Ala. 152, 69 So. 518.

¹⁴ *Seaboard &c. R. Co. v. Smith*, (Ala.), 43 So. 235; *Alabama &c. R. Co. v. Hall*, 105 Ala. 599, 17 So. 176; *St. Louis &c. R. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Chicago &c. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Overtown v. Chicago &c. R. Co.*, 181 Ill. 323, 54 N. E. 898; *Chicago &c. R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28; *Louisville &c. R. Co. v. Henricks*, 128 Ind. 462, 28 N. E. 58; *Missouri &c. R. Co. v. Hildebrand*, 52 Kans. 284, 34 Pac. 738; *Walsh v. Missouri &c. R. Co.*, 102 Mo. 582, 14 S. W. 873; *Nutter v. Boston &c. R. Co.*, 60 N. H. 483; *Scully v. New York &c. R. Co.*, 80 Hun 197, 30 N. Y. S. 61; *Penny v. Rochester R. Co.*, 7 App. Div. 595, 40 N. Y. S. 172; *Brown v. Rose-dale St. R. Co.*, (Tex. Civ. App.), 15 S. W. 120; *Galveston &c. R. Co. v. Duelm*, (Tex. Civ. App.), 23

S. W. 596; *Chipman v. Union Pac. R. Co.*, 12 Utah 68, 41 Pac. 562; *Sears v. Seattle &c. R. Co.*, 6 Wash. 227, 33 Pac. 389. See also *Braken v. Pennsylvania R. Co.*, 222 Pa. St. 410, 71 Atl. 962, 34 L. R. A. (N. S.) 790n, and note where many other cases are cited to same effect.

¹⁵ See generally *Ehrmann v. Nassau Elec. R. Co.*, 23 App. Div. 21, 48 N. Y. S. 379; *Illinois &c. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Galveston &c. R. Co. v. Duelm*, (Tex. Civ. App.), 23 S. W. 596; *Galveston &c. R. Co. v. Huebner*, (Tex. Civ. App.), 42 S. W. 1021.

¹⁶ *Overtown v. Chicago &c. R. Co.*, 80 Ill. App. 515.

¹⁷ *Ward v. Chicago &c. R. Co.*, 85 Wis. 601, 55 N. W. 771.

¹⁸ *Lyman v. Boston &c. R. Co.*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364. See also *Louisville &c. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41. But evidence that a train was late has been held irrelevant on

speed over a crossing violated a speed ordinance and the time tables of the company fixing the speed of trains through towns showed a knowledge of the existence of the ordinance, it was held that there was no error in admitting the ordinance in evidence even though the law only provided for an inspection of city ordinances by voters.¹⁹ Evidence of the failure of the engineer to sound signals at crossings is admissible in a proper case though the action is not based upon the statute requiring signals.²⁰ But it can not be shown that other trains failed to whistle or ring the bell at the crossing in question,²¹ or that the particular engineer failed to sound signals at other crossings,²² unless, in the latter instances, the crossing was within hearing distance of the traveler.²³ Persons in a position to have heard the signals, if given, may testify whether the signals were actually given or omitted.²⁴ A question to a witness whether he could have heard the signal, if given, is held not to call for a conclusion. It is said to be equivalent merely to asking whether he was within hearing distance.²⁵ Where the injury is caused by a defect in the crossing and not by a train run over the crossing, it has been held proper to admit evidence of previous

the question of speed. *Hearn v. Wilmington City R. Co.*, 24 Del. 271, 76 Atl. 692.

¹⁹ *Southern R. Co. v. Stockdon*, 106 Va. 693, 56 S. E. 713.

²⁰ *Schneider v. Missouri &c. R. Co.*, 75 Mo. 295. See also *Mack v. South Bound R. Co.*, 52 S. Car. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. 913.

²¹ *Illinois &c. R. Co. v. Borders*, 61 Ill. App. 55.

²² *Chicago &c. R. Co. v. Durand*, 65 Kans. 858, 69 Pac. 1126, (overruling *Atchison &c. R. Co. v. Hague*, 54 Kans. 284, 38 Pac. 257, 45 Am. St. 278.) But see *Mack v. South Bound R. Co.*, 52 S. Car. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. 913; *Bower v. Chicago &c.*

R. Co., 61 Wis. 457, 21 N. W. 536. See generally 1 Elliott Ev. § 186.

²³ *Baltimore &c. R. Co. v. Alsop*, 176 Ill. 471, 52 N. E. 253, 732.

²⁴ *Ensley R. Co. v. Chewning*, 93 Ala. 24, 9 So. 458; *Rockford &c. R. Co. v. Hillmer*, 72 Ill. 235; *Chicago &c. R. Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181, 5 Am. St. 559; *Mc-Marshall v. Chicago &c. R. Co.*, 80 Iowa, 757, 45 N. W. 1065, 20 Am. St. 445n; *Crane v. Michigan &c. R. Co.*, 107 Mich. 511, 65 N. W. 527, 2 Det. Leg. N. 757; *Moran v. Eastern R. Co.*, 48 Minn. 46, 50 N. W. 930; *Galveston &c. R. Co. v. Gar-teiser*, 9 Tex. Civ. App. 456, 29 S. W. 939.

²⁵ *Crane v. Michigan Cent. R. Co.*, 107 Mich. 511, 65 N. W. 527.

accidents of the same kind on the crossing as tending to charge the company with notice of its condition.²⁶ It may be shown that the railroad company was granted the right to cross the streets upon the express condition that it would maintain the crossings.²⁷ On the ground that the evidence was a conclusion it has been held improper to admit the statements of roadmen that the condition of the crossing on which the injuries were received did not impair its usefulness as a highway.²⁸ And in accordance with what seems the better reason, rules of the company wholly for its own servants are usually inadmissible against it to show negligence on its part in such cases.²⁹

§ 2827 (1793). **Evidence—Care by plaintiff to avoid injury at crossing.**—On the issue of contributory negligence defendant may not show previous instances of a want of care on plaintiff's part,³⁰ or even his reputation for a lack of care,³¹ as these facts, if shown, would not prove a want of care at the time of the

²⁶ *Southern R. Co. v. Posey*, 124 Ala. 486, 26 So. 914; *Toledo &c. R. Co. v. Milligan*, 2 Ind. App. 578, 28 N. E. 1019; *Retan v. Lake Shore &c. R. Co.*, 94 Mich. 146, 53 N. W. 1094; *Hoyt v. New York &c. R. Co.*, 118 N. Y. 399, 23 N. E. 565.

²⁷ *Valley R. Co. v. Keegan*, 87 Fed. 849.

²⁸ *Illinois Southern R. Co. v. Hayer*, 225 Ill. 613, 80 N. E. 316.

²⁹ *Merchants &c. Co. v. Chicago &c. Ry. Co.*, 170 Iowa 378, 150 N. W. 720; *Louisville &c. R. Co. v. Gaugh*, 133 Ky. 467, 118 S. W. 276; *McKernan v. Detroit Citizens' St. R. Co.*, 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347n; *Fonda v. St. Paul &c. Ry. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. 341. But see *Georgia R. Co. v. Williams*, 74 Ga. 723; *Lake Shore &c. Ry. Co. v. Ward*, 135 Ill. 511, 26 N. E. 520;

McCormick v. Columbia Elec. St. R. &c. Co., 85 S. Car. 455, 67 S. E. 562, 21 Ann. Cas. 144; *Dublin &c. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155. If intended for the protection of the public as well they are usually held admissible by the weight of authority. *Deister v. Atchison &c. R. Co.*, 99 Kans. 525, 162 Pac. 282, L. R. A. 1917C, 784n and note.

³⁰ *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150, 33 N. W. 161; *Delaware &c. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. ed. 213; *International &c. Co. v. Ives*, 31 Tex. Civ. App. 272, 71 S. W. 772; *Atlanta &c. R. Co. v. Johnson*, 66 Ga. 259; 1 Elliott Ev. § 186..

³¹ *Baldwin v. Western R. Co.*, 4 Gray (Mass.), 333.

accident and that is the only question to be determined. And the same is likewise true as to showing habits of care.⁸² In some jurisdictions, however, where the injured person did not survive the accident and there were no eye-witnesses,⁸³ plaintiff is allowed to show that deceased was a man of careful habits in the matter of crossing tracks.⁸⁴ It has also been held that evidence of previous boasts by the injured traveler as to his ability to keep out of the way of trains at crossings and not get hurt was competent upon the question of his carefulness, or readiness to take risks.⁸⁵ Evidence to show a general knowledge by the public that a crossing is dangerous has been held incompetent on the question of the plaintiff's care for his own safety. The establishment of general knowledge of this fact, it is said, would not prove plaintiff's knowledge. The sole inquiry is whether plaintiff knew or ought to have known of the danger involved in the attempt to cross and whether he acted as an ordinarily prudent man in making the attempt under the circumstances.⁸⁶ Where the traveler's injuries were received in attempting to cross the tracks over a crossing, known by him to be out of repair, it has been held that he may show as an excuse for using the crossing that the other crossings available to him

⁸² *Minot v. Boston &c. R. Co.*, 73 N. H. 317, 61 Atl. 509; *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209, 41 L. R. A. (N. S.) 683n, Ann. Cas. 1913D, 1250n and note reviewing many cases.

⁸³ *Gulf &c. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76, 42 S. W. 358; *Glass v. Memphis &c. R. Co.*, 94 Ala. 581, 10 So. 215. But see *Louisville &c. R. Co. v. McClish*, 115 Fed. 268; *Chase v. Maine &c. R. Co.*, 77 Maine 62, 52 Am. Rep. 744.

⁸⁴ *McNueta v. Lockridge*, 32 Ill. App. 86, affirmed in 137 Ill. 270, 27 N. E. 452, 31 Am. St. 362; *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *Louisville &c. R. Co. v. Clark*, 105 Ky. 571, 49

S. W. 323; *Tucker v. Boston &c. R. Co.*, 73 N. H. 132, 59 Atl. 943. See also *Davis v. Concord &c. R. Co.*, 68 N. H. 247, 44 Atl. 388; *Missouri Pac. R. Co. v. Moffatt*, 60 Kans. 113, 55 Pac. 837, 72 Am. St. 343. But see 1 Elliott Ev. § 186; 3 Elliott Ev. § 2505; *Gray v. Chicago &c. R. Co.*, 143 Iowa 268, 121 N. W. 1097; *Chase v. Maine Cent. R. Co.*, 77 Maine 62, 52 Am. Rep. 744; *Baltimore &c. R. Co. v. State*, 107 Md. 642, 69 Atl. 439, 72 Atl. 340.

⁸⁵ *Brouillette v. Connecticut River R. Co.*, 162 Mass. 198, 38 N. E. 507.

⁸⁶ *Savannah &c. R. Co. v. Evans*, 121 Ga. 391, 49 S. E. 308.

were also out of repair.³⁷ On the question of care in attempting to pass between cars blocking a passageway it may be shown in plaintiffs' behalf that he saw other persons crossing, as this evidence goes both to the matter of the negligence of the railroad company in moving the cars and the plaintiff's contributory negligence in making the attempt.³⁸ The subject of imputed negligence has been sufficiently considered elsewhere and a bare reference to a few more recent authorities is all that is required here.³⁹

§ 2828 (1794). **Evidence—Injuries to persons on track away from crossing.**—On the question of the care to be exercised toward persons on the track at places other than crossings, it has been held that the plaintiff may show that the track at the place where the injuries were received had long been used by pedestrians to the knowledge of the company and its engineers.⁴⁰ Proof of occasional trespasses on the track at the place in question is not, however, ordinarily sufficient to charge engineers with notice so as to make the failure to maintain a lookout an act of negligence.⁴¹ On the question of care in maintain-

³⁷ *Galveston &c. R. Co. v. Matula* (Tex.), 19 S. W. 376. But see *Reinhardt v. Chicago Junction R. Co.*, 235 Ill. 576, 85 N. E. 605.

³⁸ *Weaver v. Southern R. Co.*, 76 S. Car. 49, 56 S. E. 657; *San Antonio &c. R. Co. v. Green*, 20 Tex. Civ. App. 5, 49 S. W. 670; *Schmitz v. St. Louis &c. R. Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250.

³⁹ *Angell v. Chicago &c. Ry. Co.*, 97 Kans. 688, 156 Pac. 763; note in *Ann. Cas.* 1912A, 647; *Brennan v. Minnesota &c. Ry. Co.*, 130 Minn. 314, 153 N. W. 611, L. R. A. 1915F, 11n; *Landrum v. St. Louis &c. Ry. Co.*, (Mo. App.), 178 S. W. 273.

⁴⁰ *Wabash R. Co. v. Jones*, 53 Ill. App. 125; *O'Conner v. Illinois Cent. R. Co.*, 77 Ill. App. 22; *Ris-*

bridger v. Michigan Cent. R. Co., 188 Mich. 672, 152 N. W. 961, 157 N. W. 279; *Eckert v. St. Louis &c. R. Co.*, 13 Mo. App. 352; *Ludtke v. Lake Shore &c. R. Co.*, 24 Ohio C. C. 120; *Cassida v. Oregon R. &c. Co.*, 14 Ore. 551; *Jones v. Charleston &c. R. Co.*, 65 S. Car. 410, 43 S. E. 884; *Texas &c. Ry. Co. v. Key*, (Tex. Civ. App.), 175 S. W. 492; *Lindsay v. Canadian &c. R. Co.*, 68 Vt. 556, 35 Atl. 513. But, as elsewhere shown, in many, if not most, jurisdictions there is no liability for mere negligence, in such cases, in the absence of an invitation or its equivalent, at least where due care is exercised after discovering the traveler's peril.

⁴¹ *Thomas v. Chicago &c. R. Co.*,

ing a lookout along the track it has been held not improper to admit evidence of experiments, made by a witness at the place of the accident, to show how far a man could be seen under the condition prevailing at the time of the accident.⁴² So it has been held proper to admit the testimony of experts as to the time required to stop a locomotive under the circumstances shown by the evidence.⁴³ And so an experienced railroad man may testify as to whether a street car can be stopped in a much shorter space than a steam locomotive or a number of cars.⁴⁴ But it has been held that scientific books treating of this question of stopping trains and giving the results of experiments are not admissible in the absence of facts therein showing the conditions in which these trains were stopped.⁴⁵ Evidence that the train was supplied with a complete and efficient brake equipment has been held admissible where the evidence showed that a slight diminution of the speed would have allowed the injured person to escape without harm.⁴⁶ In a case where there were no eye witnesses to a railroad accident which resulted in the death of a person on the track it was held not competent for the defendant railroad company to show a habit of deceased to jump on moving trains near the place where his body was found, for the purpose of raising an inference that his death resulted from such an attempt. In such a case it was said, the testimony must be confined to such acts of the deceased at the time as are capable of direct or circumstantial proof.⁴⁷

93 Iowa 248, 61 N. W. 967; Willis v. Louisville &c. R. Co., 164 Ky. 124, 175 S. W. 18.

⁴² Cox v. Norfolk &c. R. Co., 126 N. Car. 103, 35 S. E. 237. See also ante § 2711.

⁴³ Cox v. Norfolk &c. R. Co., 126 N. Car. 103, 35 S. E. 237.

⁴⁴ Northern Texas Trac. Co. v. Caldwell, 44 Tex. Civ. App. 374, 99 S. W. 869.

⁴⁵ Burg v. Chicago &c. R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. 419 (Railway Age not a scientific work).

⁴⁶ Louisville &c. R. Co. v. Orr, 121 Ala. 489, 26 So. 35.

⁴⁷ Louisville &c. R. Co. v. McClish, 115 Fed. 268. But see last preceding section.

§ 2829 (1795). **Evidence—Injuries to employes.**—On the issue of the existence of the relation of employer and employed, evidence is admissible on defendant's behalf, that it did not employ the plaintiff and he was not working for it at the time the injuries were received.⁴⁸ On the other hand, where the railroad company sued for the injury claims that it was not operating the railroad at the time of the accident, but that it was operated by a successor, the plaintiff may introduce railroad tickets and list of officers, agencies and stations issued by the defendant, and the words, marks and sign on its bulletin boards to show that the defendant was holding out to the world that it operated the road at such time.⁴⁹ On the issue of assumption of risk, evidence is admissible which tends to show the plaintiff's knowledge of the defects causing his injury.⁵⁰ But it has been held that an extract from an application for employment in one line of railroad service, which admitted the applicant's knowledge of the dangers of the employment, was not admissible on the issue of assumption of risk in a different line of railroad work to which the applicant was afterwards assigned.⁵¹ On the question of the railroad company's knowledge of defects or dangerous conditions, evidence is admissible of declarations, conversations or conduct showing this knowledge.⁵² So, the plaintiff may show that defendant had this knowledge by reason of complaints made to the superintendent of the road or other vice-principal.⁵³ And so the railroad company may be

⁴⁸ *Georgia &c. R. Co. v. Strauss*, 110 Ga. 189, 35 S. E. 332.

⁴⁹ *Southern Pac. Co. v. Wellington*, (Tex. Civ. App.), 36 S. W. 1114. See also *Amerson v. Corona Coal &c. Co.*, 194 Ala. 175, 69 So. 601; *Nicholson v. Atchison &c. Ry. Co.*, 95 Kans. 13, 147 Pac. 1123, L. R. A. 1915E, 417; *Otway v. Snare &c. Co.*, 167 App. Div. 128, 168 App. Div. 956, 152 N. Y. S. 845, 153 N. Y. S. 1131.

⁵⁰ *Lake Shore &c. R. Co. v. Mal-*

com, 12 Ind. App. 612, 40 N. E. 822.

⁵¹ *Texas &c. R. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. ed. 382.

⁵² *Texas &c. R. Co. v. Barron*, 4 Tex. Civ. App. 546, 23 S. W. 537. But, of course, this must be by the company or some one whose declarations are receivable against it.

⁵³ *Dutro v. Metropolitan St. R. Co.*, 111 Mo. App. 258, 86 S. W. 915.

charged with constructive knowledge by reason of a lack of diligence in making inspections where a proper inspection would have disclosed the defect responsible for the injury.⁵⁴ The plaintiff may prove promises to make repairs in a defective appliance as an excuse for his continuance at work with knowledge of the defect.⁵⁵ But he can not, ordinarily at least, prove promises made to another employe who made complaint.⁵⁶ Furthermore, plaintiff must show that the person to whom he made the complaint and who promised to make the repairs was authorized to repair the defect or bind the master by a promise to repair.⁵⁷ The rules for the government of employes, properly promulgated, are admissible where it is claimed that a disobedience of these rules caused the injuries sued for.⁵⁸ Where the rule relied on is oral, its substance may be testified to by persons having knowledge of its existence.⁵⁹ Proof of actual delivery of the rules to employes is not required in all cases; evidence reasonably justifying an inference that they were received is sufficient.⁶⁰ The construction placed upon the rules by the employer may be shown in a proper case by evidence of his acts and conduct with reference to the particular rule.⁶¹ The employe's

⁵⁴ *St. Louis &c. R. Co. v. Dorsey*, 189 Ill. 251, 59 N. E. 593; *Toledo Consol. St. R. Co. v. Mammet*, 2 Ohio Dec. 532.

⁵⁵ *Springs v. Southern R. Co.*, 130 N. Car. 186, 41 S. E. 100; *Louisville &c. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. 326.

⁵⁶ *Ford v. Chicago &c. R. Co.*, 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657. See also *Shea v. American Hide &c. Co.*, 221 Mass. 282, 109 N. E. 158.

⁵⁷ *Perdue v. Louisville &c. R. Co.*, 100 Ala. 535, 14 So. 366.

⁵⁸ *Louisville &c. R. Co. v. Banks*, 132 Ala. 471, 31 So. 573; *Chicago &c. R. Co. v. O'Sullivan*, 143 Ill. 48, 32 N. E. 398; *Lake Erie &c. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E.

564; *Pierson v. Chicago &c. R. Co.*, 116 Iowa, 601, 88 N. W. 363; *Rogers v. Louisville &c. R. Co.*, 15 Ky. L. 686, 25 S. W. 269; *Madden v. Chesapeake &c. R. Co.*, 28 W. Va. 610. See also *Cleveland &c. R. Co. v. Oesterling*, 182 Ind. 481, 103 N. E. 401 (disobedience of rule held contributory negligence).

⁵⁹ *St. Louis &c. R. Co. v. Bauer*, 156 Ill. 106, 40 N. E. 448.

⁶⁰ *Lehigh Val. R. Co. v. Snyder*, 56 N. J. L. 326, 28 Atl. 376; *Ford v. Chicago &c. R. Co.*, 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657; *Parks v. St. Louis &c. R. Co.*, 29 Tex. Civ. App. 551, 69 S. W. 125; *McDonald v. Fitchburg R. Co.*, 19 App. Div. 577, 46 N. Y. S. 600;

⁶¹ *Lake Shore &c. R. Co. v. An-*

knowledge of the rule may be shown either before or after the admission of the rule in evidence.⁶² The abrogation of a rule may be established by evidence that it had been habitually violated and disregarded to the knowledge of the railroad company for a long period of time.⁶³ Time tables and train sheets are admissible in proper case to show the movement of trains on the day of the accident.⁶⁴ Train sheets seem to stand in a class by themselves and are admissible because of the improbability of their fabrication on account of their purpose and the manner in which they are kept.⁶⁵ And in a recent action

draws, 14 Ohio C. C. 564. See also *Pelton v. Illinois Cent. Ry. Co.* 171 Iowa 91, 150 N. W. 236, 239.

⁶² *Binion v. Georgia &c. R. Co.*, 111 Ga. 878, 36 S. E. 938; *Parker v. Georgia &c. R. Co.*, 83 Ga. 539, 10 S. E. 233.

⁶³ *Lake Erie &c. R. Co. v. Craig*, 80 Fed. 488, 47 U. S. App. 647, 38 Ohio L. J. 122; *Hissong v. Richmond &c. R. Co.*, 91 Ala. 514, 8 So. 776; *Louisville &c. R. Co. v. Richardson*, 100 Ala. 232, 14 So. 209; *Chicago &c. R. Co. v. Myers*, 95 Ill. App. 578; *Lowe v. Chicago &c. R. Co.*, 89 Iowa 420, 56 N. W. 519; *Strong v. Iowa &c. R. Co.*, 94 Iowa 380, 62 N. W. 799; *Spaulding v. Chicago &c. R. Co.*, 98 Iowa 205, 67 N. W. 227; *Eastman v. Lake Shore &c. R. Co.*, 101 Mich. 597, 60 N. W. 309; *White v. Louisville &c. R. Co.*, 72 Miss. 13, 16 So. 248; *Barry v. Hannibal &c. R. Co.*, 98 Mo. 62, 11 S. W. 308, 14 Am. St. 610; *Schaub v. Hannibal &c. R. Co.*, 106 Mo. 74, 16 S. W. 924; *Francis v. Kansas City &c. R. Co.*, 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; *Wallace v. Boston &c. R. Co.*, 72 N. H. 504, 57 Atl. 913; *Cameron v. New York &c. R. Co.*, 77 Hun 519,

60 N. Y. St. 273, 28 N. Y. S. 898; *Copins v. New York &c. R. Co.*, 122 N. Y. 557, 25 N. E. 915, 19 Am. St. 523; *Nashville &c. R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050; *Galveston &c. R. Co. v. Garteiser*, 9 Tex. Civ. App. 456, 29 S. W. 939; *International &c. R. Co. v. Jacobs*, 37 Tex. Civ. App. 390, 84 S. W. 288; *Wright v. Southern Pac. Co.*, 14 Utah 383, 46 Pac. 374, 5 Am. & Eng. R. Cas. (N. S.) 559; *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000. But, as elsewhere shown, there is much conflict as to what violation, and by what employes is sufficient to amount to a waiver or abrogation of the rules. See also *Canadian Pac. R. Co. v. Elliot*, 137 Fed. 905. Rules for the protection of employes, with which they are familiar, will not be held to have been abrogated or abandoned where the evidence does not clearly justify that conclusion. *Shumaker's Admx. v. Atlantic &c. R. Co.*, 125 Va. 393, 99 S. E. 739.

⁶⁴ *Stewart v. Raleigh &c. R. Co.*, 141 N. Car. 253, 53 S. E. 877.

⁶⁵ *Bush v. Taylor*, 136 Ark. 554, 207 S. W. 226, (but they do not import absolute verity and are not

against a receiver for setting fire in operating trains over another railroad, train sheets kept by the train dispatcher of such other road showing daily movement of all trains, including those of the receiver, were held admissible against him although not supported by suppletory oath of the dispatcher or employe who actually made the entries.⁶⁶ On the issue of the failure of a master to exercise ordinary care to provide reasonably safe appliances, it has been held that a witness having sufficient knowledge of the subject may testify to the general practice of other employers with reference to similar appliances and the comparative safety of different appliances; but it is not competent to show that the appliances of another railroad company are better than those used by the railroad company whose conduct is called in question.⁶⁷ As elsewhere shown, there is sharp conflict among the authorities as to whether the doctrine *res ipsa loquitur* applies in an action by an employe against his master. Many of the courts hold that it can have no application in such cases, and, while this is, perhaps, not sustained to the full extent by the numerical weight of authority, it seems evident that the doctrine can not so readily be applied in the ordinary action between master and servant as it can in actions by a passenger against the carrier or in other cases in which there is no question of fellow servants, assumption of risks or the like.⁶⁸

necessarily conclusive of the facts recorded). *French v. Virginia Ry. Co.*, 121 Va. 383, 93 S. E. 585. They may be inadmissible in favor of the company, however, where kept at another place and mere hearsay or self-serving declarations. *St Louis &c. Ry. Co. v. Gibson*, 113 Ark. 417, 168 S. W. 1129.

⁶⁶ *Bush v. Taylor*, 136 Ark. 554, 207 S. W. 226.

⁶⁷ *Norfolk &c. R. Co. v. Bell*, 104 Va. 836, 52 S. E. 700. But see generally upon this subject, *Gulf &c. R. Co. v. Evansich*, 61 Tex. 3;

Texas &c. R. Co. v. Behmyer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. ed. 905; *Shandrew v. Chicago &c. R. Co.*, 142 Fed. 320; ante § 1832.

⁶⁸ See *Stepanovich v. Pittsburgh &c. Coal Co.*, 218 Fed. 604; *Looney v. Metropolitan Co.*, 200 U. S. 486, 26 Sup. Ct. 303, 50 L. ed. 568; *Patton v. Texas &c. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361; *Northern Pac. R. Co. v. Dixon*, 139 Fed. 737; 1 L. R. A. (N. S.) 533; *Going v. Southern Ry. Co.*, 192 Ala. 665, 69 So. 73; *Rose v. Minneapolis &c. R. Co.*, 121 Minn.

§ 2830 (1796). Evidence—Further of injuries to employes.—On the question of negligence in failing to properly instruct a youthful employe, it has been held proper to prove the youthful appearance of the employe by other persons that knew him.⁶⁹ The fact of failing to instruct such employe, however, can not be proved or disproved by evidence of the giving or failure to give such instructions to other employes.⁷⁰ Where the issue is whether reasonable care has been exercised in providing safe appliances for employes, proper evidence is admissible as to the methods of other railroad companies generally in these respects.⁷¹ But evidence of this character must be given by witnesses shown to be acquainted with the methods and conditions in the line of employment generally.⁷² Similarly, it has been held, that a railroad company may show that it has followed the customs and methods of other railroad companies as tending to show the exercise of reasonable care.⁷³ Thus where

363, 141 N. W. 487, Ann Cas. 1914D, 92 and note (doctrine applies in some cases); *Missouri &c. Ry. Co. v. West*, 50 Okla. 521, 151 Pac. 212 (doctrine does not apply); *Missouri &c. Ry. Co. v. Cassaday*, (Tex. Civ. App.), 175 S. W. 796 (doctrine held to apply).

⁶⁹ *Texarkana &c. R. Co. v. Preacher*, (Tex. Civ. App.), 59 S. W. 593.

⁷⁰ *Texas &c. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511.

⁷¹ *Chicago &c. R. Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622; *Anderson v. Illinois &c. R. Co.*, 109 Iowa 524, 80 N. W. 561; *Klaffke v. Bettendorf Axle Co.*, 125 Iowa 223, 100 N. W. 1116; *Schroeder v. Chicago &c. R. Co.*, 128 Iowa 365, 103 N. W. 985; *Hall v. Chicago &c. R. Co.*, 140 Iowa 30, 116 N. W. 113; *Atchison &c. R. Co. v. Croll*, 3 Kans. App. 242, 45 Pac. 112; *Cass*

v. Boston &c. R. Co., 14 Allen (Mass.), 448; *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357, 104 Am. St. 665; *Alabama &c. R. Co. v. Overstreet*, 85 Miss. 78, 37 So. 819; *Fogus v. Chicago &c. R. Co.*, 50 Mo. App. 250; *Devoe v. New York &c. R. Co.*, 174 N. Y. 1, 66 N. E. 568; *Bodie v. Charleston &c. R. Co.*, 66 S. Car. 302, 44 S. E. 943; *Virginia Iron &c. Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362. See ante § 1832. Also *McFadden v. City of Philadelphia*, 248 Pa. St. 83, 93 Atl. 827; *Travers v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284.

⁷² *Dolan v. Boott Cotton Mills*, 185 Mass. 576, 70 N. E. 1025.

⁷³ *Southern R. Co. v. McLellan*, 80 Miss. 700, 32 So. 283; *Lee v. Missouri Pac. R. Co.*, 195 Mo. 400, 92 S. W. 614; *Southern R. Co. v. Blanford*, 105 Va. 373, 54 S. E. 1.

the manner of the inspection is not criticised, it has been held proper to admit evidence that it was of the same character as that in use by other railways of the country.⁷⁴ But the fact of following these methods will not excuse the railroad company if the custom is itself negligent and in disregard of the employe's safety.⁷⁵ The plaintiff can not show that the methods of a particular railroad company are safer than those of the defendant company, since the inquiry is whether the particular method of work at the time was unsafe, and it is undoubtedly true that in matters of this kind skilful and experienced men will differ and it would be unfair to hold an employer negligent for not following some other method, believed by some person to be less dangerous.⁷⁶ On the question of the safety of appliances furnished the employe, the defendant may show that he furnished safer appliances than the servant used, and that the servant could have procured such safer appliances had he cared to.⁷⁷ Evidence of previous accidents from the same cause is usually admissible, if at all, only for the purpose of charging the master with notice or knowledge of the conditions causing the injuries.⁷⁸

See also *Texas &c. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. ed. 1136.

⁷⁴ *Hover v. Chicago &c. R. Co.*, 40 Tex. Civ. App. 280, 89 S. W. 1084. See also *Shandrew v. Chicago &c. R. Co.*, 142 Fed. 320.

⁷⁵ *Kansas City &c. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88; *Austin v. Chicago &c. R. Co.*, 93 Iowa 236, 61 N. W. 849; *Gulf &c. R. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 37 S. W. 475; *Douglas v. Chicago &c. R. Co.*, 100 Wis. 405, 76 N. W. 356, 69 Am. St. 930. See also *Chicago &c. R. Co. v. Carpenter*, 56 Fed. 451, 12 U. S. App. 392; *Central R. Co. v. De Bray*, 71 Ga. 406.

⁷⁶ *Richmond &c. Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37

S. E. 285; *Chicago &c. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Tribette v. Illinois &c. R. Co.*, 71 Miss. 212, 13 So. 899.

⁷⁷ *Cahow v. Chicago &c. R. Co.*, 113 Iowa 224, 84 N. W. 1056; *O'Connor v. Pennsylvania R. Co.*, 48 App. Div. 244, 62 N. Y. S. 723.

⁷⁸ *Morse v. Minneapolis &c. R. Co.*, 30 Minn. 465, 16 N. W. 358; *Dye v. Delaware &c. R. Co.*, 130 N. Y. 671, 29 N. E. 320; *Louisville &c. R. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 7 Am. St. 432; *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363, 48 Pac. 503. It is sometimes admitted to show both defect and notice. *Davis v. Kornman*, 141 Ala. 479, 37 So. 789. *Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 So. 268; *Clapp v. Min-*

Proof of similar accidents is not admissible on behalf of the plaintiff where there is no controversy as to the dangerous character of the instrumentality or situation causing the accident and the defense is that the risk was assumed by an employe having knowledge of the perils of the employment.⁷⁹ But evidence that no similar accident had previously occurred has been admitted on behalf of the plaintiff to rebut a charge of contributory negligence, on the theory that this fact induced a feeling of security.⁸⁰ Where it is plain that the injury was caused by an incompetent employe, the plaintiff, in order to fix the master with liability on this ground, may show previous acts of negligence by this employe, to the knowledge of the master.⁸¹ It may be said generally, that the master will be charged with knowledge of the incompetency of the servant where his negligent acts were so frequent and notorious that the master could have known of them by the exercise of ordinary diligence.⁸²

neapolis &c. R. Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. 629; Findlay Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55, 40 Am. St. 686. See also Dunham v. Wabash R. Co., 126 Mo. App. 643, 105 S. W. 21.

⁷⁹ Dye v. Delaware &c. R. Co., 130 N. Y. 671, 29 N. E. 320.

⁸⁰ Louisville &c. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. 84. There is conflict among the authorities as to whether the defendant may show long use of the appliance in the same way without accident as tending to show due care or lack of any reason to foresee or expect injury. Such evidence has been held admissible in Southern R. Co. v. McLellan, 80 Miss. 700, 32 So. 283; Stringham v. Hilton, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483; Laffin v. Buffalo &c. R. Co., 106 N. Y. 136,

12 N. E. 599, 60 Am. Rep. 433. See also T. & H. Pueblo B. Co. v. Klein, 5 Colo. App. 348, 38 Pac. 608; Doyle v. St. Paul &c. R. Co., 42 Minn. 79, 43 N. W. 787; Evan-son v. Grande Ronde Lumber Co., 77 Ore. 1, 149 Pac. 1053; Contra: Louisville &c. R. Co. v. Kemper, 153 Ind. 618, 53 N. E. 931; Bryce v. Chicago &c. R. Co., 103 Iowa 665, 72 N. W. 780; and compare Carty v. Boescke-Dawe Co., 2 Cal. App. 646, 84 Pac. 267; Myers v. Hudson Iron Co., 150 Mass. 131, 22 N. E. 631, 15 Am. St. 176.

⁸¹ Havens v. Rhode Island &c. R. Co., 26 R. I. 48, 58 Atl. 247. See also Salo v. Martin, 187 Mich. 617, 154 N. W. 20.

⁸² Southern Pac. Co. v. Hetzer, 135 Fed. 272. See also Whittaker v. Delaware &c. Co., 126 N. Y. 544, 27 N. E. 1042.

But he is not necessarily charged with this knowledge by mere proof of isolated acts of negligence.⁸³ This knowledge may be shown by evidence of a general reputation for incompetency among his fellow workmen.⁸⁴ It may also be shown that he was suspended,⁸⁵ or discharged for failure to perform his duties.⁸⁶ So, his general reputation for intemperance at the time of his employment may be shown on the question of the care of the railroad company in hiring him.⁸⁷ But any evidence as to previous acts of negligence on the part of an employe is plain

⁸³ *Southern Pac. Co. v. Hetzer*, 135 Fed. 272. See also *Holland v. Southern Pac. Co.*, 100 Cal. 240, 34 Pac. 666; *Evansville &c. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101, 7 Am. St. 458; *Morrow v. St. Paul City Ry. Co.*, 74 Minn. 480, 77 N. W. 303; *Galveston &c. R. Co. v. Davis*, 92 Tex. 372, 48 S. W. 570. But compare *O'Hare v. Chicago &c. R. Co.*, 95 Mo. 662, 9 S. W. 23; *Pleasants v. Raleigh &c. R. Co.*, 121 N. Car. 492, 28 S. E. 267, 61 Am. St. 647.

⁸⁴ *East Tennessee &c. R. Co. v. Kane*, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; *Metropolitan West Side Elev. R. Co. v. Fortin*, 203 Ill. 454, 67 N. E. 977; *Chicago &c. R. Co. v. Hartman*, 71 Ill. App. 427; *Norfolk &c. R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710n, 47 Am. St. 392; *Gilman v. Eastern R. Co.*, 95 Mass. 433, 90 Am. Dec. 210; *Cooney v. Commonwealth Ave. St. R. Co.*, 196 Mass. 11, 81 N. E. 905; *Park v. New York &c. R. Co.*, 155 N. Y. 215, 49 N. E. 674, 63 Am. St. 663 (but must be shown by specific acts or that incompetency was

generally known); *Galveston &c. R. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301; *International &c. R. Co. v. Jackson*, 25 Tex. Civ. App. 619, 62 S. W. 91. See also *Giordano v. Brandywine &c. Co.*, 3 Pen. (Del.) 423, 52 Atl. 332.

⁸⁵ *Baltimore &c. R. Co. v. Camp*, 65 Fed. 952; *Metropolitan West Side Elev. R. Co. v. Fortin*, 203 Ill. 454, 67 N. E. 977.

⁸⁶ *Mexican Nat. R. Co. v. Mussette*, 7 Tex. Civ. App. 169, 24 S. W. 520.

⁸⁷ *Baltimore &c. R. Co. v. Henthorne*, 73 Fed. 634; *Wabash &c. R. Co. v. Brown*, 65 Fed. 941; *Norfolk &c. R. Co. v. Hoover*, 79 Md. 259, 29 Atl. 994; *Texas &c. R. Co. v. Rowland*, 3 Tex. Civ. App. 158, 22 S. W. 134. But a distinction is made between proving general reputation as to carelessness and incompetency or notice in this way and proving the fact of habitual intoxication. *Hobson v. New Mex. &c. R. Co.*, 2 Ariz. 171, 11 Pac. 545; *Galveston &c. R. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301.

ly irrelevant unless the employe is shown to have been negligent at the time of the accident under investigation.⁸⁸ The defendant railroad company is entitled to show the general reputation of the employe for competency at the time of his employment to disprove negligence alleged in hiring the servant charged with causing the injury.⁸⁹ Where the question is as to the sufficiency of the inspection, evidence is held admissible as to the custom of well-regulated and prudently managed railroad companies in this regard.⁹⁰ It has been held proper to allow an inspector shown to be a thoroughly competent man, to testify that he knew that his son was to go out on the train he was inspecting and which, because of a defect therein, caused the injuries sued upon.⁹¹ Where the negligence charged is susceptible of direct proof, evidence is ordinarily inadmissible as to negligence and omission of duty by the defendant at other times and places.⁹²

⁸⁸ *Thompson v. Lake Shore &c. R. Co.*, 84 Mich. 281, 47 N. W. 584; *Galveston &c. R. Co. v. Faber*, 77 Tex. 153, 8 S. W. 64.

⁸⁹ *Baltimore &c. R. Co. v. Camp*, 81 Fed. 807; *Illinois &c. R. Co. v. Morrissey*, 45 Ill. App. 127. But compare *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83.

⁹⁰ *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435; *Shandrew v. Chicago &c. R. Co.*, 142 Fed. 320.

⁹¹ *Hover v. Chicago &c. R. Co.*, 40 Tex. Civ. App. 280, 89 S. W. 1084.

⁹² *Hudson v. Chicago &c. R. Co.*, 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692; *Dye v. Delaware &c. R. Co.* 130 N. Y. 671, 29 N. E. 320; *Sills v. Fort Worth &c. R. Co.*, (Tex. Civ. App.) 28 S. W. 908. Evidence of other accidents or of a condition either at, before

or even after the accident in question or at a somewhat different place may, however, be admissible in exceptional cases or for a limited purpose. See *St. Louis &c. R. Co. v. Cooke*, 118 Ark. 49, 175 S. W. 1170; (where timbers of bridge were claimed to be defective and unsound, evidence was held admissible to show bridge rebuilt from same timbers unsound); *Standard Cotton Mills v. Cheatham*, 125 Ga. 649, 54 S. E. 650; *Louisville &c. R. Co. v. Stewart*, 131 Ky. 665, 115 S. W. 775; *Union Pac. R. Co. v. Edmondson*, 77 Nebr. 682, 110 N. W. 650; *Moran v. Corliss Steam Engine Co.*, 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; *Taylor, B. & H. R. Co. v. Taylor*, 79 Tex. 104, 14 S. W. 918, 23 Am. St. 316; *Gulf &c. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151.

§ 2831. (1797.) **Evidence—Further of injuries to employes—Low bridges and other overhanging objects.**—Where the question is whether a trainman standing erect on the top of a car could pass under an overhead bridge or other object, evidence of the height of ordinary freight cars on the road is relevant, especially in connection with evidence as to the distance of the top of the bridge from the level of the track.⁹³ Where tell-tales are placed by the railroad company in accordance with the statute, a trainman injured by striking a low overhead bridge may show that the tell-tale was placed too near the bridge to answer the purpose of the statute.⁹⁴ On the question of negligence in maintaining an overhanging structure at too low a height from the track, evidence is admissible to show that the railroad company knew of this dangerous situation by reason of complaints having been made about it.⁹⁵ In a case where a trainman was struck by a limb of a tree which overhung the track, it was held that although no legal obligation rested upon the railroad company to erect and maintain warnings on either side of the tree, and the failure to do so was not negligence of itself, yet, in an action against the company for the death of a trainman caused by such an obstruction, evidence that these warnings had not been erected was admissible as tending to show that the employe did not know of the obstruction and had not been warned of the danger.⁹⁶

§ 2832. **Injuries to employes—Res ipsa loquitur.—Miscellaneous.**—As elsewhere shown, under the rule of the federal courts and in many of the states, the *res ipsa loquitur* doctrine does not apply, ordinarily at least, in actions by employes

⁹³ *East Tennessee &c. R. Co. v. Thompson*, 94 Ala. 636, 10 So. 280.

⁹⁴ *Wallace v. Central Vermont R. Co.*, 138 N. Y. 302, 33 N. E. 1069.

⁹⁵ *Galveston &c. R. Co. v.*

Gormley, (Tex. Civ. App.), 27 S. W. 1051.

⁹⁶ *Pittsburg &c. R. Co. v. Parish*, 28 Ind. App. 189, 62 N. E. 514, 91

Am. St. 120.

against the master for personal injuries.⁹⁷ And in a recent case⁹⁸ where the action was under a state employers' liability statute, and the evidence showed that the parties were engaged in interstate commerce and within the Federal Employers' Liability Act, it was held that there could be no recovery under the complaint because "the case pleaded was not proven and the case proven was not pleaded,"⁹⁹ and that refusing to allow an amendment so as to bring the complaint within the federal statute was not available error because the *res ipsa loquitur* doctrine did not apply and there was no proof of the masters' negligence. As a general rule, although several acts of negligence are pleaded, proof of any one of them, if a proximate cause of the injury, is sufficient.¹

§ 2833. Miscellaneous questions of practice and evidence—Indemnity insurance.—Several interesting cases involving matters of practice and the admissibility of evidence have recently been decided. In one of them it is held that a person called as a juror may be asked as to whether he is a stockholder or otherwise interested in a casualty company by which the defendant is indemnified or insured.² But there are authorities to the

⁹⁷ The following are a few of the recent cases to such effect: *Looney v. Metropolitan Ry. Co.* 200 U. S. 480, 26 Sup. Ct. 303, 50 L. ed. 564; *Texas &c. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. ed. 1136; *Patton v. Texas &c. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361; *Southern Ry. Co. v. Derr*, 240 Fed. 73; *Louisville &c. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558; *Williams v. Western &c. R. Co.*, 20 Ga. App. 726, 93 S. E. 555; *Missouri &c. Ry. Co. v. Taylor*, (Okla.), 170 Pac. 1148. And see elaborate note to *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, and other cases,

in L. R. A. 1917E, 5—249, reviewing authorities on both sides.

⁹⁸ *Williams v. Western &c. R. Co.*, 20 Ga. App. 726, 93 S. E. 555.

⁹⁹ Citing *Toledo &c. R. Co. v. Slavin*, 236 U. S. 454, 456, 35 Sup. Ct. 306, 59 L. ed. 671; *St. Louis &c. Ry. Co. v. Scale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. ed. 1129, Ann. Cas. 1914C, 156n; *Eng. v. Southern Pac. Co.*, 210 Fed. 92.

¹ *Crane v. Kansas City &c. Ry. Co.*, 199 Mo. App. 448, 203 S. W. 640, ante § 2694. But compare *Chicago &c. R. Co. v. Conrad*, 182 Ind. 173, 105 N. E. 897.

² *Egner v. Curtis &c. Co.*, 96 Nebr. 18, 146 N. W. 1032, L. R. A.

contrary,³ and it is generally held that evidence that the defendant is insured in a casualty or indemnity company is incompetent and inadmissible;⁴ and comment and argument of counsel to that effect is improper and may be cause for reversal.⁵ In some instances, however, these rules may not apply in actions between master and servant. In such an action evidence of the employer's voluntary offer to pay the injured employe's doctor bills and wages while disabled is not admissible ordinarily at least, to show a recognition of liability.⁶

§ 2834. Effect of verdict against company and in favor of co-defendant employe.—The question has arisen as to whether a verdict in the case of a railroad company, sued jointly with its employe for damages for personal injuries caused by alleged

1915A, 153n; citing to same effect *Citizens Light &c. Co. v. Lee*, 182 Ala. 561, 62 So. 199; *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340, 61 N. E. 79; *Foley v. Cudahy Packing Co.*, 119 Iowa 246, 93 N. W. 284; *Swift v. Platte*, 68 Kans. 1, 74 Pac. 635n; 72 Pac. 271; *Spoonick v. Backus &c. Co.*, 89 Minn. 354, 94 N. W. 1079. See also *Grant v. National R. Spring Co.*, 100 App. Div. 234, 91 N. Y. S. 805; *Featherstone v. Lowell Cotton Mills*, 159 N. Car. 429, 74 S. E. 918; *Faber v. Reiss Coal Co.*, 124 Wis. 554, 102 N. W. 1049. But compare *Chybowski v. Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833.

³*Eckhart &c. Milling Co. v. Schaefer*, 101 Ill. App. 500; *Lipschutz v. Ross*, 84 N. Y. S. 632; *Cunningham v. Heidelberger*, 48 Misc. 614, 95 N. Y. S. 554.

⁴*Capital Constr. Co. v. Holtzman*, 27 App. D. C. 125; *Emery Dry Goods Co. v. DeHart*, 130

Ill. App. 244; *Gore v. Brockman*, 138 Mo. App. 231, 119 S. W. 1082; *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85, Ann. Cas. 1914A, 947, and note; *Simpson v. Foundation Co.*, 201 N. Y. 479, 490, 95 N. E. 10, Ann. Cas. 1912B, 321n; *Manigold v. Black River Trac. Co.*, 81 App. Div. 381, 80 N. Y. S. 861; *Levinski v. Cooper (Tex.)*, 142 S. W. 959.

⁵*Emery Dry Goods Co. v. De Hart*, 130 Ill. App. 244; *Haigh v. Edelmeyer &c. Elev. Co.*, 123 App. Div. 376, 107 N. Y. S. 936; *Shawnee v. Sparks*, 26 Okla. 665, 110 Pac. 884. In *Home Tel. Co. v. Weir (Ind.)*, 101 N. E. 1020 it was held improper but harmless where the remarks were withdrawn and the jury instructed to disregard them.

⁶*Grogan v. Dooley*, 211 N. Y. 30, 105 N. E. 135; *Sias v. Consolidated Lighting Co.*, 73 Vt. 35, 50 Atl. 554. But compare *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. 454.

negligence, should be allowed to stand when the verdict is against the company and in favor of the employe. In other words, can the servant be exonerated and the master held liable? The answer to this question, as thus broadly stated, may depend upon the issues and circumstances of the particular case, so that it would be going too far to give an unqualified answer in the negative. But where the case is such that the only negligence of the company, if any, is that of the employe who is sued as a co-defendant, so that the company could not have been negligent unless such employe was negligent, a verdict in favor of the employe and against the company on such issue is inconsistent and contradictory and can not support a legal judgment thereon against the company.⁷ Where, however, the issue is such that the company may be charged with negligence otherwise than through the negligence of its co-defendant, it may be found liable and is not necessarily entitled to judgment in its favor on a verdict so finding and exonerating the employe.⁸

§ 2835. Recent decisions under Federal Employers' Liability Act and Workmen's Compensation Act.—Many decisions involving the Federal Employers' Liability Act, and others under Workmen's Compensation Acts, have been rendered since the chapters on those subjects were put in type, and attention is here called to those that are deemed important. Recent decisions of the Supreme Court of the United States as to who are employes and when they are deemed to be engaged in interstate commerce within the Federal Employers' Liability Act, and

⁷ *Portland &c. Co. v. Stratton*, 158 Fed. 63, 16 L. R. A. (N. S.) 677 and note; *Hayes v. Chicago Tel. Co.*, 218 Ill. 414, 75 N. E. 1003, 2 L. R. A. (N. S.) 764n; *Childress v. Lake Erie &c. R. Co.*, 182 Ind. 251, 105 N. E. 467; *Stevens v. Walker*, 99 Maine 43, 58 Atl. 53; *McGinnis v. Chicago &c. R. Co.*, 200 Mo. 347, 98 S. W. 590, 9 L. R. A. (N. S.) 880n, 118 Am. St. 661, 9 Ann. Cas. 656, and note. See also

Ruth v. McPherson, 150 Mo. App. 694, 131 S. W. 474; *Zitnik v. Union Pac. R. Co.*, 91 Nebr. 679, 136 N. W. 995; *Donaldson Iron Co. v. Howley Constr. Co.*, 226 Pa. St. 445, 75 Atl. 685, 18 Ann. Cas. 778.

⁸ *Lake Erie &c. R. Co. v. Reed*, 57 Ind. App. 65, 103 N. E. 127. See also *Webster v. Chicago &c. R. Co.*, 119 Minn. 72, 137 N. W. 168, 169; *Carver v. Luverne &c. Co.* 121 Minn. 388, 141 N. W. 488.

also upon other phases of the subject, are cited below.⁹ It is held in most jurisdictions that a court stating a cause of action under the Federal Employers' Liability Act may be joined with one stating a cause of action under the state or common law,¹⁰ and that even in one paragraph or count the cause of action may be so stated that the plaintiff can recover under the Federal Act if the evidence brings the case within it or under the state law if the evidence brings the case within it and not within the Federal Act.¹¹ Where the employe is injured by violation of the Federal

⁹ Philadelphia &c. Ry. Co. v. Polk (U. S.), 41 Sup. Ct. 518; Hull v. Philadelphia &c. Ry. Co., 252 U. S. 475, 40 Sup. Ct. 358; Di Donato v. Philadelphia &c. R. Co. (U. S.), 40 Sup. Ct. 482, 41 Sup. Ct. 516; Philadelphia & R. Ry. Co. v. Hancock, 253 U. S. 284, 40 Sup. Ct. 512 (employe was asked if any car in his train carried interstate freight); Erie R. Co. v. Collins, 253 U. S. 77, 40 Sup. Ct. 450; Kansas City So. Ry. Co. v. Leinan, 144 Ark. 454, 223 S. W. 1; Cleveland &c. R. Co. v. Rapp, (Ind.) 129 N. E. 478, (employe not); Wright v. Interurban Ry. Co., (Iowa) 179 N. W. 877 (interurban railway employe not); Wagner v. Chicago &c. R. Co. (Mo. App.), 232 S. W. 771; Lyon v. Wabash Ry. Co. (Mo. App.), 232 S. W. 786; notes in 10 A. L. R. 1184, et seq., and 1422; and in 14 A. L. R. 732, et seq.; see also as to railroad employe in a territory though not employed in interstate commerce, Chicago R. &c. Co. v. Trout (Tex. Civ. App.), 224 S. W. 472.

¹⁰ Ex parte Atlantic Coast Line R. Co., 190 Ala. 132, 67 So. 256; Midland Valley R. Co. v. Ennis, 109 Ark.

206, 159 S. W. 214; Pelton v. Illinois Cent. R. Co., 171 Iowa 91, 150 N. W. 236; Bouchard v. Central Vt. R. Co., 87 Vt. 399, 89 Atl. 475, L. R. A. 1915C, 33; see also Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. 729; but see South Covington &c. R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742; Louisville &c. R. Co. v. Strange, 156 Ky. 439, 161 S. W. 239.

¹¹ Osborne v. Gray, 241 U. S. 16, 60 L. ed. 865, 36 Sup. Ct. 486; Delaware &c. R. Co. v. Yurkonis, 220 Fed. 429, 137 C. C. A. 23 (writ of error and certiorari dismissed in 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. 902, and 239 U. S. 652, 60 L. ed. 486, 36 Sup. Ct. 160); Stafford v. Norfolk &c. R. Co., 202 Fed. 605; Vandalia R. Co. v. Stringer, 182 Ind. 676, 106 N. E. 865, 107 N. E. 673; Alexander v. Great Northern R. Co., 51 Mont. 565, 154 Pac. 914, L. R. A. 1918E, 862; Koennecke v. Seaboard Air Line R. Co., 101 S. Car. 86, 85 S. E. 374; or an amendment may be made to conform with the proof; Missouri &c. R. Co. v. Wuff, 226 U. S. 570, 57 L. ed. 335, 33 Sup. Ct. 135, Ann. Cas. 1914B, 134; Gaines-

Safety Appliance Act assumption of risks and contributory negligence are no defense, and such act applies to all cars on any railway that is a highway of interstate commerce.¹² The Federal Boiler Inspection Act as amended March 4, 1915, includes all parts of a locomotive and is an act for the safety of employes within the Federal Employers' Liability Act.¹³ It is well settled as shown in the chapter on such Act, that it supersedes, or suspends, state laws on the subject and establishes a rule intended to operate uniformly in all states as to interstate commerce, and it can neither be extended nor abridged by common or statutory laws of a state.¹⁴ Where, therefore, the employe is injured while engaged in interstate commerce so that such Federal statute applies, a state Workmen's Compensation Act can not afford relief and the Industrial Board or Commission has no jurisdiction to award him compensation as the remedy is exclusive under the

ville *Midland R. Co. v. Vandiver*, 141 Ga. 350, 80 S. E. 997; *Lanmars v. Chicago &c. R. Co.*, 187 Iowa 1277, 175 N. W. 311; *Schaeffer v. Illinois Cent. R. Co.*, 172 Ky. 337, 189 S. W. 237; compare, however, *Cincinnati &c. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940; *Hogarty v. Philadelphia R. Co.*, 255 Pa. 236, 99 Atl. 741, 8 A. L. R. 1386; and their doctrine of election of remedies usually has no application; *Hogan v. New York &c. R. Co.*, 223 Fed. 890; *Jackson v. Industrial Com.*, 280 Ill. 526, 117 N. E. 705. As to other matters of practice and procedure generally, see notes in 12 A. L. R. 711-720.

¹² *Lyon v. Wabash Ry. Co.* (Mo. App.), 232 S. W. 786, citing *Texas &c. Ry. Co. v. Rigsby*, 241 U. S. 33, 60 L. ed. 874, 36 Sup. Ct. 482; *Southern Ry. Co. v. United States*, 222 U. S. 20, 6 L. ed. 72, 32 Sup. Ct. 2;

Kilburn v. Chicago &c. Ry. Co. (Mo.), 232 S. W. 1017; see also *Davis v. Michigan Cent. R. Co.*, 294 Ill. 355, 128 N. E. 539; *Baltimore &c. R. Co. v. Wheeler* (Ind. App.), 129 N. E. 40.

¹³ *Cochran v. Atchison &c. Ry. Co.* (Kans.), 198 Pac. 685, citing, *Great Northern R. Co. v. Donaldson*, 246 U. S. 121, 62 L. ed. 616, 38 Sup. Ct. 230, Ann. Cas. 1918C, 581; see also *Kilburn v. Chicago &c. Ry. Co.* (Mo.), 232 S. W. 1017. As to what was not violation of Boiler Inspection Act, see *Flack v. Atchison &c. Ry. Co.* (Mo.), 224 S. W. 415. Compare also *Brown v. Lehigh Valley R. Co.*, 181 N. Y. S. 800.

¹⁴ *McLain v. Chicago &c. R. Co.*, 140 Minn. 35, 167 N. W. 349, 12 A. L. R. 688, and numerous recent cases there cited in note. See also *Pryor v. Williams* (U. S.), 41 Sup. Ct. 36.

Federal statute.¹⁵ Recent decisions in railroad cases arising under Workmen's Compensation Acts are cited below.¹⁶

¹⁵ New York Cent. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, 37 Sup. Ct. 546, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; New York &c. R. Co. v. Porter, 249 U. S. 168, 63 L. ed. 536, 39 Sup. Ct. 188; Hines v. Industrial Accident Com. (Cal.), 192 Pac. 859, 14 A. L. R. 720; Walker v. Chicago &c. R. Co., 66 Ind. App. 165, 117 N. E. 969; and state cannot compel an election. Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. ed. 1057, 37 Sup. Ct. 556; Philadelphia &c. R. Co. v. Hancock, 253 U. S. 284, 40 Sup. Ct. 512.

¹⁶ Philadelphia &c. R. Co. v. Polk (U. S.), 41 Sup. Ct. 518 (no presumption in proceeding under Pennsylvania Act that employe or freight train loaded with interstate and intrastate shipments was engaged in

intrastate commerce and burden is on claimant); Manchester St. Ry. Co. v. Barrett, 265 Fed. 557 (Act to be liberally construed); Bishop v. Chicago Rys. Co., 215 Ill. App. 153; Foley v. Hines (Me.), 111 Atl. 715; Kowalek v. New York Consol. R. Co., 229 N. Y. 489, 128 N. E. 888; Kuhn v. Pennsylvania R. Co. (Pa.), 113 Atl. 672 (when employer cannot repudiate settlement); Davis v. Central Vt. Ry. Co. (Vt.), 113 Atl. 539 (employe's election to take compensation does not preclude employer from suing wrongdoer in name of employe). See also upon various phases of the general subject notes in 10 A. L. R. 168, 1010, 1488; and 13 A. L. R. 427, 512, 683, 729, 1251, 1376.

CHAPTER LXXXVII.

DAMAGES IN ACTIONS FOR PERSONAL INJURIES.

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| Sec. | Sec. |
| 2840. Object of damages—Kinds. | 2855. Impairment of capacity to earn money. |
| 2841. Necessary that damages should be proximate result of negligent act—Speculative damages. | 2856. Impairment of capacity—Expectancy of life. |
| 2842. Prospective damages—Reasonable certainty required. | 2857. Impairment of capacity—Evidence. |
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| 2845. Exemplary damages—Evidence of financial condition of defendant. | 2860. Fright. |
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| 2847. Minimizing damages—Submission to surgical operations. | 2862. Disfigurement, deformity and loss of functions. |
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| 2849. Aggravation of existing injuries. | 2864. Mental suffering on account of injury to another. |
| 2850. Social or financial condition of parties — Character and habits. | 2865. Injury to another—Parent and child—Husband and wife. |
| 2851. Loss of time and earnings—Employment of substitute. | 2866. Ejection of passengers. |
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| | 2870. Excessive damages — Judgments or verdicts held not excessive. |
| | 2871. Remittitur. |
| | 2872. Inadequacy of damages. |

§ 2840. (1798.) Object of damages—Kinds.—Damages are defined as the indemnity recoverable by a person who has sustained an injury through the act or default of another. Their

purpose in this connection is to compensate a person for the pecuniary loss sustained and the pain and suffering endured by him as the natural and direct result of another's negligent act.¹ "It is a general and very sound rule of law, that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained."² As depending upon the amount of the recovery, these damages may be roughly divided into three classes: Nominal, compensatory and exemplary. Nominal or inconsequential damages are such as are awarded where an injury from a negligent act is shown, and there is no proof of serious loss, or as to the extent or amount of the damages.³ Compensatory damages, as the term is here used, are substantial and measure the actual damages sustained and proved by the plaintiff.⁴ Exemplary damages are damages allowed in addition to actual or compensatory damages, where the wrongful act of the defendant causing the injuries is accompanied by circumstances showing malice, wantonness or wilfulness, and oppression, and are imposed with a view to punish the offender, and to deter others from similar misconduct.⁵

¹ *Peterson v. Roessler & Co.*, 131 Fed. 156; *St. Louis &c. R. Co. v. Linam*, 68 Ark. 621, 60 S. W. 951; *Crutcher v. Choctaw &c. R. Co.*, 74 Ark. 358, 85 S. W. 770; *Baldwin v. Webb*, 121 Ga. 416, 49 S. E. 265; *Holt v. Hannibal &c. R. Co.*, 174 Mo. 524, 74 S. W. 631; *Ammons v. Southern R. Co.* 140 N. Car. 196, 52 S. E. 731; *St. Louis &c. R. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673; 6 *Thomp. Neg.* (2d ed.) § 7152.

² *Rockwood v. Allen*, 7 Mass. 254.

³ *Nolan v. New York &c. R. Co.*, 53 Conn. 401, 4 Atl. 160; *Paul v. Omaha &c. R. Co.*, 82 Mo. App. 500; *Rohwer v. Chadwick*, 7 Utah, 385, 26 Pac. 1116. See also *Alabama Fuel &c. Co. v. Ward*, 194

Ala. 242, 69 So. 621 (only nominal damages recoverable because of uncertainty and failure to prove extent); *Melone v. Sierra R. Co.*, 151 Cal. 113, 91 Pac. 522; *Meek v. Union Pac. R. Co.*, 95 Kans. 111, 147 Pac. 1112 (nominal damages where consignee had paid nothing for cattle wrongfully converted nor for their transportation); *Wilson v. St. Louis &c. R. Co.*, 160 Mo. App. 649, 142 S. W. 775; *Bigham v. Wabash &c. Term. R. Co.*, 223 Pa. St. 106, 72 Atl. 318.

⁴ *Talbott v. West Virginia &c. R. Co.*, 42 W. Va. 560, 26 S. E. 311; *Gilbert v. Kennedy*, 22 Mich. 117.

⁵ 6 *Thomp. Neg.* (2d ed.) § 7152; *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451; *Ferguson v. Missouri Pac. Ry. Co.*, (Mo.),

Of the latter species of damages one author has said: "The theory on which these damages are given is simply the theory of punishment and public example. The giving of such damages in any case is admitted to be an anomaly in legal procedure, and the soundness of the doctrine has always been questioned. The principle is unique in that it imports into civil actions a segment of the criminal law, but the doctrine has been accepted as the general rule in England, and in most of the states of the United States, and is too well settled now to be shaken."⁶ It seems well settled that exemplary damages are not to be allowed unless the plaintiff shows that he has suffered actual damages,⁷

177 S. W. 616; *Carmichael v. Southern Bell Tel. &c. Co.*, 157 N. Car. 21, 72 S. E. 619, 39 L. R. A. (N. S.) 651n, Ann. Cas. 1913B, 1117 and notes; *Pennsylvania R. Co. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322. See notes in 13 L. R. A. 600, 17 L. R. A. 72, 28 Am. St. 870, 27 Am. Dec. 684, 50 Am. Dec. 767, and 62 Am. Dec. 379; *Norfolk &c. Trac. Co. v. Miller*, 174 Fed. 607. See also *Lake Shore &c. R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 263, 37 L. ed. 97, also holding that whether a railroad company can be charged with punitive damages for illegal and wanton conduct of its conductor towards a passenger is a matter of general and not local law, and that, in the United States courts such damages cannot be recovered against the company in such a case in the absence of a statute, where it is not shown that the company knew the conductor was unfit or approved or ratified his act. So, in *Louisville &c. R. Co. v. Smith*, 135 Ky. 462, 122 S. W. 806, it is held that the laws of the state in which a

personal injury occurs govern the question as to whether exemplary damages are recoverable.

⁶ 6 Thomp. Neg. (2d ed.) § 7163. See also *Milwaukee &c. R. Co. v. Armes*, 91 U. S. 489, 23 L. ed. 374. Exemplary damages are held not recoverable in some states. *Hassett v. Carroll*, 85 Conn. 23, 81 Atl. 1013, Ann. Cas. 1913A, 333, and note; *Ellis v. Brockton Pub. Co.*, 198 Mass. 538, 84 N. E. 1018, 126 Am. St. 454, 15 Ann. Cas. 83, and note.

⁷ *Paterson v. Dakin*, 31 Fed. 682; *Martin v. Leslie*, 93 Ill. App. 44; *Dickinson v. Atkins*, 100 Ill. App. 401; *Kuhn v. Chicago &c. R. Co.*, 74 Iowa 137, 37 N. W. 116; *Stone-street v. Crandell*, 10 Kans. App. 575, 62 Pac. 249; *Schippel v. Norton*, 38 Kans. 567, 16 Pac. 804; *Adams v. Salina*, 58 Kans. 246, 48 Pac. 918; *Cole v. Gray*, 70 Kans. 705, 79 Pac. 654; *Western Union Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098, 25 Ky. L. 268, 76 S. W. 162; *Hoagland v. Forest Park &c. Co.*, 170 Mo. 335, 70 S. W. 878, 94 Am. St. 740; *Watts v. South-Bound R. Co.*, 60 S. Car. 67, 38 S. E. 240;

though they may be only nominal.⁸ As dependent on the necessity of pleading the damages another distinction, sometimes difficult to draw, is made between general and special damages. The former are such as the law implies and presumes as resulting from the negligent act.⁹ They are defined by the Georgia Code as "such as the law presumes to flow from any tortious act and may be recovered without proof of any amount."¹⁰ Special damages, though a consequence of the tortious act and traceable thereto, do not so directly or inevitably result from the act that they can be necessarily implied by law, and hence must be specially alleged and proved in order to be recovered.¹¹

§ 2841. (1799.) Necessary that damages should be proximate result of negligent act—Speculative damages.—The damages recoverable for a personal injury are limited to those shown to be the natural and proximate result of the wrongful act complained of,¹² though it is not necessary that such result

Oliver v. Columbia Nav. &c. Co., 65 S. Car. 1, 43 S. E. 307; Robinson v. Western Union Tel. Co., 101 S. Car. 20, 85 S. E. 436; Lacy v. Gentry (Tex. Civ. App.), 56 S. W. 949; Malin v. McCutcheon, 33 Tex. Civ. App. 387, 76 S. W. 586.

⁸ Wilson v. Vaughn, 23 Fed. 229; Alabama &c. R. Co. v. Sellers, 93 Ala. 9, 9 So. 375, 30 Am. St. 17; Goodson v. Stewart, 154 Ala. 660, 46 So. 239; Louisville &c. R. Co. v. Ritchel, 148 Ky. 701, 147 S. W. 411, 41 L. R. A. (N. S.) 958n, Ann. Cas. 1913E, 517n.

⁹ Lillard v. Kentucky &c. Co., 134 Fed. 168; Parsons v. Sutton, 66 N. Y. 92; Irby v. Wilde, 150 Ala. 402, 43 So. 574.

¹⁰ 2 Ga. Civ. Code (1895), § 3960 (3070).

¹¹ Lillard v. Kentucky &c. Co., 134 Fed. 168. See also Tomlinson

v. Derby, 43 Conn. 562; Irby v. Wilde, 150 Ala. 402, 43 So. 574; Bristol Manf. Co. v. Gridley, 28 Conn. 201; Kircher v. Larchwood, 120 Iowa 578, 95 N. W. 184; McHenry Coal Co. v. Taylor, 165 Ky. 144, 176 S. W. 976; Fleddermann v. St. Louis Trans. Co., 134 Mo. App. 199, 113 S. W. 1143; Geoghegan v. Third Ave. R. Co., 51 App. Div. 369, 64 N. Y. S. 630; Campbell v. Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. 878; San Antonio &c. R. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; Prehn v. Royal Bank, L. R. 5 Exch. 92.

¹² St. Louis &c. R. Co. v. Neel, 56 Ark. 279, 19 S. W. 963; Benson v. Central Pac. R. Co., 98 Cal. 45, 32 Pac. 809; Georgetown &c. R. Co. v. Eagles, 9 Colo. 544, 13 Pac. 696; Florida &c. R. Co. v. Wade, 53 Fla. 620, 43 So. 775; Southwest-

should have been actually foreseen or contemplated by the wrongdoer.¹³ It follows that damages of a remote, speculative or conjectural character cannot be recovered.¹⁴ The fact that

ern R. Co. v. Paulk, 24 Ga. 356; Montgomery &c. R. Co. v. Boring, 51 Ga. 582; Chicago &c. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 305; Illinois Cent. R. Co. v. Heisner, 45 Ill. App. 143; Cincinnati &c. R. Co. v. Rodgers, 24 Ind. 103; Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Southern R. Co. v. Sittasen, 166 Ind. 257, 76 N. E. 973; Bosch v. Burlington &c. R. Co., 44 Iowa 402, 24 Am. Rep. 754; Atchison &c. R. Co. v. Bales, 16 Kans. 252; Union Pac. R. Co. v. Shook, 3 Kans. App. 710, 47 Pac. 685; Shields v. Louisville &c. R. Co., 97 Ky. 103, 29 S. W. 978, 27 L. R. A. 680; Baltimore &c. R. Co. v. Blocher, 27 Md. 277; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Cutting v. Grand Trunk R. Co., 13 Allen (Mass.) 381; Dennis v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Perley v. Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Lewis v. Flint &c. R. Co., 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790; Selleck v. Lake Shore &c. R. Co., 58 Mich. 195, 24 N. W. 774; Wilson v. Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410; Royston v. Illinois Cent. R. Co., 67 Miss. 376, 7 So. 320; Nagel v. Missouri Pac. R. Co., 75 Mo. 653, 42 Am. Rep. 418; Hooksett v. Concord R. Co., 38 N. H. 243; Cuff v. Newark &c. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Medbury v. New York &c. R. Co., 26

Barb. (N. Y.) 564; O'Neill v. New York &c. R. Co., 115 N. Y. 579, 22 N. E. 217; Costello v. New York City R. Co., 91 N. Y. S. 23; Pittsburgh &c. R. Co. v. Staley, 41 Ohio St. 118; Pennsylvania R. Co. v. Hope, 80 Pa. St. 373, 21 Am. Rep. 100, 52 Am. Rep. 74; O'Donnell v. Rhode Island Co., 28 R. I. 245, 66 Atl. 578; Collins v. East Tennessee &c. R. Co., 56 Tenn. 841; Houston &c. R. Co. v. Leslie, 57 Tex. 83; Patten v. Chicago &c. R. Co., 32 Wis. 524.

¹³ Georgia R. &c. Co. v. Hayden, 71 Ga. 518, 51 Am. Rep. 274; Louisville &c. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572; Hill v. Winsor, 118 Mass. 251; McGarrahan v. New York &c. R. Co., 171 Mass. 211, 50 N. E. 610; Schumaker v. St. Paul &c. R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 171n; Yeager v. Berry, 82 Mo. App. 534; Wilson v. Northern Pac. Ry. Co., 30 N. Dak. 456, 153 N. W. 429, L. R. A. 1915E, 991n, and note; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. 47; Crouse v. Chicago &c. R. Co., 104 Wis. 473, 80 N. W. 752. But many courts make the test of liability depend on whether the consequences are such as might or ought to have been foreseen as likely to follow. See note in 36 Am. St. 807, 810. See generally notes in 11 L. R. A. 45, and 690, 12 L. R. A. 698.

¹⁴ Hall v. Cedar Rapids &c. R. Co., 115 Iowa 18, 87 N. W. 739;

the injuries received may develop into more serious conditions will not be sufficient to authorize an allowance of damages therefor. It is required that these apprehended consequences be such as, in the ordinary course of nature, or under the circumstances shown, are reasonably certain to ensue.¹⁵ But the fact that the damages are difficult of computation will not necessarily render them speculative or conjectural.¹⁶ The burden of proof that the damages claimed are a proximate result of the injury usually rests on the plaintiff.¹⁷ The question whether the damages in a particular case are the proximate result of the injury is generally held to be a question of fact for the determination of the jury, unless the evidence on that point is so clear and undisputed as to admit of but one conclusion, in which event the question is one of law for the court.¹⁸

Brown v. St. Louis &c. R. Co., 127 Mo. App. 499, 106 S. W. 83; *Evans v. Cincinnati &c. R. Co.*, 78 Ala. 341; *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154, 44 Pac. 423, 62 Am. St. 772n; *Cobb v. Great Western R. Co.*, 62 L. J. Q. B. 335, 68 L. T. 483.

¹⁵ *Chicago &c. R. Co. v. Lindeman*, 143 Fed. 946, 950, and authorities there cited; *Daigneau v. Grand Trunk R. Co.*, 153 Fed. 593; *Chicago City R. Co. v. Mead*, 206 Ill. 117, 69 N. E. 19; *Fry v. Dubuque &c. R. Co.*, 45 Iowa 416; *Olson v. Chicago &c. R. Co.*, 94 Minn. 241, 102 N. W. 449; *Pentoney v. St. Louis Transit Co.*, 108 Mo. App. 681, 84 S. W. 140; *Chicago &c. R. Co. v. McDowell*, 66 Nebr. 170, 92 N. W. 121; *Curtis v. Rochester &c. R. Co.*, 18 N. Y. 541; *Filer v. New York &c. R. Co.*, 49 N. Y. 47; *Strohm v. New York &c. R. Co.*, 96 N. Y. 305; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544; *Briggs v.*

New York &c. R. Co., 117 N. Y. 59, 69 N. E. 223; *Streng v. Frank Ibert Brew. Co.*, 50 App. Div. 542, 64 N. Y. S. 34; *Johnson v. Troy*, 124 App. Div. 29, 108 N. Y. S. 917; *Pennsylvania Co. v. Files*, 65 Ohio 403, 62 N. E. 1047; *Missouri &c. R. Co. v. Mitchell*, 75 Tex. 77, 12 S. W. 810. In *Southern Ind. R. Co. v. Davis*, 32 Ind. App. 569, 69 N. E. 550, it was held that evidence was not admissible to show that extra firemen, such as plaintiff, had been promoted to regular firemen in case of vacancy as this was too speculative where there was no rule to that effect.

¹⁶ *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 125 Fed. 244; *Chew v. Lucas*, 15 Ind. App. 595, 43 N. E. 235; *Pittsburgh &c. R. Co. v. Blum (Ky.)*, 125 S. W. 300.

¹⁷ *McCarty v. Lockport*, 13 App. Div. 494, 43 N. Y. S. 693.

¹⁸ *East Tennessee &c. R. Co. v. Lockhart*, 79 Ala. 315; *Schwartz v.*

§ 2842. (1800.) **Prospective damages—Reasonable certainty required.**—As a general rule the law contemplates one compensation for all the damages resulting from an act of negligence and that such compensation shall be recovered in a single action.¹⁹ On this ground the injured person suing for damages is allowed to recover damages, not only for the suffering endured by him up to the time of the trial, but also the damages which the evidence shows he is reasonably sure to suffer in the future.²⁰

Shull, 45 W. Va. 405, 31 S. E. 914; 1 Elliott's Gen. Pr. § 429. See also Henry v. St. Louis &c. R. Co., 76 Mo. 288, 293, 43 Am. Rep. 762; Shawnee &c. Trac. Co. v. Griggs, 50 Okla. 566, 151 Pac. 230; Behling v. Southwest &c. Lines, 160 Pa. St. 359, 28 Atl. 777, 40 Am. St. 724; Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. 31, 33, 34, 23 Am. St. 192, and note, 12 L. R. A. 268.

¹⁹ 6 Thomp. Neg. (2d ed.) § 7204.

²⁰ Washington &c. R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. ed. 884; Bay Shore R. Co. v. Harris, 67 Ala. 6; Wallace v. Wilmington &c. R. Co., 8 Houst. (Del.) 529, 18 Atl. 818; Simeone v. Lindsay, 6 Penn. Del. 224, 65 Atl. 778; Atlanta &c. R. Co. v. Johnson, 66 Ga. 259; Lake Shore &c. R. Co. v. Johnson, 135 Ill. 641, 26 N. E. 510; Lauth v. Chicago Union Trac. Co., 244 Ill. 244, 91 N. E. 431; Cicero &c. R. Co. v. Brown, 89 Ill. App. 318; Cleveland &c. R. Co. v. Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Ohio &c. R. Co. v. Cosby, 107 Ind. 32, 7 N. E. 373; Fry v. Dubuque &c. R. Co., 45 Iowa 416; Mitchell v. Chicago &c. R. Co., 138 Iowa 283, 114 N. W. 622; Black v. Carrollton &c. R. Co., 10 La. Ann. 33, 63 Am. Dec. 586; Baltimore &c. R. Co. v. Trainor, 33 Md.

542; Sherwood v. Chicago &c. R. Co., 82 Mich. 374, 46 N. W. 773; Johnson v. Northern Pac. R. Co., 47 Minn. 430, 50 N. W. 473; Memphis &c. R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699n; Gorhan v. Kansas City &c. R. Co., 113 Mo. 408, 20 S. W. 1060; Stotler v. Chicago &c. R. Co., 200 Mo. 107, 98 S. W. 509; Cherry v. St. Louis &c. R. Co., 163 Mo. App. 53, 145 S. W. 837; Holyoke v. Grand Trunk R. Co., 48 N. H. 541; Hopkins v. Atlantic &c. R. Co., 36 N. H. 9, 72 Am. Dec. 287; Ganiard v. Rochester City &c. R. Co., 50 Hun 22, 2 N. Y. S. 470, 18 N. Y. St. 692, affirmed 121 N. Y. 661; Curtis v. Rochester &c. R. Co., 20 Barb. 282, affirmed 18 N. Y. 534, 75 Am. Dec. 258; Matteson v. New York &c. R. Co., 62 Barb. (N. Y.) 364; Midland Val. R. Co. v. Hilliard, 46 Okla. 391, 148 Pac. 1001; Pittsburgh &c. R. Co. v. Donahue, 70 Pa. St. 119; Wilson v. Pennsylvania R. Co., 132 Pa. St. 27, 18 Atl. 1087; International &c. R. Co. v. Clark, 96 Tex. 349, 72 S. W. 584, rev'g 71 S. W. 587; Houston &c. R. Co. v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902; Norfolk R. &c. Co. v. Spratley, 103 Va. 379, 49 S. E. 502. See also 3 Elliott Ev. § 1988.

But it is always to be borne in mind that there can be no recovery of damages for these future consequences unless the evidence shows that they are not merely possible but probable, and, in general we think there should be such a probability of their occurrence as amounts to a reasonable certainty that they will result. The damages cannot be based on speculation or hypothesis.²¹ This subject is well considered in several comparatively recent cases. In one of them,²² the following quotation is made from an earlier case: "The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects of the act as are reasonably certain to result from it. Possible, even probable, future damages are too remote and speculative to form the basis of a legal injury. If they may or subsequently do result from the accident, they are but a part of that *damnum absque injuria* which reaches too far into the realm of conjecture to form any part of the basis of an action at law."²³ In another case evidence of medical experts as to what "might" result was held too speculative and uncertain,²⁴ and in several cases, instructions that the plaintiff is entitled to recover for such pain and suffering as "may" result from the injury, or "as he may

²¹ *Daigneau v. Grand Trunk R. Co.*, 153 Fed. 593; *Chicago &c. R. Co. v. Newsome*, 154 Fed. 665; *Fry v. Dubuque &c. R. Co.*, 45 Iowa 416; *Brininstool v. Michigan United R. Co.*, 157 Mich. 172, 121 N. W. 728; *McCarthy v. St. Louis Transit Co.*, 108 Mo. App. 317, 83 S. W. 298; *Chicago &c. R. Co. v. McDowell*, 66 Nebr. 170, 92 N. W. 121; *Gregory v. New York &c. R. Co.*, 55 Hun 303, 28 N. Y. St. 726, 8 N. Y. S. 525; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544, 26 N. Y. St. 729; *McKenna v. Brooklyn Heights R. Co.*, 41 App. Div. 255, 58 N. Y. S. 462; *Maimone v. Dry Dock &c. R. Co.*, 58 App. Div. 383, 68 N. Y. S. 1073;

Missouri &c. R. Co. v. Mitchell, 75 Tex. 77, 12 S. W. 810.

²² *Chicago &c. R. Co. v. Lindeman*, 143 Fed. 946.

²³ *Chicago &c. R. Co. v. De Clow*, 124 Fed. 142, 143, 145; citing *Filer v. New York &c. R. Co.*, 49 N. Y. 42, 45; *White v. Milwaukee &c. R. Co.*, 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; *Block v. Milwaukee &c. R. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. 849; *Ford v. Des Moines*, 106 Iowa 94, 75 N. W. 630, and two or three other cases cited in last preceding note.

²⁴ *Briggs v. New York &c. R. Co.*, 177 N. Y. 59, 69 N. E. 223, 101 Am. St. 718.

hereafter suffer and endure," have been held bad.²⁵ But such an instruction was held not to be erroneous in a recent case in Missouri.²⁶

§ 2843 (1801). **Exemplary damages.**—Exemplary damages are never recoverable for injuries due to mere negligence,²⁷ at least where such negligence is simply the want of ordinary care. The right to recover these damages is generally based by the authorities largely upon the motive of the wrongdoer,²⁸ and their recovery is sustained only where the injury was wantonly and wilfully inflicted.²⁹ In some jurisdictions the courts allow a re-

²⁵ *Ford v. Des Moines*, 106 Iowa 94, 75 N. W. 630; *Hardy v. Milwaukee R. Co.*, 89 Wis. 183, 61 N. W. 771. See also *Albin v. Chicago &c. R. Co.*, 103 Mo. App. 308, 77 S. W. 153; *Haas v. St. Louis R. Co.*, 111 Mo. App. 709, 90 S. W. 1155.

²⁶ *Dean v. Kansas City &c. R. Co.*, 199 Mo. 386, 97 S. W. 910.

²⁷ *Milwaukee &c. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Columbus &c. R. Co. v. Bridges*, 86 Ala. 448, 5 So. 864, 11 Am. St. 58n; *Richmond &c. R. Co. v. Vance*, 93 Ala. 144, 9 So. 574, 30 Am. St. 41; *Hayden v. Fair Haven &c. R. Co.*, 76 Conn. 355, 56 Atl. 613; *Chattanooga &c. R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. 853, 21 Am. St. 169; *Louisville &c. R. Co. v. Shanks*, 94 Ind. 598; *Kansas City &c. R. Co. v. Kier*, 41 Kans. 661, 671, 21 Pac. 770, 13 Am. St. 311; *Atchison &c. R. Co. v. McGinnis*, 46 Kans. 109, 26 Pac. 453; *Chicago &c. R. Co. v. O'Connell*, 46 Kans. 581, 26 Pac. 947; *Henderson City R. Co. v. Lockett*, 30 Ky. L. 321, 98 S. W. 303; *Batter-*

son v. Chicago &c. R. Co., 49 Mich. 184, 13 N. W. 508; *Berg v. St. Paul City R. Co.*, 96 Minn. 513, 105 N. W. 191; *McKeon v. Citizens R. Co.*, 42 Mo. 79; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 6 S. W. 464.

²⁸ *Milwaukee &c. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Illinois &c. R. Co. v. Cobb*, 68 Ill. 53; *Curl v. Chicago &c. R. Co.*, 63 Iowa 417, 16 N. W. 69, 19 N. W. 308; *Baltimore &c. R. Co. v. Blocher*, 27 Md. 277; *Philadelphia &c. R. Co. v. Green*, 110 Md. 32, 71 Atl. 986; *Webb v. Gilman*, 80 Maine 177, 13 Atl. 688; *New Orleans &c. R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Belknap v. Boston &c. R. Co.*, 49 N. H. 358; *Fohrmann v. Consolidated Trac. Co.*, 63 N. J. L. 391, 43 Atl. 892; *Day v. Holland*, 15 Ore. 464, 15 Pac. 855.

²⁹ *Tiblier v. Alford*, 12 Fed. 262; *Ensley R. Co. v. Chewning*, 93 Ala. 24, 9 So. 458; *Snedecor v. Pope*, 143 Ala. 275, 39 So. 318; *Murphy v. New Haven &c. R. Co.*, 29 Conn. 496; *Illinois &c. R. Co. v. Welch*, 52 Ill. 184, 4 Am. Rep. 593; *Lowry v. Co's-*

covery of these damages for "gross" negligence on the part of the defendant.³⁰ But even here, it seems, there may be no recovery unless the negligence was so gross as to amount to wantonness, or a conscious indifference to consequences.³¹ Gross negligence warranting a recovery of exemplary damages was held to have been shown in a recent case where a train was run over a trestle at fifty miles an hour, when the schedule time was thirty-three miles an hour, and a person on the trestle was struck by the train and killed.³² In another case, where a conductor ejected a passenger from the train because of the apparent invalidity of his ticket, but did not act in a rough or unkind manner, and did not apply force or threats, or even place his hand upon the passenger except to assist him down the car steps, it was held that exemplary damages could not be recovered against the railroad. Here the conduct of the conductor was not such as to show a wanton or reckless disregard of the passenger's

ter, 91 Ill. 182; *Kirton v. North Chicago St. R. Co.*, 91 Ill. App. 554; *Coal Belt Electric R. Co. v. Young*, 126 Ill. App. 651; *Leavenworth &c. R. Co. v. Rice*, 10 Kans. 426; *Jacobs v. Louisville &c. R. Co.*, 10 Bush (Ky.) 263; *Illinois Cent. R. Co. v. Lence*, 30 Ky. L. 988, 100 S. W. 215; *McFee v. Vicksburg &c. R. Co.*, 42 La. Ann. 790, 7 So. 720; *Hoffman v. Northern &c. R. Co.*, 45 Minn. 53, 47 N. W. 312; *Edelman v. St. Louis Transfer Co.*, 3 Mo. App. 503; *Laird v. Chicago &c. R. Co.*, 78 Mo. App. 273; *Gardner v. St. Louis &c. R. Co.*, 117 Mo. App. 138, 93 S. W. 917; *Hayes v. Southern R. Co.*, 141 N. Car. 195, 53 S. E. 847; *Watts v. South Bound R. Co.*, 60 S. Car. 67, 38 S. E. 240; *Brasington v. South Bound R. Co.*, 62 S. Car. 325, 40 S. E. 665, 89 Am. St. 905; *Aaron v. Southern R. Co.*, 68 S. Car. 98, 46 S. E. 556; *Clai-*

borne v. Chesapeake &c. R. Co., 46 W. Va. 363, 33 S. E. 262.

³⁰ *South &c. R. Co. v. McLendon*, 63 Ala. 266; *Patterson v. South &c. R. Co.*, 89 Ala. 318, 7 So. 437; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; *Louisville &c. R. Co. v. Mount*, 125 Ky. 593, 101 S. W. 1182; *Central Pass. R. Co. v. Chatterson*, 17 Ky. L. 5, 29 S. W. 18; *Louisville &c. R. Co. v. Eaden*, 29 Ky. L. 365, 93 S. W. 7, 16 L. R. A. (N. S.) 581; *Taylor v. Grand Trunk &c. R. Co.*, 48 N. H. 304, 2 Am. Rep. 229.

³¹ *Leavenworth &c. R. Co. v. Rice*, 10 Kans. 426; *Kansas Pac. R. Co. v. Kessler*, 18 Kans. 523; *Arkansas &c. R. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. 130; *Berg v. St. Paul City R. Co.*, 96 Minn. 513, 105 N. W. 191; *Atchison &c. R. Co. v. Ringle*, 71 Kans. 839, 80 Pac. 43.

³² *Nickles v. Seaboard Air Line*

rights.⁸³ Whether or not the particular case is one warranting the allowance of exemplary damages is a question for the court to determine in its instructions to the jury,⁸⁴ and whether when permissible they shall be allowed in such a case,⁸⁵ and the amount,⁸⁶ are matters almost wholly within the discretion of the jury, and their determination will not be disturbed on appeal unless so grossly excessive as to indicate prejudice, partiality, or corruption.⁸⁷ The award of exemplary damages has been upheld in cases where wantonness was shown by trainmen in the ejection of passengers;⁸⁸ where the trainmen wilfully, recklessly,

R. Co., 74 S. Car. 102, 54 S. E. 255.

⁸³ Southern R. Co. v. Hawkins, 28 Ky. L. 364, 89 S. W. 258. See also Southern R. Co. v. Thurman, 28 Ky. L. 699, 90 S. W. 240; Ammons v. Southern R. Co., 140 N. Car. 196, 52 S. E. 731. But compare Seaboard &c. R. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427, 2 L. R. A. (N. S.) 472; Cook v. Lusk, 186 Mo. App. 288, 172 S. W. 81.

⁸⁴ Ware v. St. Paul Water Co., 1 Dill. (U. S.) 405, 3 Chic. Leg. N. 41; Murphy v. New York &c. R. Co., 29 Conn. 499; Chicago v. Martin, 49 Ill. 241, 95 Am. Dec. 590; Morford v. Woodworth, 7 Ind. 93; Chiles v. Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Kountz v. Brown, 16 B. Mon. (Ky.) 586; Southern R. Co. v. Hawkins, 28 Ky. L. 364, 89 S. W. 258; Heil v. Glanding, 42 Pa. St. 493, 82 Am. Dec. 537.

⁸⁵ Salem v. Webster, 192 Ill. 369, 61 N. E. 323; Kentucky &c. R. Co. v. Gastineau, 83 Ky. 119; Louisville &c. R. Co. v. Brooks, 83 Ky. 129, 4 Am. St. 135; Wade v. Columbia Elec. St. R. Co., 51 S. Car. 296, 29 S. E. 233, 64 Am. St. 676. See also Cox v. Birmingham R. &c. Co., 163

Ala. 170, 50 So. 975; St. Louis &c. R. Co. v. Stamps, 84 Ark. 241, 104 S. W. 1114; Jordan v. Delaware &c. R. Co., 24 Del. 107, 75 Atl. 1014.

⁸⁶ Yazoo &c. R. Co. v. Mitchell, 83 Miss. 179, 35 So. 339; Parsons v. Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. 464. See also Southern R. Co. v. Hawkins, 28 Ky. L. 364, 89 S. W. 258.

⁸⁷ Lally v. Cantwell, 40 Mo. App. 44.

⁸⁸ Head v. Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. 434; Atlanta &c. St. R. Co. v. Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824; Seaboard &c. R. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427, 2 L. R. A. (N. S.) 472; Illinois Cent. R. Co. v. Davenport, 177 Ill. 110, 52 N. E. 266, affirming 75 Ill. App. 579; Southern Kansas R. Co. v. Rice, 38 Kans. 398, 16 Pac. 817; Finch v. Northern Pac. R. Co., 47 Minn. 36, 49 N. W. 329; St. Clair v. Missouri Pac. R. Co., 29 Mo. App. 76; Cook v. Lusk, 186 Mo. App. 288, 172 S. W. 81; Rose v. Wilmington &c. R. Co., 106 N. Car. 168, 11 S. E. 526; Tomlinson v. Wilmington &c. R. Co., 107 N. Car.

or capriciously refused to stop trains on signal at flag stations;³⁹ where the evidence showed a wanton disregard of the duty of the railroad company in regard to the safety of passengers while boarding and alighting from cars;⁴⁰ for refusal to sell a ticket or check the baggage of a passenger to a regular stopping station, under circumstances indicating a wanton disregard of the rights of the passenger;⁴¹ for the wanton and wilful refusal of a conductor to accept a valid ticket tendered for passage;⁴² where a street car conductor refused to receive a transfer offered by a passenger, though the passenger explained the conditions under which he received the transfer from the preceding conductor, and compelled him to ride in the car beyond his destination and humiliated him by threats of arrest.⁴³ But it has been held in a recent case that punitive damages cannot be recovered by a white person who is required to enter a car for colored people, in the absence of insult or the like.⁴⁴

§ 2844. (1802.) Exemplary damages—Liability of corporation for.—While the modern authorities, almost without excep-

327, 12 S. E. 138; *Guy v. Pittsburgh &c. R. Co.*, 6 Ohio N. P. 3; *Patry v. Chicago &c. R. Co.*, 77 Wis. 218, 46 N. W. 56; *Vassau v. Madison &c. R. Co.*, 106 Wis. 301, 82 N. W. 152. See also *Birmingham R. &c. Co. v. Lee*, 153 Ala. 386, 45 So. 164; *Adams v. St. Louis &c. R. Co.*, 149 Mo. App. 278, 130 S. W. 48.

³⁹ *Wilson v. New Orleans &c. R. Co.*, 63 Miss. 352. See also *Woodward v. Southern R. Co.*, 99 S. Car. 251, 83 S. E. 591, L. R. A. 1915C, 477n, and note. As to whether they are recoverable for carrying passenger beyond destination, see notes to *Dalton v. Kansas City &c. R. Co.*, 17 L. R. A. (N. S.) 1230, and *Ft. Smith &c. R. Co. v. Ford*, 41 L. R. A. (N. S.) 746.

⁴⁰ *Appleby v. South Carolina &c.*

R. Co., 60 S. Car. 48, 38 S. E. 237.

⁴¹ *Pittsburgh &c. R. Co. v. Lyon*, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. 517.

⁴² *Scott v. Chesapeake &c. R. Co.*, 43 W. Va. 484, 27 S. E. 211; *Southern R. Co. v. Wood*, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536. See also *Illinois Cent. R. Co. v. Gortikov*, 90 Miss. 787, 45 So. 363, 14 L. R. A. (N. S.) 464n, 122 Am. St. 324.

⁴³ *Mueller v. St. Louis Transit Co.*, 108 Mo. App. 325, 83 S. W. 270.

⁴⁴ *Southern R. Co. v. Thurman*, 28 Ky. L. 699, 979, 90 S. W. 240, 2 L. R. A. (N. S.) 1108. Compare however *Louisville &c. R. Co. v. Ritchel*, 148 Ky. 701, 147 S. W. 411, 41 L. R. A. (N. S.) 958n, Ann. Cas. 1913E, 517, and note.

tion, hold that corporations may be liable in exemplary damages,⁴⁵ they are not in entire harmony in their application of the principle. One line of decisions holds that the corporation is liable in exemplary damages for the wanton and wilful acts of its servants only when they were committed at the direction of the corporation, or the corporation has subsequently ratified such acts.⁴⁶ It is the theory of these decisions that the purpose of exemplary damages is to punish the guilty offender and that this object is not accomplished by punishing his employer alone. In the language of one court: "We do not see how such damages can be allowed where the principal is prosecuted for the tor-

⁴⁵ *Citizens St. R. Co. v. Steen*, 42 Ark. 321; *Central R. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. 250; *Jeffersonville &c. R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Kansas Pacific R. Co. v. Little*, 19 Kans. 267; *Louisville &c. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530, 7 Am. St. 600; *Goddard v. Grand Trunk R. Co.*, 57 Maine 202, 2 Am. Rep. 39; *Hanson v. European &c. R. Co.*, 62 Maine 84, 16 Am. Rep. 404; *New Orleans &c. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *New Orleans &c. R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421; *Atlantic &c. R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Louisville &c. R. Co. v. Garrett*, 8 Lea (Tenn.), 438, 41 Am. Rep. 680. See also notes to *Spellman v. Richmond &c. R. Co.*, 35 S. Car. 475, 28 Am. St. 858, 870-883, and note, to *Hoboken &c. Co. v. Kahn*, 59 N. J. L. 218, 59 Am. St. 585; also note to *Crane v. Bennett*, 177 N. Y. 106, 101 Am. St. 722, 730-772.

⁴⁶ *Lake Shore &c. R. Co. v.*

Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. ed. 97; *McGehee v. McCarley*, 91 Fed. 462; *Palo Alto v. Pacific Postal &c. Co.*, 103 Fed. 841; *Turner v. North Beach &c. R. Co.*, 34 Cal. 594; *Ristine v. Blocker*, 15 Colo. App. 224, 61 Pac. 486; *Rouse v. Metropolitan St. R. Co.*, 41 Mo. App. 298; *Ackerson v. Erie R. Co.*, 32 N. J. L. 254; *Kastner v. Long Island R. Co.*, 76 App. Div. 323, 12 N. Y. Ann. Cas. 77, 78 N. Y. S. 469; *Murphy v. Central Park &c. R. Co.*, 48 N. Y. Super. Ct. 96; *Voves v. Great Northern R. Co.*, 26 N. Dak. 110, 143 N. W. 760, 48 L. R. A. (N. S.) 30n, (where the authorities are collected and the states in which this rule obtains and those in which the contrary rule obtains are named); *Sullivan v. Oregon &c. R. Co.*, 12 Ore. 392, 7 Pac. 508; 53 Am. Rep. 364; *Bingham v. Lipman*, 40 Ore. 363, 67 Pac. 98; *Hays v. Houston &c. R. Co.*, 46 Tex. 272; *Galveston &c. R. Co. v. Donahoe*, 56 Tex. 162; *International &c. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. 802; *Dillingham v. Anthony*, 73 Tex. 47; 11 S.

tious act of his servant unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's acts. No man should be punished for that of which he is not guilty."⁴⁷ A ratification within this rule, it has been held, may result from the inaction of the officers of the corporation.⁴⁸ So, a corporation has been held to have ratified the tort of an employe where it strenuously endeavored to prove that his act was not tortious, and in the course of the action made an unwarranted and violent attack on the conduct and character of the plaintiff.⁴⁹ The other line of decisions does not require that the tortious act should have been directly authorized, or expressly ratified by the corporation.⁵⁰ As said by one of the courts

W. 139, 3 L. R. A. 634, 15 Am. St. 753; *Bass v. Chicago &c. R. Co.*, 36 Wis. 450, 17 Am. Rep. 495; *Croaker v. Chicago &c. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Vassau v. Madison &c. R. Co.*, 106 Wis. 301, 82 N. W. 152; *Rueping v. Chicago &c. R. Co.*, 116 Wis. 625, 93 N. W. 843, 96 Am. St. 1013. See also *Voves v. Great Northern R. Co.*, 26 N. Dak. 110, 143 N. W. 760, 48 L. R. A. (N. S.) 30, and note.

⁴⁷ *Hagan v. Providence &c. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377, and note. See also *Lake Shore &c. R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. ed. 97.

⁴⁸ *San Antonio &c. R. Co. v. Grier*, 20 Tex. Civ. App. 138, 49 S. W. 148. Retention in service after notice of the act has been held a ratification. *Bass v. Chicago &c. R. Co.*, 42 Wis. 654, 24 Am. St. 437; *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276, 100 Am. St. 909.

⁴⁹ *Pullman &c. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53. Compare also *Peterson v. Middlesex &c.*

Trac. Co., 71 N. J. L. 296, 59 Atl. 459. But see *Gulf &c. R. Co. v. Reed*, 80 Tex. 362, 158 S. W. 1105, 26 Am. St. 749.

⁵⁰ *Fell v. Northern Pac. R. Co.*, 44 Fed. 248; *Highland &c. R. Co. v. Robinson*, 125 Ala. 483, 28 So. 28; *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136, 66 S. W. 661, 91 Am. St. 74; *St. Louis &c. R. Co. v. Dalby*, 19 Ill. 353; *Toledo &c. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Dinsmoor v. Wolber*, 85 Ill. App. 152; *Hawkins v. Riley*, 17 Mon. (Ky.) 101; *Lexington R. Co. v. Cozine*, 111 Ky. 799, 23 Ky. L. 1137, 64 S. W. 848, 98 Am. St. 430; *Chesapeake &c. R. Co. v. Dodge*, 23 Ky. L. 1959, 66 S. W. 606; *Smith v. Middleton*, 112 Ky. 588, 23 Ky. L. 2010, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. 308; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Philadelphia &c. Co. v. Orbann*, 119 Pa. St. 37, 12 Atl. 816, 21 W. N. C. (Pa.) 76; *Reeves v. Southern R. Co.*, 68 S. Car. 89;

holding this view: "Corporations never expressly authorize their servants to beat or insult those having business relations with them, and they rarely ratify such conduct. Having, by the constitution of their being, to act solely by agents or servants, they must, as a matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrong while performing the master's business, and in the scope of their employment; and this to the extent of liability for punitive damages in proper cases."⁵¹ Under either theory damages are recoverable against the corporation where the act may be said to be the corporation's own act, as where, for example, it was negligent in hiring and retaining in its employ an incompetent servant, or where the act of the servant, within the scope of his employment, was authorized or ratified by the corporation and the act would justify punitive damages if the action were against the servant alone.⁵²

§ 2845. (1803.) **Exemplary damages—Evidence of financial condition of defendant.**—It is a general rule that the wealth or pecuniary condition of the defendant—liable in exemplary damages—may be shown, with a view to enable the jury to impose proper damages by way of punishment. This rule, it will be observed, is contrary to the rule that generally obtains where nothing more than compensatory damages can be awarded. Were such information to be withheld where exemplary or

46 S. E. 543. *Quinn v. South Carolina R. Co.*, 29 S. Car. 381, 7 S. E. 614, 1 L. R. A. 683. See also note in 48 L. R. A. (N. S.) 30, 35; *Labbatton Master & Servant*, §§ 2554-2556.

⁵¹ *Pullman &c. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53. See also *Goddard v. Grand Trunk R. Co.*, 57 Maine 202, 2 Am. Rep. 39; *Hanson v. European &c. R. Co.*, 62 Maine 84, 16 Am. Rep. 404; *Chicago &c. R. Co. v. Herring*, 57 Ill. 59; *Jeffersonville R. Co. v. Rodg-*

ers, 38 Ind. 116, 10 Am. Rep. 103; *Baltimore &c. R. Co. v. Blocher*, 27 Md. 277; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757.

⁵² *Denver &c. R. Co. v. Harris*, 122 U. S. 597, 610, 7 Sup. Ct. 1286, 30 L. ed. 1146; *Brown v. Memphis &c. R. Co.*, 7 Fed. 51; *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 Pac. 753, 48 L. R. A. (N. S.) 1n; *Cleghorn v. New York &c. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375.

punitive damages may be awarded the purpose of exemplary damages as a means of punishment might be defeated by disproportionate verdicts. Thus, an amount clearly excessive in the case of a defendant of limited means might not be regarded as a punishment at all by a defendant of great wealth.⁵³ The rule has been held to allow the defendant also to go into the question and show his want of means, though the subject has not been gone into by the plaintiff,⁵⁴ but this is not unquestioned. In a case where exemplary damages were demanded for an assault on a passenger by a sleeping car porter, it was held proper, on the question of defendant's financial standing, to ask (1) what was the entire paid up capital stock of the company; (2) what its liabilities were; (3) what were its assets; (4) what was the surplus of the company over and above its liabilities; (5) what dividends had been paid stockholders for five years past and how they were paid.⁵⁵

§ 2846. (1804.) Duty of injured person to minimize damages.—It is the duty of one injured by a railroad company to use such means as are reasonably in his power to make the evil consequence as light as possible.⁵⁶ This requires that he should

⁵³ *Brown v. Evans*, 17 Fed. 912; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. 413; *Greenberg v. Western Assn.*, 140 Cal. 357, 73 Pac. 1050; *Courvoisier v. Raymond*, 23 Colo. 113, 47 Pac. 284; *Smith v. Wunderlich*, 70 Ill. 426; *Mullin v. Spangenberg*, 112 Ill. 140; *Farman v. Lauman*, 73 Ind. 568; *McCarthy v. Niskern*, 22 Minn. 90; *Belknap v. Boston & C. R. Co.*, 49 N. H. 358; *Matheis v. Mazet*, 164 Pa. St. 580, 30 Atl. 434; *Cumberland & C. Co. v. Poston*, 94 Tenn. 696, 30 S. W. 1040; *Cumberland & C. Co. v. Shaw*, 102 Tenn. 313, 52 S. W. 163; *Harman v. Cundiff*, 82 Va. 239; *Gilman v. Brown*, 115 Wis. 1, 91 N. W. 227; *Cosfriff v. Miller*, 10 Wyo. 190, 68 Pac. 206,

98 Am. St. 977; 3 Elliott Ev. § 1997. See also 1 Elliott Ev. § 178; *Schmitt v. Kurrus*, 234 Ill. 578, 85 N. E. 261; *Elms v. Southern Power Co.*, 79 S. Car. 502, 60 S. E. 1110.

⁵⁴ *Johnson v. Smith*, 64 Maine 553. But see *Case v. Marke*, 20 Conn. 248; *Mullin v. Spangenberg*, 112 Ill. 140.

⁵⁵ *Pullman & C. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

⁵⁶ *Owens v. Baltimore & C. R. Co.*, 35 Fed. 715, 1 L. R. A. 75; *Atchison & C. R. Co. v. Jones*, 110 Ill. App. 626; *Allender v. Chicago & C. R. Co.*, 37 Iowa 264; *Chandler v. Allison*, 10 Mich. 460; *State v. Powell*, 44 Mo. 436; *Louisville & C. R. Co. v. Burke*, 46 Tenn. 45.

exercise reasonable care in seeking medical or surgical aid, and if he neglects to do so, and this neglect aggravates the injury, he is not entitled to recover damages for the aggravated injury.⁵⁷ It is not demanded that the injured person should send for a physician where the injury seems trifling, and its full gravity is not realized by him. All that the rule requires is that he exercise ordinary care in seeking medical attention.⁵⁸ Where the physician is called in, it is the duty of the injured person to acquaint the physician with all the facts necessary to enable him to properly treat the injury, unless the physician is already acquainted with these facts.⁵⁹ It has been held, that the failure to call a physician could not be urged as defense where the evidence showed that the injured person gave to his injuries the treatment that a physician of ordinary care and skill would have prescribed.⁶⁰ Where the physician is called, it is the duty of the in-

⁵⁷ *Owens v. Baltimore &c. R. Co.*, 35 Fed. 715, 1 L. R. A. 75; *Texas &c. R. Co. v. White*, 101 Fed. 928, 62 L. R. A. 90; *Birmingham R. &c. Co. v. Moore*, 148 Ala. 115, 42 So. 1024; *Georgia &c. R. Co. v. Berry*, 78 Ga. 744, 4 S. E. 10; *Chicago City R. Co. v. Saxby*, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. 218; *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Armistead v. Shreveport &c. R. Co.*, 108 La. 171, 32 So. 456; *Beauerle v. Michigan Cent. R. Co.*, 152 Mich. 345, 116 N. W. 424; *Glasgow v. Metropolitan St. R. Co.*, 191 Mo. 347, 89 S. W. 915; *Dietrich v. Hannibal &c. R. Co.*, 89 Mo. App. 36; *Gulf &c. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492; *Ft. Worth &c. R. Co. v. Word* (Tex. Civ. App.), 32 S. W. 14; *Robertson v. Texas &c. R. Co.* (Tex. Civ. App.), 79 S. W. 96; *St. Louis &c. R. Co. v. John-*

son (Tex. Civ. App.), 94 S. W. 162; *Throckmorton v. Missouri &c. R. Co.*, 14 Tex. Civ. App. 222, 39 S. W. 174; *Missouri &c. R. Co. v. Hagan*, 42 Tex. Civ. App. 133, 93 S. W. 1014.

⁵⁸ *Fields v. Mankato Elec. Trac. Co.*, 116 Minn. 218, 133 N. W. 577; *Texas &c. R. Co. v. Neal* (Tex. Civ. App.), 33 S. W. 693. See also *Trinity &c. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389; *International &c. R. Co. v. Duncan*, 55 Tex. Civ. App. 440, 121 S. W. 362; *Variety Mfg. Co. v. Landaker*, 227 Ill. 22, 81 N. E. 47; *Webb v. Metropolitan &c. R. Co.*, 89 Mo. App. 604.

⁵⁹ *Rock Island v. Starkey*, 189 Ill. 515, 59 N. E. 971. See also *Illinois Cent. R. Co. v. Poston* (Ky.), 125 S. W. 253.

⁶⁰ *Arkansas &c. Co. v. Hobbs*, 105 Tenn. 29, 58 S. W. 278.

jured person to follow his directions, and he cannot recover damages for the aggravation of injuries due solely to disobedience of the physician's directions.⁶¹ Where the injured person has used reasonable care in the employment of a physician, he may recover for injuries that are increased through the mistakes or unskillful treatment of the physician selected by him. The courts generally regard these enhanced injuries as direct results of the original injury.⁶² It has been held that the defense of ag-

⁶¹ *Hennessey v. District of Columbia*, 8 Mackey (D. C.), 220, 19 Wash. L. 322; *Illinois Cent. R. Co. v. Poston* (Ky.), 125 S. W. 253; *Studgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616; *Zibbell v. Grand Rapids*, 129 Mich. 659, 89 N. W. 563, 8 Det. Leg. N. 1120; *Wise v. Wabash R. Co.*, 135 Mo. App. 230, 115 S. W. 452; *Gulf &c. R. Co. v. Denson* (Tex. Civ. App.), 72 S. W. 70; *Roanoke R. &c. Co. v. Sterrett*, 111 Va. 293, 68 S. E. 998.

⁶² *Alabama &c. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. 65; *Chicago City R. Co. v. Cooney*, 196 Ill. 466, 63 N. E. 1029, affirming 95 Ill. App. 471; *Chicago &c. R. Co. v. Burrige*, 107 Ill. App. 23; *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Chicago City R. Co. v. Saxby*, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. 218; *Sandwich v. Dolan*, 34 Ill. App. 199; *Kennedy v. Busse*, 60 Ill. App. 440; *Suelzer v. Carpenter*, 183 Ind. 23, 107 N. E. 467; *Citizens' St. R. Co. v. Hobbs*, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377; *Columbia City v. Langohr*, 20 Ind. App. 395, 50 N. E. 831; *Rice v. Des Moines*, 40 Iowa 638; *Stover v. Bluehill*, 51

Maine 439; *Reed v. Detroit*, 108 Mich. 224, 65 N. W. 967, 2 Det. Leg. N. 822; *McGarrahan v. New York &c. R. Co.*, 171 Mass. 211, 50 N. E. 610; *Hunt v. Boston Term. Co.*, 212 Mass. 99, 98 N. E. 786, 48 L. R. A. (N. S.) 116n; *Tuttle v. Farmington*, 58 N. H. 13; *Boynton v. Somersworth*, 58 N. H. 321; *Seeton v. Dunbarton*, 72 N. H. 269, 56 Atl. 197, 73 N. H. 134, 59 Atl. 944; *Sauter v. New York Cent. &c. R. Co.*, 6 Hun (N. Y.) 446; *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Loeser v. Humphrey*, 41 Ohio St. 378, 52 Am. Rep. 86; *Heintz v. Caldwell*, 16 Ohio C. C. 630; *Mattis v. Philadelphia Traction Co.*, 6 Pa. Dist. 94; *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578; *St. Louis &c. R. Co. v. Doyle* (Tex. Civ. App.), 25 S. W. 461; *Dallas v. Meyers* (Tex. Civ. App.), 55 S. W. 742; *Houston &c. R. Co. v. Hanks*, 58 Tex. Civ. App. 298, 124 S. W. 136; *Bardwell v. Jamaica*, 15 Vt. 438; *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563, 69 Am. St. 906. See also *Fields v. Mankato Elec. &c. Co.*, 116 Minn. 218, 133 N. W. 577; *Pyke v. Jamestown*, 15 N. Dak. 157, 107 N. W. 359.

gravation of damages through the negligence of the plaintiff himself may be urged and proven, though not pleaded.⁶³ Applying the principle stated at the outset, it has been held, that it was the duty of a passenger prevented from taking a train by the wrongful act of an employe, to hold himself in readiness to take the next train, and that he could not recover damages that could have been prevented had he taken a later train open to him.⁶⁴

§ 2847 (1804a). Minimizing damages—Submission to surgical operations.—The rule in regard to the obtaining of medical and surgical aid, stated in the last preceding section, may even require the injured person to submit to a surgical operation,⁶⁵ but not if it is complicated, doubtful and dangerous.⁶⁶ And certainly the rule does not require him to submit to a second operation of such a dangerous and doubtful character.⁶⁷ The test seems to be

⁶³ *Waxahatchie v. Connor* (Tex. Civ. App.), 35 S. W. 692. But compare as to burden of showing it, *Jones v. Bondurant*, 21 Colo. App. 24, 120 Pac. 1047.

⁶⁴ *St. Louis &c. R. Co. v. Stroud*, 67 Ark. 112, 56 S. W. 870. See also *Georgia R. &c. Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. 490; *Ingraham v. Pullman Co.*, 190 Mass. 33, 76 N. E. 237, 2 L. R. A. (N. S.) 1087. In the Massachusetts case just cited it is held that aggravation of valvular heart trouble by sitting up all night could not be recovered for as a proximate result of a carrier's refusal to furnish a drawing room on a certain train, in accordance with its contract, where the carrier offered to supply one on a train that left a few hours later or other good sleeping accommodations on the same train, as it was the duty of the plaintiff to do what he reasonably could to les-

sen the injury and not to aggravate it. See also *Texas &c. R. Co. v. Pierce*, 10 Tex. Civ. App. 429, 30 S. W. 1122. But compare *Chicago &c. R. Co. v. Floyd*, 115 Ark. 607, 171 S. W. 913.

⁶⁵ *Donovan v. New Orleans Ry. &c. Co.*, 132 La. 239, 61 So. 216, 48 L. R. A. (N. S.) 109n; *Leitzel v. Delaware &c. R. Co.*, 232 Pa. St. 475, 81 Atl. 543, 48 L. R. A. (N. S.) 114. See to same effect *White v. Chicago &c. R. Co.*, 145 Iowa 408, 124 N. W. 309. But compare *Gibson v. Armstrong*, 145 Minn. 35, 176 N. W. 173, 11 A. L. R. 227; *Maroney v. Minneapolis &c. R. Co.*, 123 Minn. 480, 144 N. W. 149, 49 L. R. A. (N. S.) 756.

⁶⁶ *Martin v. Pittsburgh Rys. Co.*, 238 Pa. St. 528, 86 Atl. 299, 48 L. R. A. (N. S.) 115.

⁶⁷ *Otos v. Great Northern Ry. Co.*, 128 Minn. 283, 150 N. W. 922, (citing *Maroney v. Minneapolis &c. Ry. Co.*, 123 Minn 480, 144 N.

whether, upon the whole, the steps taken and means used by the injured person to reduce or mitigate the damages were such as an ordinarily prudent person would reasonably have used.⁶⁸

§ 2848. (1805.) **Effect of insurance.**—The rule is well settled that damages for personal injury cannot be reduced by the amount of insurance carried by the injured person.⁶⁹ It is likewise well settled that plaintiff cannot show that defendant is insured against loss in case of recovery against him on account of his negligence.⁷⁰

W. 149, 49 L. R. A. (N. S.) 756); *Martin v. Pittsburgh Rys Co.*, 238 Pa. St. 528, 86 Atl. 299, 48 L. R. A. (N. S.) 115.

⁶⁸ *Birmingham R. &c. Co. v. Anderson*, 163 Ala. 72, 50 So. 1021; *Wolf v. Third Ave. R. Co.*, 67 App. Div. 605, 74 N. Y. S. 336; *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578; *Gulf &c. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492; *Missouri &c. R. Co. v. Hannig* (Tex. Civ. App.), 41 S. W. 196. And see note in 11 A. L. R. 230-233, and in 6 A. L. R. 1260.

⁶⁹ *Long v. Kansas City &c. R. Co.*, 170 Ala. 635, 54 So. 62; *Western &c. R. Co. v. Meigs*, 74 Ga. 857; *City of Rome v. Rhodes*, 134 Ga. 650, 68 S. E. 330; *Pittsburgh &c. R. Co. v. Thompson*, 56 Ill. 138; *Wabash R. Co. v. Detting*, 147 Ill. App. 179; *Louisville &c. R. Co. v. Carothers*, 23 Ky. L. 1673, 65 S. W. 833, 66 S. W. 385; *Erhart v. Wabash R. Co.*, 136 Mo. App. 617, 118 S. W. 657; *Cornish v. North Jersey St. R. Co.*, 73 N. J. L. 273, 62 Atl. 1004; *Kellogg v. New York &c. R. Co.*, 79 N. Y. 72; *Houston &c. R. Co. v. Cowser*, 57 Tex. 293; *International &c. R. Co.*

v. Garcia, 70 Tex. 207, 7 S. W. 802; *International &c. R. Co. v. McDonald*, 75 Tex. 41, 12 S. W. 860, 42 Am. & Eng. R. Cas. 211; *Gary v. Wells &c. R. Co.* (Tex. Civ. App.), 40 S. W. 845; *Missouri &c. R. Co. v. Flood*, 35 Tex. Civ. App. 197, 79 S. W. 1106; *Harding v. Townsend*, 43 Vt. 536, 5 Am. Rep. 304; *Downey v. Chesapeake &c. R. Co.*, 28 W. Va. 732; *Ricketts v. Chesapeake &c. R. Co.*, 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 41 Am. & Eng. R. Cas. 42, 25 Am. St. 901. See also ante § 2069. But see *Georgetown Water &c. Co. v. Neale*, 137 Ky. 197, 125 S. W. 293; *Congdon v. Howe Scale Co.*, 66 Vt. 255, 29 Atl. 253.

⁷⁰ *Prewitt-Spurr Mfg. Co. v. Woodall*, 115 Tenn. 605, 90 S. W. 623; *Roche v. Llewellyn &c. Co.*, 140 Cal. 563, 74 Pac. 147; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202. See also to same effect, *Montgomery v. Wyche*, 169 Ala. 181, 53 So. 786; *Vacher v. Geager*, 151 Ill. App. 144; *State v. Trimble*, 104 Md. 317, 64 Atl. 1026; *Lytton v. Marion Mfg. Co.*, 157 N. Car. 331, 72 S. E. 1055, Ann. Cas. 1913C, 358, and note.

§ 2849. (1806.) **Aggravation of existing injuries.**—It is said by one capable writer on the subject of damages, that: "The duty of care towards, and of abstaining from the unlawful injury of another applies to the sick and the weak and infirm to the same extent as to the robust and healthy."⁷¹ And it is well settled by the authorities that a person who is injured by the negligent act of another may recover the resulting damages, although damage would not have resulted, or would have been much less, but for his diseased or weakened condition before and at the time of his accident.⁷² And the rule is the same whether the disease caused by the injuries supervenes or in fact exists at the time of the injury and is aggravated by it.⁷³ Thus, where a passenger

⁷¹ Watson Dam. for Pers. Inj. § 195.

⁷² Campbell v. Los Angeles Trac. Co., 137 Cal. 565, 70 Pac. 624; Chicago City R. Co. v. Saxby, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. 218; Louisville &c. R. Co. v. Falvey, 104 Ind. 409; 3 N. E. 389, 4 N. E. 908; Louisville &c. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572; Ohio &c. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297; Louisville &c. R. Co. v. Snider, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. 60n; Allison v. Chicago &c. R. Co., 42 Iowa 274; Purcell v. St. Paul City &c. R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Ross v. Great Northern R. Co., 101 Minn. 122, 111 N. W. 951; Maroney v. Minneapolis &c. R. Co., 123 Minn. 480, 144 N. W. 149, 49 L. R. A. (N. S.) 756; Brown v. Hannibal &c. R. Co., 66 Mo. 588; Owens v. Kansas City &c. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. 39; Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851; Matthew v. Wabash R.

Co., 115 Mo. App. 468, 78 S. W. 271, affirmed 199 U. S. 605, 26 Sup. Ct. 752, 50 L. ed. 329; Thomas v. St. Louis &c. R. Co., 187 Mo. App. 420, 173 S. W. 728; Louisville &c. R. Co. v. Northington, 91 Tenn. 56, 17 S. W. 880; 16 L. R. A. 268n; Gulf &c. R. Co. v. Reagan (Tex.), 34 S. W. 796; Gulf &c. R. Co. v. Brown, 16 Tex. Civ. App. 93, 40 S. W. 608; Texas &c. R. Co. v. Lee, 32 Tex. Civ. App. 23, 74 S. W. 345; Galveston &c. R. Co. v. Butschek, 34 Tex. Civ. App. 194, 78 S. W. 740; San Antonio &c. R. Co. v. Kivlin, 42 Tex. Civ. App. 633, 93 S. W. 709. See also Jones v. Caldwell, 20 Idaho 5, 116 Pac. 110, 48 L. R. A. (N. S.), 119n.

⁷³ Ohio &c. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. 47; Maguire v. Sheehan, 117 Fed. 819, 59 L. R. A. 496. See also McCahill v. New York Transp. Co., 201 N. Y. 221, 94 N. E. 616, 48 L. R. A. (N. S.) 131, Ann Cas. 1912A, 961; notes in 48 L. R. A. (N. S.) 93, 119.

became permanently disabled by reason of the carrier's negligence in permitting its cars to become cold, it was held that the fact that the passenger was in such condition as to predispose her to dangerous consequences from being exposed to cold did not relieve the carrier from liability for exposing her to cold and bringing on such results.⁷⁴ So, in another case, where the plaintiff was in good health prior to a personal injury, due to defendant's negligence, but the shock of such injury produced delirium tremens, by reason of which, and of his acts during delirium his recovery from the injury itself was retarded and rendered less complete, it was held that the fact that his susceptibility to the disease was the result of his own voluntary acts should not be considered in mitigation of damages, but the defendant was liable for all damages resulting from the disease as well as from the original injury.⁷⁵ The rule does not, however, make the defendant liable for injuries or conditions that are entirely attributable to previous diseases or dissipation and not to the accident.⁷⁶

⁷⁴ *Missouri &c. R. Co. v. Byrd*, 40 Tex. Civ. App. 315, 89 S. W. 991. See also *St. Louis &c. R. Co. v. Lewis*, 91 Ark. 343, 121 S. W. 268; *Atlantic &c. R. Co. v. Douglas*, 119 Ga. 658, 46 S. E. 867; *Maroney v. Minneapolis &c. R. Co.*, 123 Minn. 480, 144 N. W. 149, 49 L. R. A. (N. S.) 756.

⁷⁵ *Maguire v. Sheehan*, 117 Fed. 819, 59 L. R. A. 496.

⁷⁶ *Whitcomb v. New York &c. R. Co.*, 215 Mass. 440, 102 N. E. 663; *Ford v. Kansas City*, 181 Mo. 137, 79 S. W. 923. See also *People's R. Co. v. Baldwin*, 7 Penn. (Del.) 383, 72 Atl. 979; *Baltimore &c. R. Co. v. Morgan*, 35 App. (D. C.) 195; *Beauerle v. Michigan Cent. R. Co.*, 152 Mich. 345, 116 N. W. 424; *Wheeler v. Milner*, 137 Wis. 26, 118 N. W. 187. So, as al-

ready shown, it is the duty of the injured party to minimize damages.. See *Ingraham v. Pullman Co.*, 190 Mass. 33, 76 N. E. 237, 2 L. R. A. (N. S.) 1087, and note; *Zibbell v. Grand Rapids*, 129 Mich. 659, 89 N. W. 563; *Robertson v. Texas &c. R. Co.* (Tex. Civ. App.), 79 S. W. 96; *Galveston &c. R. Co. v. Zantzinger*, 92 Tex. 365, 48 S. W. 562, 71 Am. St. 859, 44 L. R. A. 553. In *O'Keefe v. Kansas City &c. Ry. Co.*, 87 Kans. 322, 124 Pac. 416, 48 L. R. A. (N. S.) 135, a person who was intoxicated was allowed to recover damages he would have suffered if sober, such intoxication not contributing to the injury—but not including any added injuries or loss resulting from the intoxication.

§ 2850 (1807). **Social or financial condition of parties.—Character and habits.**—In actions for compensatory damages solely, evidence of plaintiff's poverty, or the number of persons dependent on him for support is not admissible.⁷⁷ It is likewise improper to go into the question of the wealth of the defendant unless exemplary damages are demanded and recoverable.⁷⁸ Evidence of this character is clearly outside the issue and only serves to arouse the sympathy or prejudice of the jury and divert their minds from the real issue involved. It has been held in one case, however, that evidence of the poverty and size of plaintiff's family was admissible as tending to show a

⁷⁷ Baltimore &c. R. Co. v. Camp, 81 Fed. 807; Barbour County v. Horn, 48 Ala. 566; Louisville &c. R. Co. v. Binion, 107 Ala. 645, 18 So. 75; St. Louis &c. R. Co. v. Adams, 74 Ark. 326, 85 S. W. 768, 86 S. W. 287, 109 Am. St. 85; Louisville &c. R. Co. v. Collingsworth, 45 Fla. 403, 33 So. 513; Pittsburg &c. R. Co. v. Powers, 74 Ill. 341; Chicago &c. R. Co. v. Few, 15 Ill. App. 125; Quincy Horse R. Co. v. Omer, 101 Ill. App. 155; Chicago &c. R. Co. v. Steckman, 125 Ill. App. 299, affirmed 224 Ill. 500, 79 N. E. 602; Kansas City R. Co. v. Egan, 64 Kans. 421, 67 Pac. 887; Union Pac. R. Co. v. Hammerlund, 70 Kans. 888, 79 Pac. 152; Central &c. R. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441, 9 Am. St. 309; Louisville &c. R. Co. v. Hall, 115 Ky. 567, 74 S. W. 280, 24 Ky. L. 2487; Chicago &c. R. Co. v. Bayfield, 37 Mich. 205; Hewitt v. Flint &c. R. Co., 67 Mich. 61, 34 N. W. 659; Bahr v. Northern Pacific R. Co., 101 Minn. 314, 112 N. W. 267; Southern R. Co. v. McLellan, 80 Miss. 700, 32 So. 283; Sykes v. St.

Louis &c. R. Co., 88 Mo. App. 193; Wallace v. Western &c. R. Co., 104 N. Car. 442, 10 S. E. 552; Maynard v. Oregon R. &c. Co., 46 Ore. 15, 78 Pac. 983; Louisville &c. R. Co. v. Gower, 85 Tenn. 465, 3 S. W. 824; International &c. R. Co. v. Goswick, 98 Tex. 477, 85 S. W. 785; Gulf &c. R. Co. v. Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358; Crouse v. Chicago &c. R. Co., 102 Wis. 196, 78 N. W. 446. But see in case of death, ante, § 2068, et seq.; 1 Elliot Ev. § 178, 3 Id. §§ 2016, 2017. See also Vandalla Coal Co. v. Yemm, 175 Ind. 524, 92 N. E. 49; Dallas Elec. St. R. Co. v. Summers, 48 Tex. Civ. App. 474, 106 S. W. 891. But compare Schmitt v. Kurrie, 140 Ill. App. 132.

⁷⁸ Macon &c. R. Co. v. Winn, 26 Ga. 259; Bowe v. Bowe, 26 Ohio C. C. 409. See also Johnston v. Beadle, 6 Cal. App. 251, 91 Pac. 1011; Crane v. Ross, 168 Mich. 623, 135 N. W. 83; Riverside &c. Cotton Mills v. Carter, 113 Va. 346, 74 S. E. 183.

loss of capacity to meet the obligations imposed on him by law.⁷⁹ And in another very recent case, where the issue was the earning capacity of a woman killed in a railroad accident, and it was sought to prove this by showing what work she habitually did, it was held competent to show the number and ages of her children; it appearing, that she cared for them besides doing other work.⁸⁰ It is also difficult to see how the moral character of the plaintiff can become an issue in an action for personal injuries, and the cases generally hold that such evidence, though admissible for purposes of impeachment, cannot be received for the purpose of affecting the right or the amount of the recovery.⁸¹ Evidence of the plaintiff's habits of industry and sobriety prior to his injury is sometimes admissible on the question of the impairment of plaintiff's capacity to labor and earn money.⁸²

⁷⁹ *Youngblood v. South Carolina &c. R. Co.*, 60 S. Car. 9, 38 S. E. 232, 85 Am. St. 824n. See also *Johns v. Charlotte &c. R. Co.*, 39 S. Car. 162, 17 S. E. 698, 20 L. R. A. 520n, 39 Am. St. 709; *Georgia &c. R. Co. v. Keating*, 99 Ga. 308, 25 S. E. 669; *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

⁸⁰ *Lord v. Manchester St. R. Co.*, 74 N. H. 295, 67 Atl. 639. See also *Simoneau v. Pac. Elec. R. Co.*, 159 Cal. 494, 115 Pac. 320; *Claffy v. Chicago &c. R. Co.*, 249 Ill. 210, 94 N. E. 551. But compare *Pittsburgh &c. R. Co. v. Powers*, 74 Ill. 341; *Cook v. Cleveland &c. R. Co.*, 143 Ill. App. 109; *Chicago &c. R. Co. v. Steckman*, 125 Ill. App. 299; *Union Pac. R. Co. v. McMican*, 194 Fed. 393.

⁸¹ *Hardy v. Minneapolis &c. R. Co.*, 36 Fed. 657; *Joliet St. R. Co. v. Call*, 42 Ill. App. 41; *Louisville &c. R. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190n; *Hunter v. Durand*, 137

Mich. 53; 100 N. W. 191; *Wright v. Kansas City*, 187 Mo. 678, 86 S. W. 452; *Johnson v. Wells*, 6 Nev. 224; *St. Louis &c. R. Co. v. Smith*, 34 Tex. Civ. App. 612, 79 S. W. 340; 3 Elliott Ev. § 2002. But see *Biddle v. Riley*, 118 Ark. 206, 176 S. W. 134, L. R. A. 1915F, 992n, and compare *Abbot v. Tolliver*, 71 Wis. 64, 36 N. W. 622, where it is held that the jury can take into consideration the question of the chastity of a woman suffering a personal injury, as affecting the amount to be allowed.

⁸² *Central Pac. R. Co. v. Perker-son*, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 210; *Louisville &c. R. Co. v. Daniel*, 28 Ky. L. 1146, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190; *Buffalo Creek &c. Co. v. Hodges*, 30 Ky. L. 346, 98 S. W. 274; *Cleveland &c. R. Co. v. Southerland*, 19 Ohio St. 151; *Wallace v. Pennsylvania Co.*, 219 Pa. St. 327, 68 Atl. 952; *Texas-Mexican R. Co. v. Douglas*, 73 Tex. 325, 11 S. W. 333.

"This testimony is admissible for the sole purpose of showing the value of his earning capacity. It is likewise permissible to prove, by way of diminution of damages, that the plaintiff was an habitually lazy and drunken person; and in each case the court should admonish the jury as to the purpose for which it is admitted, to-wit: for the sole purpose of showing the value of the earning capacity of the plaintiff."⁸³ It has been held, in an action for injuries to a boy, where the question of his future earnings as dependent on his adaptability for certain lines of work was involved, that it was proper, on this issue, to admit evidence that he was obedient, industrious, sober and economical.⁸⁴

§ 2851. (1808.) **Loss of time and earnings—Employment of substitute.**—A person whose injuries incapacitate him temporarily from engaging in his ordinary business or occupation is entitled to recover as damages the amount of his wages or earnings during disability, and this amount will, of course, vary in each case according to the nature of his employment and the time lost.⁸⁵ The compensation for lost time is usually so much

See also *Wright v. Crawfordsville*, 142 Ind. 636, 42 N. E. 227; *Ohio &c. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774.

⁸³ *Buffalo Creek &c. Co. v. Hodges*, 30 Ky. L. 346, 98 S. W. 274. See also ante, § 2069.

⁸⁴ *Cameron Mill &c. Co. v. Anderson*, 98 Tex. 156, 81 S. W. 282. So, evidence of the plaintiff's occupation and means of earning money and the effect of the injury thereon is usually admissible, as will be shown in subsequent sections. See also *Gaithen v. Blowers*, 11 Md. 536; *McNamara v. King*, 2 Gilm. (Ill.) 432, 436; *Vicksburg &c. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. ed. 257; *Louisville &c. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343.

⁸⁵ *Davidson v. Southern Pac. R. Co.*, 44 Fed. 476; *Alabama &c. R. Co. v. Frazier*, 93 Ala. 45, 9 So. 303, 30 Am. St. 28n; *Adams v. Wilmington &c. Elec. R. Co.*, 3 Penn. (Del.) 512, 52 Atl. 264; *Simeone v. Lindsay*, 6 Penn. (Del.) 224, 65 Atl. 778; *West Chicago St. R. Co. v. Foster*, 175 Ill. 396, 51 N. E. 690, affirming 74 Ill. App. 414; *Ohio &c. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Lake Shore &c. R. Co. v. Teeters* (Ind. App.), 74 N. E. 1014; *Missouri &c. R. Co. v. Smith*, 6 Ind. Ter. 99, 89 S. W. 668; *McKinley v. Chicago &c. R. Co.*, 44 Iowa 314; *Morris v. Chicago &c. R. Co.*, 45 Iowa 29; *Stynes v. Boston &c. R. Co.*, 206 Mass. 75, 91 N. E. 998, 30 L. R. A. (N. S.) 737n; *Posch v. Southern*

money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary employment.⁸⁶ On this subject it has been observed that: "When a man is allowed to prove his average earnings, or the wages actually lost by him, they are proved as a measure of the value of the time and power to labor of which he has been deprived, not as themselves recoverable *eo nomine*."⁸⁷ The jury is not strictly limited in all cases to the particular calling in which the injured person was engaged at the time of receiving the injuries, nor to the wages he was then receiving, as it is apparent that such a rule would be unjust in cases where the plaintiff trained to a particular line of work, was injured while engaged in some temporary employment.⁸⁸ And there is authority that the jury, in the case of injuries to an infant, may consider his earning capacity in any employment for which he is fitted.⁸⁹ In a case of injuries to an

Elec. R. Co., 76 Mo. App. 601; *Paquin v. St. Louis &c. R. Co.*, 90 Mo. App. 118; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541, *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Palmer v. Conant*, 58 Hun. 333, 11 N. Y. S. 917; *Brignoli v. Chicago &c. R. Co.*, 4 Daly (N. Y.) 82; *Rockwell v. Third Ave. R. Co.*, 64 Barb. (N. Y.) 438, 53 N. Y. 625; *Bevine v. New York City R. Co.*, 96 N. Y. S. 1058; *Clark v. Durham Trac. Co.*, 138 N. Car. 77, 50 S. E. 518, 107 Am. St. 509; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Glenn v. Philadelphia &c. Co.*, 206 Pa. St. 135, 55 Atl. 860; *Gulf &c. R. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614; *Nones v. Northouse*, 46 Vt. 587.

⁸⁶ *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. 705. See also *Alabama &c. R. Co. v. Frazier*, 93 Ala. 45,

9 So. 303, 30 Am. St. 28n; *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323.

⁸⁷ *Braithwaite v. Hall*, 168 Mass. 38, 46 N. E. 398. See also *Sibley v. Nason*, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. 520.

⁸⁸ *Dallas &c. R. Co. v. Hardy* (Tex. Civ. App.), 86 S. W. 1053; *St. Louis &c. R. Co. v. Knowles*, 44 Tex. Civ. App. 172, 99 S. W. 867; *Texarkana &c. R. Co. v. Toliver*, 37 Tex. Civ. App. 437, 84 S. W. 375; *Cook v. Chehalis River Lumber Co.*, 48 Wash. 619, 94 Pac. 189. Compare also *Lake Shore &c. R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425n; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. 705; *Northern Pac. Ry. Co. v. Wendel*, 156 Fed. 336.

⁸⁹ *Pecos &c. R. Co. v. Blasengame*, 42 Tex. Civ. App. 66, 93 S. W. 187. But see *Atlanta &c. R.*

insurance solicitor, it was held that the fact that his remuneration was contingent, and depended on the number of risks he succeeded in writing during the year, did not preclude an allowance for loss of time because of his injuries, to be determined on the basis of his average earnings.⁹⁰ Where the nature of the employment is such that it is necessary for the injured person to hire a substitute, he may recover the amount properly paid this substitute.⁹¹ He cannot, however, recover for his own loss of time and in addition what he has to pay for a substitute, as that would amount to double damages.⁹² It has also been held that he cannot collect for the services of a substitute who makes no charge therefor.⁹³ And where a plaintiff seeks to recover for

Co. v. Newton, 85 Ga. 517, 11 S. E. 776; Atchison &c. R. Co. v. Chance, 57 Kans. 40, 45 Pac. 60. In an action by a father for injuries to his child, the measure of damages is the son's full earning capacity and not merely the net result of his earnings. Galligan v. Woonsocket St. R. Co., 27 R. I. 363, 62 Atl. 376. Where the plaintiff does not receive a stated sum it is held that his average earnings prior to the injury may be considered. Alabama &c. R. Co. v. Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. 28; Murdock v. New York &c. Co., 167 Mass. 549, 46 N. E. 57; Rio Grande &c. R. Co. v. Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

⁹⁰ Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 124 Am. St. 402.

⁹¹ The Joseph Stickney, 31 Fed. 156; Macon &c. St. R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756; North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. 157; Sachra v. Manilla, 120 Iowa 562, 95 N. W. 198; Williams v. Edmunds, 75 Mich. 92, 42 N. W. 534; Grady v.

St. Louis Transit Co. 102 Mo. App. 212, 76 S. W. 673; Gumb v. Twenty-third St. R. Co., 30 N. Y. St. 253, 9 N. Y. S. 316; Moran v. New York City R. Co., 94 N. Y. S. 302; Willis v. Second Ave. Trac. Co., 189 Pa. St. 430, 42 Atl. 1; International &c. R. Co. v. Zapp (Tex. Civ. App.), 49 S. W. 673; Denison &c. R. Co. v. Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054. See also to same effect, White v. People's R. Co., 6 Penn. (Del.) 476, 72 Atl. 1059; Willis v. Second Ave. Trac. Co., 189 Pa. St. 430, 42 Atl. 1. But compare Stynes v. Boston Elev. R. Co., 206 Mass. 75, 91 N. E. 998, 30 L. R. A. (N. S.) 737n.

⁹² Indianapolis &c. Transit Co. v. Reeder, 42 Ind. App. 520, 85 N. E. 1042; Blackman v. Gardiner &c. Co., 75 Maine 214. Nor for loss of time in addition to wages that might have been earned. Gulf &c. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486.

⁹³ Shanahan v. St. Louis &c. Co., 109 Mo. App. 228, 83 S. W. 783. But see Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874.

the employment of a substitute, it seems that he must plead and prove both the necessity for, and the value of the substitute's services.⁹⁴ So, in order to recover for loss of time it seems that there must be some evidence from which loss of time and its value may at least be inferred.⁹⁵

§ 2852. (1809.) Earnings and profits of business.—Profits in conducting a business are not regarded as earnings or as a correct measure of earning capacity and their loss is not considered a necessary consequence of a personal injury.⁹⁶ But this

⁹⁴ *Costello v. New York City R. Co.*, 91 N. Y. S. 23. See also *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 659, 88 S. W. 781; *Gumb v. Twenty-third St. Ry. Co.*, 114 N. Y. 411, 21 N. E. 993.

⁹⁵ *Galveston &c. R. Co. v. Thornsberry* (Tex.), 17 S. W. 521; *Klein v. Second Ave. R. Co.*, 54 N. Y. Super. Ct. 164. See also *Stynes v. Boston Elev. R. Co.*, 206 Mass. 75, 91 N. E. 998, 30 L. R. A. (N. S.) 737n. As to recovery for loss of time during minority, see *Klugel v. Aitken*, 94 Wis. 432, 69 N. W. 67, 35 L. R. A. 249; *Louisville &c. R. Co. v. Davis*, 99 Ala. 593, 12 So. 786. Compare also *Central of Ga. R. Co. v. McNab*, 150 Ala. 332, 43 So. 222; *McDermott v. Severe*, 25 App. D. C. 276; *Indianapolis &c. Co. v. Croly*, 55 Ind. App. 543, 104 N. E. 328; *Hayes v. Southern R. Co.*, 141 N. Car. 195, 53 S. E. 847. As to when a married woman may recover for loss of time, see *Smith v. Chicago &c. R. Co.*, 119 Mo. 246, 23 S. W. 784; *Brooks v. Schwerin*, 54 N. Y. 343; note in 20 L. R. A. (N. S.) 215, and in 23 L. R. A. (N. S.) 408. Not when it belongs to her husband. *Blaechinska v. How-*

ard Mission &c., 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215n; *Atchison &c. R. Co. v. McGinnis*, 46 Kans. 109; *Ohio &c. R. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373. Husband is usually entitled to recover for loss of wife's services. *Citizens' St. R. Co. v. Twiname*, 121 Ind. 375, 378, 23 N. E. 159, 7 L. R. A. 352 and authorities there cited. See also *Alabama &c. Ry. Co. v. Appleton*, 171 Ala. 324, 54 So. 638, Ann. Cas. 1913A, 1181; *Engleman v. Metropolitan St. R. Co.*, 133 Mo. App. 514, 113 S. W. 700 (married woman not allowed to recover for hospital fees and medicines unless she shows that she has become liable therefor. But see *Chesapeake &c. Ry. Co. v. Stump*, 165 Ry. 708, 178 S. W. 1037; note in 33 L. R. A. (N. S.) 1042 (loss of consortium).

⁹⁶ *Chicago &c. R. Co. v. Hale*, 176 Fed. 71; *Mahoney v. Boston Elev. R. Co.*, 221 Mass. 116, 108 N. E. 1033; *Silsby v. Michigan Car Co.*, 95 Mich. 204, 54 N. W. 761; *Pryor v. Metropolitan St. R. Co.*, 85 Mo. App. 367; *Blate v. Third Ave. R. Co.*, 29 App. Div. 388, 51 N. Y. S. 590; *Weir v. Union R.*

does not prevent the jury from considering the nature and the extent of the employment of the injured person in a proper case and the value of his personal oversight and superintendence in conducting a business.⁹⁷ It has also been held proper to show the character and magnitude of the business of the injured person, as tending to prove the amount and grade of services he was able to render previous to the accident.⁹⁸ One court, drawing a distinction between earnings and profits, has said: "Profits derived from an investment or the management of a business enterprise are not earnings. The deduction from such profits of the legal rate of interest on the money employed does not give to the balance of the profits the character of earnings. The word 'earnings' means the fruit or reward of labor, the price of services performed. Profits represent the net gain made from an investment or from the prosecution of some business after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. The size and location of the town selected, the character of the commodities dealt in, the degree of competition encountered, the measure of prosperity enjoyed by the community, may make an enterprise a decided success, which under less favorable circumstances, in the hands of the same persons, might turn out a failure. The profits of a business with which one is connected cannot therefore be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value. Its admission for that purpose was error. It was also error to treat this subject of the value of earning power as one

Co., 188 N. Y. 416, 81 N. E. 168; Marks v. Long Island R. Co., 3 N. Y. St. 562; Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191.

⁹⁷ Storrs v. Los Angeles Trac. Co., 134 Cal. 91, 66 Pac. 72; Keyes v. Cedar Falls, 107 Iowa 509, 78 N. W. 227; Escher v. Carroll County, 146 Iowa 738, 125 N. W. 810; Chi-

cago &c. R. Co. v. Posten, 59 Kans. 449, 53 Pac. 465; Thomas v. Union R. Co., 18 App. Div. 185, 45 N. Y. S. 920. See also St. Louis &c. Ry. Co. v. Jackson, 93 Ark. 119, 124 S. W. 241.

⁹⁸ Heer v. Warren-Scharf &c. Co., 118 Wis. 57, 94 N. W. 789. See also North Jersey St. R. Co. v. Schwartz, 66 N. J. L. 437, 49 Atl. 676.

to be settled by expert testimony. An expert in banking or merchandising might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of his injury. In settling this question they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits and manner of living."⁹⁹ But in another case in the same jurisdiction it is held that profits from the management of a business may sometimes be shown as bearing on the loss of earning power.¹

§ 2853. (1810.) Payment of wages and expenses during disability.—The courts are not entirely agreed as to the right of an injured person to recover for loss of wages and expenses, where these have been paid him during his disability. One line of decisions holds that there can be no recovery of such items of damage since the injured person suffered no loss in these respects.² Other courts refuse to allow the jury to consider the fact of the payment of salary and expenses of the injured plaintiff by his employer or other third person. These courts take the position that these acts of liberality or philanthropy are intended for the benefit of the injured person and not for the benefit of the person responsible for his condition.³ One of the courts

⁹⁹ *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191. See also *McHugh v. Schlosser*, 159 Pa. 480, 28 Atl. 291, 23 L. R. A. 574; *Simpson v. Pennsylvania R. Co.*, 210 Pa. St. 101, 59 Atl. 693; *Hewlett v. Brooklyn Heights R. Co.*, 63 App. Div. 423, 71 N. Y. S. 531; *Johnson v. Manhattan R. Co.*, 52 Hun 111, 4 N. Y. S. 848.

¹ *McLane v. Pittsburg Rys. Co.*, 230 Pa. St. 29, 79 Atl. 237.

² *Ephland v. Missouri Pac. R. Co.*, 57 Mo. App. 147; *Drinkwater v.*

Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. 705; *Quigley v. Pennsylvania R. Co.*, 210 Pa. St. 162, 59 Atl. 958; *Montgomery &c. R. Co. v. Mallette*, 92 Ala. 209, 9 So. 363.

³ *Nashville &c. R. Co. v. Miller*, 120 Ga. 453, 47 S. E. 959, 67 L. R. A. 87n; *Ohio &c. R. Co. v. Dickerson*, 59 Ind. 317; *Williams v. St. Louis &c. R. Co.*, 123 Mo. 573, 27 S. W. 387; *Rundle v. State Belt Electric St. R. Co.*, 33 Pa. Super. Ct. 233;

taking the latter view has said: "If time has been lost as the result of a tort, sound sense, common justice, and it may be, public policy would demand that the tort-feasor be prohibited from making a defense founded upon the proposition that he has been guilty of a wrong—it may be, a grievous and outrageous wrong—but that some third person, not only not in sympathy with the wrongdoer, but despising him and his act, has, from some worthy motive, paid to the injured person an amount which, if it had come from the wrongdoer, would have equaled the damages which would have been assessed against him."⁴ It seems clear that the defendant cannot ask that the damages be reduced by the amount of a charitable subscription taken up for the injured person among his friends.⁵ Similarly, it has been held, that the defendant could not show that the plaintiff's doctor bill was paid for him by a beneficial society to which he belonged.⁶

§ 2854. (1811.) Board of injured person pending recovery.—The injured person is not entitled to recover his living expenses or board paid by him during the time of his disability unless these expenses have been increased by reason of the injury, and then only to the extent of this increase. The allowance of these expenses, if not greater than the ordinary expenses of living, would amount to double damages in cases where the injured person is allowed the value of his time during this period.⁷ But it has been held that board may be included in the recovery where the injured person received such board as part of his compensation in his employment which was suspended by the injuries.⁸

Illinois Cent. R. Co. v. Porter, 117 Tenn. 13, 94 S. W. 666, 10 Ann. Cas. 789; *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560; *International &c. R. Co. v. Haddox*, 36 Tex. Civ. App. 385, 81 S. W. 356.

⁴ *Nashville &c. R. Co. v. Miller*, 120 Ga. 453, 47 S. E. 959, 67 L. R. A. 87n.

⁵ *Norristown v. Moyer*, 67 Pa. St. 356.

⁶ *Alston v. Stewart*, 2 Mona. (Pa. Sup. Ct. Cases) 51.

⁷ *Graeber v. Derwin*, 43 Cal. 495; *Vedder v. Delaney*, 122 Iowa 583, 98 N. W. 373.

⁸ *Texas Trac. Co. v. Hanson* (Tex. Civ. App.), 143 S. W. 214.

§ 2855. (1812.) Impairment of capacity to earn money.—An impairment of the injured person's capacity to earn money may be one of the consequences of a personal injury, and for this damages may be recovered.⁹ Where the impairment is actual the injured person is entitled to recover damages therefor, though his wages on returning to work may be as large, or larger, than before receiving the injury.¹⁰ Where the person is regularly employed at his usual work, at the time of the injury, the extent of the impairment will ordinarily be the difference in wages or salary before and after the injury.¹¹ But the recovery

⁹ *Southern Pac. Co. v. Hall*, 100 Fed. 760; *Delaware &c. R. Co. v. Devore*, 114 Fed. 155; *Southern R. Co. v. Hobbs* (Ala.), 43 So. 844; *Southern Ry. Co. v. Peters*, 194 Ala. 94, 69 So. 611; *Karczewski v. Wilmington City R. Co.*, 4 Pen. (Del.) 24, 54 Atl. 746; *McAllister v. People's R. Co.*, 4 Pen. (Del.) 272, 54 Atl. 743; *Southern Cotton Oil Co. v. Skipper*, 125 Ga. 368, 54 S. E. 110; *Chicago &c. R. Co. v. Wilson*, 63 Ill. 168; *Chicago &c. R. Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985, affirming 99 Ill. App. 174; *Chicago &c. R. Co. v. Krempel*, 103 Ill. App. 1; *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Wabash &c. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Belair v. Chicago &c. R. Co.*, 43 Iowa 662; *Morris v. Chicago &c. R. Co.*, 45 Iowa 29; *Wimber v. Iowa Cent. R. Co.*, 114 Iowa 551, 87 N. W. 505; *Chesapeake &c. R. Co. v. Jordan*, 25 Ky. L. 574, 76 S. W. 145; *Haynes v. Waterville &c. R. Co.*, 101 Maine 335, 64 Atl. 614; *Spencer v. Bruner*, 126 Mo. App. 94, 103 S. W. 578; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Gale v. New York &c. R. Co.*, 53 How. Pr. (N. Y.) 389,

13 Hun (N. Y.) 1; *Houston &c. R. Co. v. Boehm*, 57 Tex. 152; *International &c. R. Co. v. Locke* (Tex. Civ. App.), 67 S. W. 1082; *San Antonio &c. R. Co. v. Beam* (Tex. Civ. App.), 50 S. W. 411; *San Antonio &c. R. Co. v. Lester* (Tex. Civ. App.), 84 S. W. 401; *St. Louis &c. R. Co. v. Byers* (Tex. Civ. App.), 70 S. W. 558; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766; *Missouri &c. R. Co. v. Milam*, 20 Tex. Civ. App. 688, 50 S. W. 417; *Galveston &c. R. Co. v. Hampton*, 24 Tex. Civ. App. 458, 59 S. W. 928; *Norfolk &c. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455.

¹⁰ *Central Mfg. Co. v. Cotton*, 108 Tenn. 63, 65 S. W. 403. See also *Clare v. Sacramento &c. Co.*, 122 Cal. 504, 55 Pac. 326; *Nolan's Adm'r v. Standard Sanitary Mfg. Co.*, 33 Ky. L. 745, 111 S. W. 290; *Hoyt v. Metropolitan St. R. Co.*, 175 N. Y. 502, 67 N. E. 1083, affirming 73 App. Div. 249, 76 N. Y. S. 832; *San Antonio &c. R. Co. v. Turney*, 33 Tex. Civ. App. 626, 78 S. W. 256; *Duffy v. St. Louis &c. Co.*, 104 Mo. App. 235, 78 S. W. 831.

¹¹ *Southern Pac. Co. v. Hall*, 100 Fed. 760; *Southern R. Co. v. Howell*,

of this species of damages does not depend on the fact that the injured person was employed at the time of receiving his injuries. He may recover damages for an impairment of capacity though he was not engaged in any business or occupation at the time,¹² or, if employed, it was at work of a temporary character, outside his regular employment.¹³ In cases where the injured person was not at work at his regular employment at the time of receiving his injuries, it is proper to show the kind of work he was fitted for and was last regularly engaged in, if not too remote.¹⁴ And where a settled employment has not been entered upon, it has been held not improper to show the aptitude of the injured person for work of a particular character.¹⁵ Thus, in a recent case, where the action was for personal injury to a four year old child, evidence tending to show her prospective musical talent, was held competent, in connection with other evidence showing that some of her fingers were permanently injured, to show to what extent her earning power had been di-

135 Ala. 639, 34 So. 6; *Western R. Co. v. Wallace*, 170 Ala. 584, 54 So. 533; *Chicago R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087; *Chicago & R. Co. v. Meech*, 59 Ill. App. 69; *Geveke v. Grand Rapids & R. Co.*, 57 Mich. 589, 24 N. W. 675; *Palmer v. Winona & R. Co.*, 83 Minn. 85, 85 N. W. 941; *Bourke v. Butte Elec. & R. Co.*, 33 Mont. 267, 83 Pac. 470; *Waldie v. Brooklyn Heights R. Co.*, 78 App. Div. 557, 79 N. Y. S. 922; *Rushing v. Seaboard & R. Co.*, 149 N. Car. 158, 62 S. E. 890; *Missouri & R. Co. v. Dickson*, 40 Tex. Civ. App. 550, 90 S. W. 507.

¹²*Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598; *Louisville & R. Co. v. Dick*, 25 Ky. 1831, 78 S. W. 914; *Ft. Worth & R. Co. v. Robertson* (Tex.), 16 S. W. 1093; *Stotler v. Chicago & R. Co.*, 200 Mo. 107, 98 S. W. 509; *McNeil v. Cape Girard-*

eau, 153 Mo. App. 424, 134 S. W. 582.

¹³*Galveston & R. Co. v. Appel*, 33 Tex. Civ. App. 575, 77 S. W. 635; *West Chicago St. R. Co. v. Dougherty*, 209 Ill. 241, 70 N. E. 586.

¹⁴*West Chicago R. Co. v. Maday*, 188 Ill. 308, 58 N. E. 933. See also *Chicago v. Edson*, 43 Ill. App. 417; *Lake Shore & R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425n; *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. 606, 38 N. W. 520; *Northern Pac. Ry. Co. v. Wendel*, 156 Fed. 336. But see *Omaha & R. Co. v. Ryburn*, 40 Nebr. 87, 58 N. W. 541.

¹⁵*Missouri & R. Co. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666; *Chicago & R. Co. v. Long*, 26 Tex. Civ. App. 601, 65 S. W. 882; *Trott v. Chicago & R. Co.*, 115 Iowa 80, 86 N. W. 33, 87 N. W. 722. But see *Macon v. Paducah St. R. Co.*, 110

minished.¹⁶ Where the injured person is working on commission he may show his average yearly earnings, on the question of his loss of earning power.¹⁷ These damages are properly allowed on the basis of the injured person's expectancy of life, and it has been held that the jury should give due consideration to the fact that the damages are awarded in a lump, all at once, and are free from the uncertainties of human life.¹⁸ In some jurisdictions it is proper to allow such an amount of damages as would purchase an annuity equal to the difference between plaintiff's yearly earnings before his injury and the amount, if any, he is capable of earning thereafter.¹⁹ The possibility of promotion of the injured person at increased wages cannot be considered unless the matter is regulated by fixed rules, as that matter otherwise is too speculative and remote. Promotion does not always depend upon the occurrence of a vacancy, but upon the judgment, or often even the whim of those in control.²⁰

§ 2856. (1813.) Impairment of capacity—Expectancy of life.—Where the effect of the injury to a person is to permanently diminish his earning capacity, then the expectancy of life of

Ky. 680, 62 S. W. 496, 23 Ky. L. 46.

¹⁶ Gulf &c. R. Co. v. Sauter, 46 Tex. Civ. App. 309, 103 S. W. 201. See also Scally v. Garrett, 11 Cal. App. 138, 104 Pac. 325.

¹⁷ Paul v. Omaha &c. R. Co., 82 Mo. App. 500.

¹⁸ Grant v. Union Pac. R. Co., 45 Fed. 675; Hutcheis v. Cedar Rapids &c. R. Co., 128 Iowa 279, 103 N. W. 779; Galveston &c. R. Co. v. Paschall, 41 Tex. Civ. App. 357, 92 S. W. 446. See also Larsen v. Home Tel. Co., 164 Mich. 295, 129 N. W. 894; Fry v. North Carolina R. Co., 159 N. Car. 357, 74 S. E. 971.

¹⁹ Bourke v. Butte Elec. &c. Co., 33 Mont. 267, 83 Pac. 470; Copson v. New York &c. R. Co., 171 Mass. 233, 50 N. E. 613; Rooney v. New

York &c. R. Co., 173 Mass. 222, 53 N. E. 435.

²⁰ Richmond &c. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. ed. 728; Richmond &c. R. Co. v. Allison, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43; Southern Ind. R. Co. v. Davis, 32 Ind. App. 569, 69 N. E. 550; Brown v. Chicago &c. R. Co., 64 Iowa 652, 21 N. W. 193; Mississippi Cent. R. Co. v. Hardy, 188 Miss. 932, 41 So. 505; Williams v. Spokane Falls &c. R. Co., 42 Wash. 597, 84 Pac. 1129. Promotion by fixed rule may be shown. Bryant v. Omaha &c. R. Co., 98 Iowa 483, 67 N. W. 392. See also A. L. Clark Lumber Co. v. St. Coner, 97 Ark. 358, 133 S. W. 1132.

such person becomes a matter of importance in estimating the amount of his damages, and proper evidence on that question is admissible.²¹ Resort is most often had to the various standard and recognized life tables to establish this fact.²² But a proper foundation must be laid for their introduction by showing such facts as, the age of the injured person,²³ his incapacity or diminished power to work,²⁴ the value of his services,²⁵ and the permanency of the injury.²⁶ Life tables printed in statutes,²⁷ or

²¹ *Knapp v. Sioux City &c. R. Co.*, 71 Iowa 41, 32 N. W. 18; *Atlanta &c. R. Co. v. Johnson*, 66 Ga. 259; *Powell v. Augusta &c. R. Co.*, 77 Ga. 192, 3 S. E. 757; *Gulf &c. R. Co. v. Mangham*, 95 Tex. 413, 67 S. W. 765; *Missouri &c. R. Co. v. Scarborough*, 29 Tex. Civ. App. 194, 68 S. W. 196; *San Antonio &c. R. Co. v. Kivlin*, 42 Tex. Civ. App. 633, 93 S. W. 709.

²² *Louisville &c. R. Co. v. Mother-shed*, 97 Ala. 261, 12 So. 714; *Louisville &c. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130; *Southern R. Co. v. Cunningham*, 152 Ala. 147, 44 So. 658; *McMahon v. Bangs*, 5 Penn. Del. 178, 62 Atl. 1098; *Northeastern R. Co. v. Chandler*, 84 Ga. 37, 10 S. E. 586; *Louisville &c. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Pittsburg &c. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845; *McDonald v. Chicago &c. R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *Knapp v. Sioux City &c. R. Co.*, 71 Iowa 41, 32 N. W. 18; *Chase v. Burlington &c. R. Co.*, 76 Iowa 675, 39 N. W. 196; *Louisville &c. R. Co. v. McMillen (Ky.)*, 119 S. W. 221; *Steinbrunner v. Pittsburg &c. R. Co.*, 146 Pa. St. 504, 23 Atl. 239, 28 Am. St. 806; *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98, 44 Atl. 1069; 1 Elliott Ev. § 418.

²³ *Atlantic &c. R. Co. v. Beauchamp*, 93 Ga. 6, 19 S. E. 24.

²⁴ *Macon &c. R. Co. v. Moore*, 99 Ga. 229, 25 S. E. 460.

²⁵ *Atlanta &c. R. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818.

²⁶ *Whelan v. New York &c. R. Co.*, 38 Fed. 15; *Central R. Co. v. Richards*, 62 Ga. 306; *Collins Park &c. R. Co. v. Ware*, 112 Ga. 663, 37 S. E. 975; *Illinois Cent. R. Co. v. Houchins*, 28 Ky. L. 499, 89 S. W. 530, 1 L. R. A. (N. S.) 375; *Illinois Cent. R. Co. v. Morris*, 28 Ky. L. 956, 90 S. W. 979; *Banks v. Braman*, 195 Mass. 97, 80 N. E. 799; *Mott v. Detroit &c. R. Co.*, 120 Mich. 127, 79 N. W. 3; *Foster v. Bellaire*, 127 Mich. 13, 86 N. W. 383; *Haines v. Lake Shore &c. R. Co.*, 129 Mich. 475, 89 N. W. 349; *Howard v. McCabe*, 79 Nebr. 42, 112 N. W. 305; *San Antonio &c. R. Co. v. Moore*, 31 Tex. Civ. App. 371, 72 S. W. 226; *Galveston &c. R. Co. v. Mortson*, 31 Tex. Civ. App. 142, 71 S. W. 770; *Gulf &c. R. Co. v. Cooper*, 33 Tex. Civ. App. 319, 77 S. W. 263; *Pecos &c. R. Co. v. Williams*, 34 Tex. Civ. App. 100, 78 S. W. 5; *International &c. R. Co. v. Reeves*, 35 Tex. Civ. App. 162, 79 S. W. 1099.

²⁷ *Clark v. Van Vleck*, 135 Iowa 194, 112 N. W. 648.

standard law books,²⁸ and in the Encyclopedia Britannica,²⁹ have been held admissible without other authentication. And it has been held sufficient to show that the tables offered were used by all life insurance companies as a basis for life expectancy.³⁰ But the life tables are not to be understood as absolutely essential. The jury may make their own estimate of the expectancy of life from other evidence before them pertinent to the issue, such as the age, health, habits and physical condition of the plaintiff,³¹ and evidence may be given of the longevity of the plaintiff's ancestors.³² Where life tables are admitted the court should instruct the jury as to their proper use.³³ It has been held that the fact that the injured person was engaged in a dangerous employment, which would tend to shorten life, is not to be considered where it is not shown that he intended to continue in such employment permanently.³⁴

²⁸ *Sellars v. Foster*, 27 Nebr. 118, 42 N. W. 907.

²⁹ *Worden v. Humeston*, 76 Iowa 310, 41 N. W. 26. See also *Louisville &c. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; 1 *Elliott Ev.*, § 74.

³⁰ *Gulf &c. R. Co. v. Smith* (Tex. Civ. App.), 26 S. W. 644.

³¹ *Deisen v. Chicago &c. R. Co.*, 43 Minn. 454, 45 N. W. 864; *Missouri &c. R. Co. v. Rose*, 19 Tex. Civ. App. 470, 49 S. W. 133; *Scheffler v. Minneapolis &c. R. Co.*, 32 Minn. 518, 21 N. W. 711; *Brenisholtz v. Penna. R. Co.*, 229 Pa. St. 88, 78 Atl. 37; *Galveston &c. R. Co. v. Paschall*, 41 Tex. Civ. App. 357, 92 S. W. 446. See also *St. Louis &c. R. Co. v. Glossup*, 88 Ark. 225, 114 S. W. 247; *Amos v. Delaware Ferry Co.*, 228 Pa. St. 362, 77 Atl. 12.

³² *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755; *Brown v. Blaine*, 41 Wash. 287, 83 Pac. 310. See also *Nelson v. Lake Shore &c. R. Co.*, 104 Mich. 582, 62 N. W. 993.

³³ *Campbell v. York*, 172 Pa. St. 205, 33 Atl. 879. See also ante § 2067.

³⁴ *International &c. R. Co. v. Brandon*, 37 Tex. Civ. App. 371, 84 S. W. 272; *Louisville &c. R. Co. v. Gordon*, 24 Ky. L. 1819, 72 S. W. 311. See also *Birmingham &c. R. Co. v. Wilmer*, 97 Ala. 165, 11 So. 886. And the fact that the plaintiff's employment is very hazardous or his health below the average has been held not to render mortality tables inadmissible. *Arkansas &c. R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550; *Birmingham &c. R. Co. v. Wilmer*, 97 Ala. 165, 11 So. 886. But the court should be careful to instruct the jury as to the effect or use to be made of the tables in such a case. *Denman v. Johnson*, 85 Mich. 387, 48 N. W. 565. See also *Canfield v. Chicago &c. R. Co.*, 142 Iowa 658, 121 N. W. 186; *Illinois Cent. R. Co. v. Coley*, 28 Ky. L. 336, 89 S. W. 234, 1 L. R. A. (N. S.) 375.

§ 2857. (1814.) **Impairment of capacity—Evidence.**—On the question of impairment of earning power, evidence is always admissible to show the wages paid the injured party at or shortly before his injuries were received,³⁵ and the plaintiff himself may testify as to the deterioration of his earning powers.³⁶ Where he is engaged in an employment of a temporary character at the time of the accident, he may, as showing the value of his services, testify as to an offer of higher wages, in another employment, made to him at about that time.³⁷ Where he is engaged in manual labor, and the injury is such as to impair his capacity to continue in that class of labor, evidence is admissible as to his lack of education, as showing his unfitness to engage in clerical work.³⁸ As showing inability to continue at a former employment, evidence has been held admissible that the plaintiff was refused remunerative employment at his trade or business when he returned after recovery and offered himself for work.³⁹ So, it has been held proper to receive in evidence samples of the plaintiff's former work, for the purpose of showing his skill and as laying the foundation for evidence that because of the injury his capacity to do such work was impaired or destroyed.⁴⁰ As pertinent to the issue of diminution of earning power, evidence

³⁵ See generally *Andrews v. Chicago &c. R. Co.*, 129 Iowa 162, 105 N. W. 404; *Bourke v. Butte Elec. &c. Co.*, 33 Mont. 267, 83 Pac. 470; *Lewis v. John Crane & Sons*, 78 Vt. 216, 62 Atl. 60; *Southern R. Co. v. Howell*, 135 Ala. 639, 34 So. 6.

³⁶ *Macon R. &c. Co. v. Mason*, 123 Ga. 773, 51 S. E. 569; *Houston &c. R. Co. v. Fanning*, 40 Tex. Civ. App. 422, 91 S. W. 344; *St. Louis &c. R. Co. v. Knowles*, 44 Tex. Civ. App. 172, 99 S. W. 867; *Roundtree v. Charleston &c. R. Co.*, 72 S. Car. 474, 52 S. E. 231; *O'Dea v. Michigan Cent. R. Co.*, 142 Mich. 265, 105 N. W. 746.

³⁷ *Montgomery v. Seaboard &c. R. Co.*, 73 S. Car. 503, 53 S. E. 987.

³⁸ *Helton v. Alabama &c. R. Co.*, 97 Ala. 275, 12 So. 276; *Graham v. Mattoon City R. Co.*, 234 Ill. 483, 84 N. E. 1070, 14 Ann. Cas. 853; *Southern &c. R. Co. v. Sage* (Tex. Civ. App.), 80 S. W. 1038; *San Antonio &c. R. Co. v. Skidmore*, 27 Tex. Civ. App. 329, 65 S. W. 215; *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56, 59 N. W. 453.

³⁹ *Quigley v. Pennsylvania R. Co.*, 210 Pa. 162, 59 Atl. 958. See also *St. Louis &c. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113; *St. Louis &c. R. Co. v. Norvell* (Tex. Civ. App.), 115 S. W. 861.

⁴⁰ *Youngstown Bridge Co. v. Barnes*, 98 Tenn. 401, 39 S. W. 714.

is admissible that the plaintiff was, before the injury, a person of sober and industrious habits;⁴¹ but the evidence should be strictly confined to this issue. It is not to be received for the purpose of proving the plaintiff's moral character, as that is not in issue;⁴² and it seems that it should not go to the extent of showing the amount the plaintiff had been able to save per month.⁴³ Like rules apply where the injured person was engaged in professional pursuits at the time he received his injuries. Evidence of his earnings in that capacity before the injury and the effect of the injury upon his ability to continue in his profession, or to do so as profitably as before the accident, is admissible.⁴⁴ On the question of the impairment of the capacity of a professional man to prosecute his studies and to follow his ordinary pursuits, it has been held proper to admit evidence that he was a contributor to the literature of his profession, though without compensation.⁴⁵ Owing to the fact that so much of the value of the earning power of a professional man depends upon his individual exertions and personality, it is said that the evidence on this question should usually be confined to the plaintiff's earnings, and evidence of the earnings of members of his profession generally should not ordinarily be received.⁴⁶ The defendant on his part may rebut this evidence by showing that the plaintiff was not entitled to practice his profession.⁴⁷

⁴¹ *Louisville &c. R. Co. v. Daniel*, 28 Ky. L. 1146, 91 S. W. 691; *Simonson v. Chicago &c. R. Co.*, 49 Iowa 87. See also *Pittsburgh &c. R. Co. v. Parish*, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. 120; ante § 2850.

⁴² *Louisville &c. R. Co. v. Daniel*, 28 Ky. L. 1146, 91 S. W. 691.

⁴³ *Louisville &c. R. Co. v. Woods*, 115 Ala. 527, 22 So. 33. But compare *Cook v. Danaher Lumber Co.*, 61 Wash. 118, 112 Pac. 245.

⁴⁴ *Woodbury v. District of Columbia*, 5 Mackey (D. C.) 127; *Logansport v. Justice*, 74 Ind. 378, 39 Am. R. 79; *Grieveaud v. St. Louis Cable &c. R. Co.*, 33 Mo. App. 458; *New*

Jersey Exp. Co. v. Nichols, 32 N. J. L. 166; *Mason v. Macon &c. R. Co.*, 123 Ga. 773, 51 S. E. 569.

⁴⁵ *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. ed. 472.

⁴⁶ *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. 883. See also *St. Louis &c. R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879.

⁴⁷ *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61, 19 Am. Rep. 483. See also generally as to other evidence for defense on question of amount of damages. *Illinois Cent. R. Co. v. Vaughn*, 33 Ky. L. 906, 111

§ 2858. (1815.) Pain and suffering.—A person sustaining bodily injury through the negligence of another may recover damages for the pain and suffering which necessarily result from the injury,⁴⁸ and this includes recovery of pain reasonably certain to be suffered in the future.⁴⁹ It is plain that no fixed rule

S. W. 707; *Carlton v. St. Louis &c. R. Co.*, 128 Mo. App. 451, 106 S. W. 1100.

⁴⁸ *Southern Pac. R. Co. v. Hetzer*, 135 Fed. 272; *Alabama &c. R. Co. v. Yarbrough*, 83 Ala. 238, 3 So. 447, 3 Am. St. 715; *Alabama &c. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. 65; *Waller v. Wilmington R. Co.*, 5 Pen. Del. 374, 61 Atl. 874; *Chicago Consol. &c. Co. v. Schritter*, 124 Ill. App. 578, affirmed 222 Ill. 364, 78 N. E. 820; *Ohio &c. R. Co. v. Dickerson*, 59 Ind. 317; *McKinley v. Chicago &c. R. Co.*, 44 Iowa 314, 319, 24 Am. Rep. 748; *Morris v. Chicago &c. R. Co.*, 45 Iowa 29; *Pence v. Wabash R. Co.*, 116 Iowa 279, 90 N. W. 59; *Central &c. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Am. St. 309; *Rutherford v. Shreveport &c. R. Co.*, 41 La. Ann. 793, 6 So. 644; *Brininstool v. Michigan United Rys. Co.*, 157 Mich. 172, 121 N. W. 728; *Morris v. St. Paul City R. Co.*, 105 Minn. 276, 117 N. W. 500, 17 L. R. A. (N. S.) 598n; *Whalen v. St. Louis &c. R. Co.*, 60 Mo. 323; *Ridenhour v. Kansas City &c. R. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; *Hyatt v. Hannibal &c. R. Co.*, 19 Mo. App. 287; *Morse v. Auburn &c. R. Co.*, 10 Barb. (N. Y.) 621; *Curtis v. Rochester &c. R. Co.*, 20 Barb. (N. Y.) 282, affirmed 18 N. Y. 534; *Rockwell v. Third Ave. R. Co.*, 64 Barb. (N. Y.) 438; *Gale v. New York &c. R. Co.*, 53 How. Pr. (N.

Y.) 389, 13 Hun (N. Y.) 1; *Ransom v. New York &c. R. Co.*, 15 N. Y. 415; *O'Neill v. Dry Dock &c. R. Co.*, 36 N. Y. St. 934, 15 N. Y. S. 84; *Pennsylvania R. Co. v. Allen*, 53 Pa. St. 276; *Pittsburg &c. R. Co. v. Donahue*, 70 Pa. St. 119; *Hill v. Union R. Co.*, 25 R. I. 565, 57 Atl. 374; *Texas &c. R. Co. v. Douglass*, 73 Tex. 325, 11 S. W. 333; *Missouri &c. R. Co. v. Hagan*, 42 Tex. Civ. App. 133, 93 S. W. 1014; *Richmond &c. R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211, 10 Am. St. 827; 3 Elliott Ev. § 1991.

⁴⁹ *Carpenter v. Mexican &c. R. Co.*, 39 Fed. 315; *Denver &c. R. Co. v. Roller*, 100 Fed. 738, 49 L. R. A. 77; *Chicago &c. R. Co. v. De Clow*, 124 Fed. 142; *Mobile &c. R. Co. v. George*, 94 Ala. 199, 10 So. 145; *Mills v. Wilmington R. Co.*, 1 Marv. (Del.) 269, 40 Atl. 1114; *Knoopf v. Philadelphia &c. R. Co.*, 2 Pen (Del.) 392, 46 Atl. 747; *Karczewski v. Wilmington R. Co.*, 4 Pen. (Del.) 24, 54 Atl. 746; *Winkler v. Philadelphia &c. R. Co.*, 4 Pen. (Del.) 80, 53 Atl. 90; *Chicago R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087, affirming 102 Ill. App. 202; *Chicago &c. R. Co. v. Ullrich*, 213 Ill. 170, 72 N. E. 815; *Donk Bros. &c. Co. v. Thil*, 228 Ill. 233, 81 N. E. 857; *Chicago &c. R. Co. v. Avery*, 10 Ill. App. 210; *Cleveland &c. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Stanley v. Cedar Rapids &c.*

can be laid down for the measurement of damages for this form of injury and that much must be left in all cases, to the good sense and sound judgment of the jury.⁵⁰ The amount should not be estimated by a sentimental or fanciful standard, but in a reasonable manner. It is apparent that pain cannot be actually measured in money, and it has been said that the word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but rather as describing an allowance looking towards recompense for, or made because of, the suffering consequent upon the injury. "The question is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered."⁵¹ The existence of the pain can rarely be shown by direct evidence, other,

R. Co., 119 Iowa 526, 93 N. W. 489; Cotant v. Boone &c. R. Co., 125 Iowa 46, 99 N. W. 115; Louisville &c. R. Co. v. Stewart, 163 Ky. 164, 173 S. W. 757; Covell v. Wabash R. Co., 82 Mo. App. 180; Hansberger v. Sedalia Elec. R. Co., 82 Mo. App. 566; McLain v. St. Louis &c. R. Co., 100 Mo. App. 374, 73 S. W. 909; Batten v. St. Louis Trans. Co., 102 Mo. App. 285, 76 S. W. 727; Albin v. Chicago &c. R. Co., 103 Mo. App. 308, 77 S. W. 153; Maguire v. St. Louis Trans. Co., 103 Mo. App. 459, 78 S. W. 838; Schwend v. St. Louis Trans. Co., 105 Mo. App. 534, 80 S. W. 40; Fuchs v. St. Louis Trans. Co., 111 Mo. App. 574, 86 S. W. 458; Waddell v. Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765; Nelson v. Metropolitan St. R. Co., 113 Mo. App. 702, 88 S. W. 1119; Smiley v. St. Louis &c. R. Co., 160 Mo. App. 629, 61 S. W. 667; Midland Val. R. Co. v. Hilliard, 46 Okla. 391, 148 Pac. 1001; Smitson v. Southern Pac. Co., 37 Ore, 74, 60

Pac. 907; Smedley v. Hestonville &c. R. Co., 184 Pa. St. 620, 39 Atl. 544; Brasington v. South Bound R. Co., 62 S. Car. 325, 40 S. E. 665, 89 Am. St. 905; International &c. R. Co. v. Locke (Tex. Civ. App.), 67 S. W. 1082; Mexican R. Co. v. Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282; Texas &c. R. Co. v. Scruggs, 23 Tex. Civ. App. 712, 58 S. W. 186; Waterman v. Chicago &c. R. Co., 82 Wis. 613, 52 N. W. 247, 1136; Yerkes v. Northern Pac. R. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. 961.

⁵⁰ Powell v. Nevada &c. R. Co., 28 Nev. 40, 78 Pac. 978; Salina Mill &c. Co. v. Hoyne, 10 Kans. App. 579, 63 Pac. 660; Power v. Broadway &c. R. Co., 59 Hun 623, 13 N. Y. S. 453; North Chicago St. R. Co. v. Fitzgibbons, 180 Ill. 466, 52 N. E. 483; Western &c. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320.

⁵¹ Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. 705.

perhaps, than that of the injured person himself, and the law does not require such evidence. It is generally regarded as sufficient that an injury is proved from which suffering will naturally result.⁵² But to recover for future pain and suffering it should appear to be reasonably certain.⁵³ The rule, of course, allows proof of manifestations and declarations of present pain.⁵⁴ So, where the injured person was a child, it was held proper to admit evidence with reference to the appearance of the child's face as indicating pain and suffering.⁵⁵

§ 2859. (1816.) Mental anguish.—Mental suffering, or anguish, the natural and proximate consequence of a personal injury, is a proper element of damages, and a recovery may be had therefor in an action for the injury.⁵⁶ These damages are re-

⁵² *Chicago &c. R. Co. v. Warner*, 108 Ill. 538; *Chicago &c. R. Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985; *Gagnier v. Fargo*, 12 N. D. 219, 96 N. W. 841; *Gosa v. Southern R. Co.*, 67 S. Car. 347, 45 S. E. 810; *Texas &c. R. Co. v. Curry*, 64 Tex. 85; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288; *International &c. R. Co. v. Mitchell* (Tex. Civ. App.), 60 S. W. 996; *Houston &c. R. Co. v. White* (Tex. Civ. App.), 61 S. W. 436; *Houston &c. R. Co. v. Jackson* (Tex. Civ. App.), 61 S. W. 440; *Galveston &c. R. Co. v. Hubbard* (Tex. Civ. App.), 70 S. W. 112, 33 Tex. Civ. App. 343, 76 S. W. 764; *Houston &c. R. Co. v. Simpson* (Tex. Civ. App.), 81 S. W. 353; *International &c. R. Co. v. Rhoades*, 21 Tex. Civ. App. 459, 52 S. W. 979; *Missouri &c. R. Co. v. Oslin*, 26 Tex. Civ. App. 370, 63 S. W. 1039; *Galveston &c. R. Co. v. Chapman*, 35 Tex. Civ. App. 551, 80 S. W. 856; *Galveston &c. R. Co. v. Stoy*, 44 Tex. Civ. App. 448, 99 S. W. 135.

⁵³ *Chicago &c. R. Co. v. Lindeman*, 143 Fed. 946; *Lisenbury v. St. Louis &c. Ry. Co.*, 184 Ill. App. 395; *Wallace v. Penna. R. Co.*, 222 Pa. St. 556, 71 Atl. 1086, 128 Am. St. 817; *Galveston &c. R. Co. v. Paschall*, 41 Tex. Civ. App. 357, 92 S. W. 446; ante, § 2842.

⁵⁴ *Buce v. Eldon*, 122 Iowa 92, 97 N. W. 989; *Omaha St. R. Co. v. Emminger*, 57 Nebr. 240, 77 N. W. 675. See 1 Elliott Ev. §§ 523-539, and 3 Elliott Ev. § 1992, for full consideration of the general subject; also articles in 56 Cent. Law Jour. 83, and notes in 33 Am. St. 828, 13 L. R. A. 465.

⁵⁵ *Fishburn v. Burlington &c. R. Co.* (Iowa), 98 N. W. 380, also 127 Iowa 483, 103 N. W. 481. See also *Cicero &c. R. Co. v. Priest*, 190 Ill. 592, 60 N. E. 814.

⁵⁶ *McDermott v. Severe*, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. ed. 1162; *Chicago &c. R. Co. v. Caulfield*, 63 Fed. 396, 27 U. S. App. 358; *Haile v. Texas &c. R. Co.*, 60 Fed. 557, 23 U. S. App. 80, 23 L. R. A.

garded as actual, and not punitive.⁵⁷ Of this species of damages it has been said that, "It is the mental suffering which arises necessarily and spontaneously from an injury of shock to the nerves of sensation, or from such pain and anguish as remains during the continuation of the original and existing cause

774; *St. Louis &c. R. Co. v. Leamons* (Ark.), 102 S. W. 363; *Pierce v. St. Louis &c. R. Co.*, 94 Ark. 489, 127 S. W. 707; *Nashville &c. R. Co. v. Miller*, 120 Ga. 453, 47 S. E. 959; *Indianapolis &c. R. Co. v. Stables*, 62 Ill. 313; *Cicero &c. R. Co. v. Brown*, 193 Ill. 274, 61 N. E. 1093, affirming 89 Ill. App. 318; *Chicago R. Co. v. Canevin*, 72 Ill. App. 81; *West Chicago St. R. Co. v. Lups*, 74 Ill. App. 420; *Chicago R. Co. v. Anderson*, 80 Ill. App. 71; *North Chicago St. R. Co. v. Lehman*, 82 Ill. App. 238; *North Chicago R. Co. v. Duebner*, 85 Ill. App. 602; *Kalen v. Terre Haute &c. R. Co.*, 18 Ind. App. 202, 47 N. E. 694, 63 Am. St. 343; *Muldowney v. Illinois &c. R. Co.*, 36 Iowa 462; *Atchison &c. R. Co. v. McGinnis*, 46 Kans. 109, 26 Pac. 453; *Kansas City &c. R. Co. v. Dalton*, 65 Kans. 661, 70 Pac. 645; *Pittsburgh &c. R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568; *Sullivan v. Old Colony St. R. Co.*, 197 Mass. 512, 83 N. E. 1091, 125 Am. St. 378; *Purcell v. St. Paul R. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; *Bahr v. Northern Pacific R. Co.*, 101 Minn. 314, 112 N. W. 267; *Memphis &c. R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699n; *Pullman Co. v. Kelly*, 86 Miss. 87, 38 So. 317; *O'Donnell v. St. Louis Transit Co.*,

107 Mo. App. 34, 80 S. W. 315, 67 L. R. A. 87n; *Waechter v. St. Louis &c. R. Co.*, 113 Mo. App. 270, 88 S. W. 147; *Walker v. Boston &c. R. Co.*, 71 N. H. 271, 51 Atl. 918; *Consolidated &c. Co. v. Lamberton*, 60 N. J. L. 457, 38 Atl. 684, affirming 59 N. J. L. 297, 36 Atl. 100; *Runyan v. Central R. Co.*, 65 N. J. L. 228, 47 Atl. 422; *Miller v. Baltimore &c. R. Co.*, 89 App. Div. 457, 85 N. Y. S. 883; *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. 503, reversing 81 N. Y. S. 1127; *Smith v. Wilmington &c. R. Co.*, 130 N. C. 304, 41 So. 481; *Ewing v. Pittsburgh &c. R. Co.*, 147 Pa. St. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. 709n; *Houston &c. R. Co. v. White* (Tex. Civ. App.), 61 S. W. 436; *Missouri &c. R. Co. v. Warren* (Tex. Civ. App.), 39 S. W. 652, affirmed 90 Tex. 566, 40 S. W. 6; *International &c. R. Co. v. Anchonda*, 33 Tex. Civ. App. 24, 75 S. W. 557; *Davis v. Tacoma R. &c. Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802. An element of damages where the injured person was a child only four years old. *Gulf &c. R. Co. v. Sauter*, 46 Tex. Civ. App. 309, 103 S. W. 201.

⁵⁷ *Young v. Gormley*, 120 Iowa 372, 94 N. W. 922.

that is a proper element of damages."⁵⁸ A slight physical injury only is required to allow the recovery of these damages.⁵⁹ And where the charge includes matters of malice, insult, or inhumanity, it has been held that a recovery may be had for mental pain and anguish, though not connected with bodily injury.⁶⁰ On the ground of remoteness, damages have been refused for such mental suffering as mortification and distress of mind due to the contemplation of a personal disfigurement,⁶¹ and distress to an injured person resulting from a realization that his injuries rendered him unable to properly care for those dependent on him for support and education.⁶² But it has been held proper to allow an injured woman damages for her shame and humiliation in being obliged to use a crutch and cane in walking.⁶³ And in

⁵⁸ *Decatur v. Hamilton*, 89 Ill. App. 561.

⁵⁹ *Masters v. Warren*, 27 Conn. 293; *Sidekum v. Wabash &c. R. Co.*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. 549n; *Memphis &c. R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699n. Direct evidence of mental suffering is not necessary as it may be inferred from the physical injury and pain. *Baisdrengien v. Missouri &c. R. Co.*, 91 Kans. 730, 139 Pac. 428.

⁶⁰ *Rawlins v. Wabash R. Co.*, 97 Mo. App. 511, 71 S. W. 535; *Smith v. Atchison &c. R. Co.*, 122 Mo. App. 610, 97 S. W. 1007; *Gulf &c. R. Co. v. Coopwood* (Tex. Civ. App.), 96 S. W. 102; *Caldwell v. Northern Pac. R. Co.*, 56 Wash. 223, 105 Pac. 625. See also *Lonergan v. Wm. Small & Co.*, 81 Kans. 48, 105 Pac. 27, 25 L. R. A. (N. S.) 976n; *Missouri &c. R. Co. v. Lightfoot*, 48 Tex. Civ. App. 120, 106 S. W. 395.

⁶¹ *Southern Pac. Co. v. Hetzer*, 135 Fed. 272; *Chicago R. Co. v. An-*

derson, 80 Ill. App. 71; *Indianapolis St. R. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978; post, § 2862. See also *Birmingham R. &c. Co. v. Turner*, 154 Ala. 542, 45 So. 671; *Merrill v. Los Angeles &c. Co.*, 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. 134; *Jansen v. Minneapolis &c. R. Co.*, 112 Minn. 496, 128 N. W. 826, 32 L. R. A. (N. S.) 1206n.

⁶² *Maynard v. Oregon R. &c. Co.*, 46 Ore. 15, 78 Pac. 983, 68 L. R. A. 477. See also generally as to mental anguish over collateral consequences of injury, *St. Martin v. New York &c. R. Co.*, 89 Conn. 405, 94 Atl. 279, L. R. A. 1916D, 1035, and note; *St. Louis &c. R. Co. v. Buckner*, 89 Ark. 58, 115 S. W. 923, 20 L. R. A. (N. S.) 458n (citing text).

⁶³ *Beath v. Rapid R. Co.*, 119 Mich. 512, 78 N. W. 537. See also *American Strawboard Co. v. Foust*, 12 Ind. App. 42, 39 N. E. 891; *Shortridge v. Scarritt Est. Co.*, 145 Mo. App. 295, 130 S. W. 126. But

a recent case, a woman who was pregnant at the time of the injury was held entitled to recover as elements of damages, for mental suffering due to her fear that the child would be deformed by the accident and also for distress and disappointment in being deprived of the satisfaction of bearing a sound child, where at birth such child proved to have been deformed by the injury caused by the defendant's negligence.⁶⁴ So, damages were held properly allowed to an injured person for an apprehension of insanity, caused by a mental disability due to injuries resulting from the negligence of a railroad company.⁶⁵ It is not necessary to a recovery of this species of damages, in all cases, that the wrongdoer should know that mental anguish would follow as a result of his wrongful act. Thus, where a traveler was forced by threats of the trainmen to jump from the train while it was running rapidly, on a dark night, it was held proper to admit evidence that he was at the time affected with a rupture, though it was unknown to the conductor, and did not aggravate the injury, such evidence being competent for the purpose of ascertaining the extent of his mental suffering as an element of damages.⁶⁶ There is no fixed rule for the exact measurement of damages for mental anguish and much must be left to the jury in determining the amount, under proper instructions from the court.⁶⁷

§ 2860. (1817.) **Fright.**—Damages are not recoverable for mere fright neither attended nor followed by any other injury.⁶⁸

compare *Gulf &c. R. Co. v. Dickens*, 54 Tex. Civ. App. 637, 118 S. W. 612. See post, § 2862, for additional authorities on both sides of the general question.

⁶⁴ *Gagnon v. Rhode Island Co.*, 40 R. I. 473, 101 Atl. 104, L. R. A. 1917E, 1047n.

⁶⁵ *Walker v. Boston &c. R. Co.*, 71 N. H. 271, 51 Atl. 918. See also *Prescott v. Robinson*, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 594n, 124 Am. St. 987.

⁶⁶ *Fell v. Northern Pac. R. Co.*, 44 Fed. 248.

⁶⁷ *Powell v. Nevada &c. R. Co.*, 28 Nev. 40, 78 Pac. 978; *Gulf &c. R. Co. v. Luther*, 40 Tex. Civ. App. 517, 90 S. W. 44.

⁶⁸ *Williamson v. Central &c. R. Co.*, 127 Ga. 125, 56 S. E. 119; *Atchison &c. R. Co. v. McGinnis*, 46 Kans. 109, 26 Pac. 453; *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500, and note citing cases on both sides; *Chesa-*

But it is thoroughly established that there may be a recovery for fright where there is contemporaneous physical injury,⁶⁹ however slight.⁷⁰ On the question whether there can be a re-

peake &c. R. Co. v. Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A. (N. S.) 433, and note; Wyman v. Leavitt, 71 Maine 227, 36 Am. Rep. 303; Spohn v. Missouri &c. R. Co., 116 Mo. 617, 22 S. W. 690; Strange v. Missouri Pac. R. Co., 61 Mo. App. 586; Porter v. Delaware &c. R. Co., 73 N. J. L. 405, 63 Atl. 860; Johnson v. Wells &c. Co., 6 Nev. 224, 3 Am. Rep. 245; Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. 604, 34 L. R. A. 781; Miller v. Baltimore &c. R. Co., 78 Ohio St. 309, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. 699; Huston v. Freemansburg, 212 Pa. St. 548, 61 Atl. 1022; Gulf &c. R. Co. v. Trott, 86 Tex. 412, 25 S. W. 419, 40 Am. St. 866; Gulf &c. R. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944, 77 Am. St. 856, 47 L. R. A. 325; Weatherford &c. R. Co. v. Crutcher (Tex. Civ. App.), 141 S. W. 137; Chesapeake &c. Ry. Co. v. Tinsley, 116 Va. 600, 82 S. E. 732; Stutz v. Chicago &c. R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. 769. That is, there can be no recovery for fright alone, although there is no injury at the time or afterwards that can be said to be in any sense physical, but there is much conflict as to whether nervous prostration or the like in such cases is physical injury, as understood in this connection. See notes in Ann. Cas. 1913E, 505, 24 L. R. A. (N. S.) 1159, and 2 L. R. A. (N. S.) 1073.

⁶⁹ Denver &c. R. Co. v. Roller, 100 Fed. 738, 49 L. R. A. 77; St.

Louis &c. R. Co. v. Bragg, 69 Ark. 402, 64 S. W. 226, 86 Am. St. 206; Sappington v. Atlantic &c. R. Co., 127 Ga. 178, 56 S. E. 311; Elgin &c. Trac. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; Atchison &c. R. Co. v. McGinnis, 46 Kans. 109, 26 Pac. 453; Morse v. Chesapeake &c. R. Co., 25 Ky. L. 1159, 77 S. W. 361; Stewart v. Arkansas &c. R. Co., 112 La. 764, 36 So. 676; Spade v. Lynn &c. R. Co., 172 Mass. 488, 52 N. E. 747, 70 Am. St. 298, 43 L. R. A. 832; Driscoll v. Gaffey, 207 Mass. 102, 92 N. E. 1010; Howe v. Chicago &c. R. Co., 139 Mich. 638, 103 N. W. 185; Sanderson v. Northern Pac. R. Co., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. 509; Deming v. Chicago &c. R. Co., 80 Mo. App. 152; Harless v. Missouri Elec. R. Co., 123 Mo. App. 22, 99 S. W. 793; Yeaton v. Boston &c. R. Co., 73 N. H. 285, 61 Atl. 522; Consolidated Trac. Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100; O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. 74, 54 N. Y. S. 96, affirmed 165 N. Y. 624, 59 N. E. 1128; Lofink v. Interborough &c. Co., 102 App. Div. 275, 92 N. Y. S. 386; Newton v. New York &c. R. Co., 106 App. Div. 415, 94 N. Y. S. 825; Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. 604, 34 L. R. A. 781; Ewing v. Pittsburgh &c. R. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. 709, 14 L. R. A. 666n.

⁷⁰ Atchison &c. R. Co. v. McGinnis, 46 Kans. 109; Canning v. Williamstown, 1 Cush. (Mass.) 451;

covery for injuries that result from fright unaccompanied by physical injury, there is a decided conflict in the authorities. The cases denying a recovery of damages for fright unaccompanied by physical injury decline to allow damages therefor largely as a matter of public policy, because of the difficulty of establishing the relation between the injury and the negligent act, and the opportunity such a rule would give for imposition,⁷¹ and also be-

Warren v. Boston &c. R. Co., 163 Mass. 484, 40 N. E. 895; Driscoll v. Gaffey, 207 Mass. 102, 92 N. E. 1010; Buchanan v. West Jersey R. Co., 52 N. J. L. 265, 19 Atl. 254; Consolidated Trac. Co. v. Lamberton, 59 N. J. L. 297, 36 Atl. 100. In Williamson v. Central &c. R. Co., 127 Ga. 125, 56 S. E. 119, where it was agreed that a passenger should be let off at a certain place, the court said: "If, after so stipulating the servants of the carrier are guilty of any negligence resulting in a breach of duty owing to the passenger, the carrier will be liable at least for nominal damages. (a) If the breach of duty results only in fright unattended by any physical injury, and the fright produced is not of such character as itself to produce physical or mental impairment, such fright will not be sufficient cause for the allowance of damages. (b) If the breach of duty be brought about by the willful misconduct of the conductor in causing the passenger to leave the train at a dangerous place in the nighttime, the same being a place other than that at which he has agreed to stop and allow her to alight, the carrier will be liable for punitive damages."

⁷¹ Scheffer v. Southern &c. R. Co., 105 U. S. 249, 26 L. ed. 1070;

Haile v. Texas &c. R. Co., 60 Fed. 557; Washington &c. R. Co. v. Dashiell, 7 D. C. App. 507, 24 Wash. L. 40; Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; Kalen v. Terre Haute &c. R. Co., 18 Ind. App. 202, 47 N. E. 694, 63 Am. St. 343; Cleveland &c. R. Co. v. Stewart, 24 Ind. App. 374, 56 N. E. 917; Mahoney v. Dankwart, 108 Iowa 321, 79 N. W. 134; Spade v. Lynn &c. R. Co., 172 Mass. 488, 52 N. E. 747, 70 Am. St. 298, 43 L. R. A. 832; Trigg v. St. Louis &c. R. Co., 74 Mo. 147, 41 Am. Rep. 305; Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 56 Am. St. 604, 34 L. R. A. 781; Ewing v. Pittsburg &c. R. Co., 147 Pa. St. 40, 23 Atl. 340, 30 Am. St. 709, 14 L. R. A. 666; Victorian R. Commissioners v. Coultas, L. R. 13 App. Cas. 222; Chesapeake &c. R. Co. v. Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A. (N. S.) 433, and note citing cases on both sides. See also note to Gulf &c. R. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944, 77 Am. St. 856, 47 L. R. A. 325; Bube v. Birmingham &c. Co., 140 Ala. 276, 37 So. 285, 103 Am. St. 33; Sanderson v. Northern Pac. R. Co., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. 509; Morris v. Lackawanna &c. R. Co., 228 Pa. 198, 77 Atl. 445.

cause if there is no right to recover for fright it would logically follow that there can be no recovery for its effects or consequences. Other courts, however, sustain the allowance of damages for physical injuries on the ground that they are the proximate consequence of fright caused by the negligent act or omission of another, though this fright was not attended by any other injury.⁷² An English judge, after carefully analyzing a Massachusetts case most strongly supporting the former contention, says: "But certainly, if as is admitted, and I think justly admitted, by the Massachusetts judgment, a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of immediate bodily hurt is in principle not too remote to be recoverable in law, I should be sorry to adopt a rule which would bar all such claims on grounds of policy, and, in order to repress the possible prosecution of unrighteous or groundless actions of the like kind. Such a course involves the risk of denial of justice to meritorious claims, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of cases. So far as I am entitled to speak from experience, I see no reason to sup-

⁷² *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Purcell v. St. Paul &c. R. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; *Simone v. Rhode Island Co.*, 28 R. I. 86, 66 Atl. 202; *Gulf &c. R. Co. v. Hayter*, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. 856, and note; *Citizens' Ry. Co. v. Farley* (Tex. Civ. App.), 136 S. W. 94; *Hendrix v. Texas &c. R. Co.*, 40 Tex. Civ. App. 291, 89 S. W. 461; *Bell v. Great Northern R. Co.*, 26 L. R. (Ir.) Ex. Div. 428; *Dulieu v. White*, 70 L. J. (K. B. Div.) 837; *Fitzpatrick v. Railway Co.*, 12 U. C. Q. B. 645. See generally as tending to support the

principle: *East Tennessee &c. R. Co. v. Lockhart*, 79 Ala. 315; *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927; *Salmi v. Columbia &c. R. Co.*, 75 Ore. 200, 146 Pac. 819, L. R. A. 1915D, 834; *Mack v. South Bound R. Co.*, 52 S. Car. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. 913; *Yoakum v. Kroeger* (Tex. Civ. App.), 27 S. W. 953; *St. Louis &c. R. Co. v. Murdock*, 54 Tex. Civ. App. 249, 116 S. W. 139; *Yates v. South Kirkby &c. Collins Co.* (1910), 2 K. B. 538; *McKeon v. Chicago &c. R. Co.*, 94 Wis. 477, 69 N. W. 175, 35 L. R. A. 252, 59 Am. St. 910; 15 Harv. Law Rev. 304; 41 Am. Law Reg. 141.

pose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of a nervous shock through a railway collision or a road car accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time."⁷³ Under neither rule can damages well be recovered for mere fright caused by fear of injury to another.⁷⁴

§ 2861. (1818.) Peril as an element of damages.—Somewhat similar to the question as to fright as an element of damages, if not, indeed, part of the same question, is that of suspense and peril as an element of damages. In Indiana, as shown in the notes to the last preceding section, it is held that there can be no recovery for fright or its effects where there is no physical injury at the time; but it is there held that it is proper to instruct the jury where there is a physical injury under circumstances of great peril or jeopardy caused by the negligence of the defendant to take into account the peril, if any, to the plaintiff's life.⁷⁵ So, in Michigan, it is held proper to instruct the jury that they may consider, among other things, the anxiety, suspense and fright of the plaintiff.⁷⁶

⁷³ *Dulieu v. White*, 70 L. J. (K. B. Div.) 837. The cases on both sides of the question are reviewed in a note in 45 L. R. A. (N. S.) 433, and other notes therein referred to, also in note in *Ann. Cas.* 1913E, 505.

⁷⁴ *Cleveland &c. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742, *Ann. Cas.* 1913E, 500, 503; *Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. 509; *Bell v. Great Northern R. Co.*, Ir. L. R. 26 Eq. 428. See also *Sappington v. Atlanta &c. R. Co.*, 127 Ga. 178, 56 S. E. 311.

⁷⁵ *Terre Haute &c. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178; *Louisville &c. R. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128; *Cincinnati &c. R. Co. v. Leonard*, 35 Ind. App. 268, 73 N. E. 932. See also *Seger v. Barkhamsted*, 22 Conn. 290.

⁷⁶ *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374, 46 N. W. 773. But compare *Atchison &c. R. Co. v. Chance*, 57 Kans. 40, 45 Pac. 60, holding that anxiety and distress on account of apprehension that he would leave his wife and child dependent and helpless cannot be considered.

§ 2862. (1819.) **Disfigurement, deformity and loss of functions.**—The principle is well settled that an injured person may recover for disfigurement,⁷⁷ deformity,⁷⁸ or loss of functions,⁷⁹ where these conditions are shown to be the proximate consequences of the injury suffered. Applying this principle, it has been held proper to include in a recovery of damages for injuries to a little girl, resulting in disfigurement, a sum for the effect of this disfigurement on her marriage prospects when she should reach a marriageable age.⁸⁰ So, it has been held proper to allow a married woman damages for loss of child-bearing power due to a railroad accident.⁸¹ But, though damages for disfigurement may be recovered, the authorities are numerous to the effect that mere humiliation arising from the contemplation of a maimed or disfigured body, is not to be taken into consideration in estimating the pecuniary loss of such person. Damages of this character are refused in many jurisdictions because too remote, indefinite and intangible to constitute an element of damages.⁸² “Many other causes, the edu-

⁷⁷ *Smith v. Pittsburgh &c. R. Co.*, 90 Fed. 783; *Alabama &c. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. 65; *St. Louis &c. R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Western &c. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320; *Central &c. R. Co. v. Lanier*, 83 Ga. 587, 10 S. E. 279; *West Chicago St. R. Co. v. James*, 69 Ill. App. 609; *Chicago &c. R. Co. v. Krempel*, 103 Ill. App. 1; *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374, 46 N. W. 773; *Schmitz v. St. Louis &c. R. Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; *Heddles v. Chicago &c. R. Co.*, 77 Wis. 228, 46 N. W. 115, 20 Am. St. 106n.

⁷⁸ *Reliance &c. Co. v. Mitchell*, 24 Ky. L. 1286, 71 S. W. 425. See also *Harrod v. Bisson*, 48 Ind. App.

549, 93 N. E. 1093; *Philadelphia &c. R. Co. v. Mitchell*, 107 Md. 600, 69 Atl. 422, 17 L. R. A. (N. S.) 974n; *Power v. Augusta*, 191 Fed. 647. But compare *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 Pac. 922, 15 L. R. A. (N. S.) 775n.

⁷⁹ *Normile v. Wheeling Trac. Co.*, 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901. Compare *Otos v. Great Northern Ry. Co.*, 128 Minn. 283, 150 N. W. 922, with *Bucher v. Wisconsin Cent. Ry. Co.*, 139 Wis. 597, 120 N. W. 518.

⁸⁰ *Smith v. Pittsburgh &c. R. Co.*, 90 Fed. 783.

⁸¹ *Normile v. Wheeling Trac. Co.*, 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901; *Deering Harvester Co. v. Barzak*, 227 Ill. 71, 81 N. E. 1.

⁸² *Chicago &c. R. Co. v. Caulfield*,

cation, temperament and sentiment of the sufferer, the mental attitude, the acts and words of his friends and acquaintances, concur with the accident to cause this mental distress, in such a way that it is impossible to separate and ascribe the proper part of it to the injury caused by the defendant. And the amount of the mental pain caused by any disfigurement necessarily varies so with the character, temperament and circumstances of the injured person that no just measure of damages from it can be found."⁸³ But, it is to be noted, that there is a difference of views on this question, and many courts allow this species of damages.⁸⁴

63 Fed. 396; *Southern Pac. Co. v. Hetzer*, 135 Fed. 272; *Giffen v. Lewiston*, 6 Idaho 231, 56 Pac. 545; *Illinois Cent. R. Co. v. Cole*, 165 Ill. 334, 46 N. E. 275; *Cullen v. Higgins*, 216 Ill. 78, 74 N. E. 698; *Chicago &c. R. Co. v. Hines*, 45 Ill. App. 299; *Chicago &c. R. Co. v. Spurney*, 69 Ill. App. 549; *West Chicago St. R. Co. v. James*, 69 Ill. App. 609; *Chicago R. Co. v. Anderson*, 80 Ill. App. 71; *Decatur v. Hamilton*, 89 Ill. App. 561; *Lake St. Elev. R. Co. v. Gormley*, 108 Ill. App. 59; *Linn v. Duquesne*, 204 Pa. St. 551, 54 Atl. 341, 93 Am. St. 800; *Gulf &c. R. Co. v. Dickens*, 54 Tex. Civ. App. 637, 118 S. W. 612. See also *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 Pac. 922, 15 L. R. A. (N. S.) 775n.

⁸³ *Southern Pac. Co. v. Hetzer*, 135 Fed. 272.

⁸⁴ *Patterson v. Blatti*, 133 Minn. 23, 157 N. W. 717, L. R. A. 1916E, 896n, Ann. Cas. 1918D, 63n, Ann. Cas. 63, and note stating that the weight of authority is to this effect and review many decisions on both sides. *Heddles v. Chicago &c.*

R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. 106n; *Missouri &c. R. Co. v. Miller*, 25 Tex. Civ. App. 460, 61 S. W. 978; *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206; *Rockwell v. Eldred*, 7 Pa. Super. Ct. 95. See also *Merrill v. Los Angeles &c. Co.*, 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559; *Souleyret v. O'Gara Coal Co.*, 161 Ill. App. 60; *Bolen-Darnall Coal Co. v. Williams*, 7 Ind. Ter. 648, 104 S. W. 867; *Beath v. Rapid Railway Co.*, 119 Mich. 512, 78 N. W. 537; *Shortridge v. Scarritt Est. Co.*, 145 Mo. App. 295, 130 S. W. 126; *Schmitz v. St. Louis &c. R. Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250. In *American &c. Co. v. Foust*, 12 Ind. App. 421, 39 N. E. 891, it was held proper to instruct the jury to take into consideration the extent of plaintiff's injury, bodily and mental suffering, and his deprivation of the pleasure and satisfaction in life that those only can enjoy who are possessed of a sound body and the free use of all its members. But the highest court of the same state has held that "lack

§ 2863 (1820). **Expenses of medical treatment and nursing.**—The injured plaintiff is entitled to recover the reasonable expenses incurred by him for necessary medical treatment,⁸⁵ and likewise for nursing,⁸⁶ though the bills have not been paid at

of personal enjoyment" is not an element of damages which the jury may be instructed to consider. *Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 65, followed in *South Bend Co. v. Goller*, 46 Ind. App. 531, 93 N. E. 37. See also *Indianapolis St. R. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978.

⁸⁵ *Whelan v. New York &c. R. Co.*, 38 Fed. 15; *Knopf v. Philadelphia &c. R. Co.*, 2 Pen. (Del.) 392, 46 Atl. 747; *Willman v. People's R. Co.*, 4 Pen. (Del.) 260, 55 Atl. 332; *Chicago &c. R. Co. v. Wilson*, 63 Ill. 168; *Chicago &c. R. Co. v. Gruss*, 200 Ill. 195, 65 N. E. 693, affirming 102 Ill. App. 439; *West Chicago St. R. Co. v. Maday*, 88 Ill. App. 49, affirmed 188 Ill. 308, 58 N. E. 933; *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908, 1 West Rep. 868, 2 West. Rep. 686; *Morris v. Chicago &c. R. Co.*, 45 Iowa 29; *Louisville &c. R. Co. v. Hall*, 115 Ky. 567, 74 S. W. 280, 24 Ky. L. 2487; *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374, 46 N. W. 773; *Fleming v. Kansas City &c. R. Co.*, 89 Mo. App. 129; *Smith v. Atchison &c. R. Co.*, 122 Mo. App. 85, 97 S. W. 1007; *Gale v. New York &c. R. Co.*, 53 How. Pr. 389, 13 Hun (N. Y.) 1; *Jones v. New York &c. R. Co.*, 99 App. Div. 1, 90 N. Y. S. 422; *Cuming v. Brooklyn R. Co.*, 109 N. Y. 95, 16 N. E. 65; *Allen v. Durham &c. Co.*, 144 N. Car. 288, 56 S. E. 942; *Hawes v. O'Reilley*, 126 Pa.

St. 440, 17 Atl. 642; *Smedley v. Hestonville &c. R. Co.*, 184 Pa. St. 620, 39 Atl. 544, 42 W. N. C. (Pa.) 169, 9 Am. & Eng. R. Cas. (N. S.) 649; *Hart v. Railroad Co.*, 33 S. Car. 427, 12 S. E. 9, 10 L. R. A. 794; *Missouri &c. R. Co. v. Reasor*, 28 Tex. Civ. App. 302, 68 S. W. 332; *Houston &c. R. Co. v. Stuart* (Tex. Civ. App.), 48 S. W. 799; *St. Louis &c. R. Co. v. Highnote* (Tex. Civ. App.), 74 S. W. 920; *Mullen v. Galveston &c. R. Co.* (Tex. Civ. App.), 92 S. W. 1000; *Hulehan v. Green Bay &c. R. Co.*, 68 Wis. 520, 32 N. W. 529.

⁸⁶ *Montgomery St. R. Co. v. Mason*, 133 Ala. 508, 32 So. 261; *Kline v. Santa Barbara &c. R. Co.*, 150 Cal. 741, 90 Pac. 125; *Chicago &c. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145; *Turner v. Boston &c. R. Co.*, 158 Mass. 261, 33 N. E. 520; *Flaherty v. St. Louis Trans. Co.*, 207 Mo. 318, 106 S. W. 15; *McLain v. St. Louis &c. R. Co.*, 100 Mo. App. 374, 73 S. W. 909; *Texas &c. R. Co. v. Short* (Tex. Civ. App.), 58 S. W. 56. In some cases recovery has even been allowed for expenses of trip to health resorts and the like. See *Hart v. Charlotte &c. R. Co.*, 33 S. Car. 427, 12 S. E. 9, 10 L. R. A. 794; *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374, 46 N. W. 773. But compare *Woodward Iron Co. v. Curl*, 153 Ala. 205, 44 So. 974; *Statler v. George A. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063.

the time of the trial; it is sufficient if they have actually been incurred.⁸⁷ The service and charges must be reasonable.⁸⁸ The usual and reasonable charges within the rule have been held to be the charges of the profession generally and not the usual

⁸⁷ *Forbes v. Loftin*, 50 Ala. 396; *Donnelly v. Hufschmidt*, 79 Cal. 74, 21 Pac. 546; *Mueller v. Kuhn*, 59 Ill. App. 353; *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304; *Wilson v. Chicago City R. Co.*, 144 Ill. App. 604; *Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281, 74 N. E. 34, 111 Am. St. 163; *Lacas v. Detroit R. Co.*, 92 Mich. 412, 52 N. W. 745; *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622; *Stoebier v. St. Louis Transit Co.*, 203 Mo. 702, 102 S. W. 651; *Wilbur v. Southwest &c. R. Co.*, 110 Mo. App. 689, 85 S. W. 671; *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 659, 88 S. W. 781; *Friend v. Ingersoll*, 39 Nebr. 717, 58 N. W. 281; *McNaier v. Manhattan R. Co.*, 51 Hun 644, 4 N. Y. S. 310; *Reynolds v. Niagara Falls*, 81 Hun 353, 30 N. Y. S. 954; *Chancey v. Fargo*, 5 N. Dak. 173, 64 N. W. 932; *Gries v. Zeck*, 24 Ohio St. 329; *Lutcher v. Dyson* (Tex. Civ. App.), 30 S. W. 61; *Texas &c. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720; *Wilson v. Southern Pacific R. Co.*, 13 Utah 352, 44 Pac. 1040, 57 Am. St. 766. And it has been held that recovery therefor is not defeated by the fact that the bill for services is barred by the statute of limitations. *Houston &c. R. Co. v. Gerald*, 60 Tex. Civ. App. 151, 128 S. W. 166.

⁸⁸ *Alabama &c. R. Co. v. Siniard*, 123 Ala. 557, 26 So. 689; *Amann*

v. Chicago Consol. Trac. Co., 243 Ill. 263, 90 N. E. 673; *Reed v. Chicago &c. R. Co.*, 57 Iowa 23, 10 N. W. 285; *Bowsher v. Chicago &c. R. Co.*, 113 Iowa 16, 84 N. W. 958; *Elzig v. Bales*, 135 Iowa 208, 112 N. W. 540; *Mirrieless v. Wabash &c. R. Co.*, 163 Mo. 470, 63 S. W. 718; *Fleming v. Kansas City, &c. R. Co.*, 89 Mo. App. 129; *Storm v. Butte*, 35 Mont. 385, 89 Pac. 726; *Galveston &c. R. Co. v. Thornsberry* (Tex.), 17 S. W. 521; *Wheeler v. Tyler R. Co.*, 91 Tex. 356, 43 S. W. 876, reversing 41 S. W. 517; *Texas &c. R. Co. v. Taylor* (Tex. Civ. App.), 58 S. W. 166, reversing 58 S. W. 844; *International &c. R. Co. v. Sampson* (Tex. Civ. App.), 64 S. W. 692; *Gulf &c. R. Co. v. Robinson* (Tex. Civ. App.), 72 S. W. 70; *St. Louis &c. R. Co. v. Kirby* (Tex. Civ. App.), 146 S. W. 1005; *Gulf &c. R. Co. v. Craft* (Tex. Civ. App.), 102 S. W. 170; *Missouri &c. R. Co. v. Nail*, 24 Tex. Civ. App. 114, 58 S. W. 165; *Gulf &c. R. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614; *Dallas &c. St. R. Co. v. McAllister*, 41 Tex. Civ. App. 131, 90 S. W. 933. See also *Houston &c. R. Co. v. Rowell*, 92 Tex. 147, 46 S. W. 630. An allowance for a physician's services in case of a railroad accident, can only be for their reasonable value, and not for a larger sum in view of a prospective lawsuit and the necessity of

charges of the particular physician who is testifying.⁸⁹ It seems that the recovery cannot, however, exceed the amount charged by the physician for his services. If the amount charged is less than the reasonable value of the services, as testified to by the expert witnesses, the recovery must be limited by the amount charged by the physician.⁹⁰ The cases generally sustain the recovery of future medical expenses where, owing to the nature of the injury, it is reasonably certain that they will be incurred,⁹¹ and the amount of these probable expenses is shown.⁹² Since the rule requires that the expenses for services already rendered should have been actually incurred, it has been held improper to allow a recovery for the physician's services where he testifies that he did not make any charge upon his books, and it does not appear from the proofs either that he was paid for his services or that he intended to make any charge for the same.⁹³ So, it has been held, that there can be no recovery of medical expenses which were voluntarily paid for by another.⁹⁴ But a recovery has been sustained although it was shown that the physician intended to make no charge for his services at the time of rendering them on account of the injured person being a brother physician.⁹⁵ And, likewise, where the physician testified to the services rendered by him and explained his failure to

testifying as an expert. *Gulf &c. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19.

⁸⁹ *Chicago R. Co. v. Wall*, 93 Ill. App. 411.

⁹⁰ *Nelson v. Metropolitan St. R. Co.*, 113 Mo. App. 659, 88 S. W. 781.

⁹¹ *Spahn v. Peoples' Ry. Co.* (Del.), 83 Atl. 27; *Chicago &c. R. Co. v. Henry*, 218 Ill. 92, 75 N. E. 758; *Stoebier v. St. Louis Transit Co.*, 203 Mo. 702, 102 S. W. 651; *Holyoke v. Grand Trunk R.*, 48 N. H. 541; *Missouri &c. R. Co. v. Flood* (Tex. Civ. App.), 70 S. W. 331; *Northern &c. Co. v. Mullins*,

44 Tex. Civ. App. 566, 99 S. W. 433; *Webster v. Seattle &c. R. Co.*, 42 Wash. 364, 85 Pac. 2; *Cole v. Seattle &c. R. Co.*, 42 Wash. 462, 85 Pac. 3.

⁹² *McKenna v. Brooklyn &c. R. Co.*, 41 App. Div. 255, 58 N. Y. S. 462.

⁹³ *Malott v. Woods*, 109 Ill. App 512.

⁹⁴ *Peppercorn v. Black River Falls*, 89 Wis. 38; 61 N. W. 79, 46 Am. St. 819; *Tucker v. Buffalo &c. Mills*, 76 S. Car. 539, 57 S. E. 626, 121 Am. St. 957.

⁹⁵ *Ohliger v. Toledo*, 10 O. C. D. 762, 20 O. C. C. 142.

make the charge on his books on the ground that he thought the plaintiff would never be able to pay them.⁹⁶ It is also generally held that the necessary and reasonable expenses of nursing the injured person may be recovered, though these services were offered voluntarily and without charge,⁹⁷ and in most jurisdictions even though rendered by members of the injured person's family.⁹⁸ But at least in most jurisdictions and instances, the value of such services must be proved,⁹⁹ and their value is determined wholly with reference to their value as nursing. The

⁹⁶ *Houston &c. R. Co. v. Bird* (Tex. Civ. App.), 48 S. W. 756.

⁹⁷ *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555. See ante, § 2853; *Kimball v. Northern Elec. Co.*, 159 Cal. 225, 113 Pac. 156.

⁹⁸ *Louisville &c. R. Co. v. Quinn*, 145 Ala. 657, 39 So. 616; *Indianapolis v. Gaston*, 58 Ind. 227; *Indianapolis &c. R. Co. v. Bennett*, 39 Ind. App. 141, 79 N. E. 389; *Kendall v. Albia*, 73 Iowa 241, 34 N. W. 833; *Beringer v. Dubuque &c. R. Co.*, 118 Iowa 135, 91 N. W. 931; *Lewark v. Parkinson*, 73 Kans. 553, 85 Pac. 601, 5 L. R. A. (N. S.) 1069; *Blair v. Chicago &c. R. Co.*, 89 Mo. 334, 1 S. W. 367; *Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380; *Drogmund v. Metropolitan St. R. Co.*, 122 Mo. App. 154, 98 S. W. 1091; *Texas &c. R. Co. v. Short* (Tex. Civ. App.), 58 S. W. 56 (fact that nursing services were rendered by members of family should be alleged); *Missouri &c. R. Co. v. Holman*, 15 Tex. Civ. App. 16, 39 S. W. 130; *Crouse v. Chicago &c. R. Co.*, 102 Wis. 196, 78 N. W. 446, 778. But see *Chicago &c. R. Co. v. Johnson*, 24 Ill. App. 468; *Peoria &c. R. Co. v. Johns*, 43 Ill. App. 83; *Jones &c. Co. v.*

George, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285; *Chicago &c. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145; *Gibney v. St. Louis Trans. Co.*, 204 Mo. 704, 103 S. W. 43. Plaintiff cannot recover, as expenses incurred, the value of services of members of family in the absence of express agreement to pay therefor. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. 705; *Gibney v. St. Louis Transit Co.*, 204 Mo. 704, 103 S. W. 43.

⁹⁹ *Lawson v. Seattle &c. R. Co.*, 34 Wash 500, 76 Pac. 71. See also to this effect as to physician's services and the like, *Chicago &c. R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1; *Bowsher v. Chicago &c. R. Co.*, 113 Iowa 16, 84 N. W. 958; *Cudahay Packing Co. v. Broadbent*, 70 Kans. 535, 79 Pac. 126; *Brown v. White*, 202 Pa. St. 297, 51 Atl. 962, 58 L. R. A. 321n; *Houston &c. R. Co. v. Garcia* (Tex. Civ. App.), 90 S. W. 713; *Houston &c. R. Co. v. Pereira* (Tex. Civ. App.), 45 S. W. 767; *Contra St. Louis &c. R. Co. v. Stehl*, 87 Ark. 308, 112 S. W. 876; *Moran v. Dover &c. St. R. Co.*, 74 N. H. 500, 69 Atl. 884, 19 L. R. A. (N. S.) 920n.

nurse cannot recover for services on the basis of his wages in his ordinary occupation,¹ though he has left it temporarily to wait upon the injured person.² The injured person is required to use ordinary care in the selection of the physician to treat him, and where he does this the amount of his damages will not be diminished, though the jury may find that his recovery would have been hastened, and his sufferings alleviated had a more skillful treatment been prescribed.³ There is authority against recovery for the services of physicians not qualified to practice under the laws of the state.⁴ The reason for this conclusion is thus stated by one of the courts: "If it could have been shown, as the defendant attempted to prove, that the medical and surgical services rendered the plaintiff's daughter were performed in violation of law, by a person not qualified to render them, no liability would rest upon the plaintiff for their payment; and, if the party rendering such services could not recover their value from the plaintiff, he should not be permitted to recover it from the defendant, because it is not an expense actually incurred, and to hold the defendant liable for it would not be in the nature of compensation, but a gratuity."⁵

§ 2864 (1821). Mental suffering on account of injury to another.—As a general rule damages for mental suffering resulting from bodily injury are confined to the person so injured.⁶ They

¹ *Southern Pac. Co. v. Crowder*, 135 Ala. 417, 35 So. 335; *Salida v. McKinna*, 16 Colo. 523, 27 Pac. 810; *Bridger v. Asheville &c. R. Co.*, 27 S. Car. 456, 3 S. E. 860, 13 Am. St. 653.

² *Walker v. Philadelphia*, 195 Pa. St. 168, 45 Atl. 657, 78 Am. St. 801.

³ *Baker v. Barello*, 136 Cal. 160; 68 Pac. 591; *Chicago R. Co. v. Cooney*, 196 Ill. 466, 63 N. E. 1029, aff'g 95 Ill. App. 471; *Collins v. Council Bluffs*, 32 Iowa 329; *Baldwin v. Lincoln County*, 29 Wash. 509, 69 Pac. 1081; ante, §§ 2846, 2847.

⁴ *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752; *Chicago v. Honey*, 10 Ill. App. 535. But see *Golder v. Lund*, 50 Nebr. 867, 70 N. W. 379.

⁵ *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752. This is not, however, entirely free from doubt.

⁶ *Flemmington v. Smithers*, 2 C. & P. 292, 12 E. C. L. 131; *Hyatt v. Adams*, 16 Mich. 180; *Keyes v. Minneapolis &c. R. Co.*, 36 Minn. 290; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Pullman Car Co.*

cannot, ordinarily at least, be recovered for anxiety for the safety of another, such as that of a parent for the safety of his child,⁷ nor even for distress caused a parent by the physical injury to his child;⁸ nor for that of a husband for his wife.⁹

§ 2865 (1822). Injury to another—Parent and child—Husband and wife.—As shown in the last preceding section, mental suffering caused by anxiety or sympathy for another is not ordinarily an element of damages even where the relation of parent and child or husband and wife exists. But, a physical injury to one may also cause loss and injury to another, for which the latter may have a right of action. Thus, in addition to the action which a wife may have for injury to herself,¹⁰ the husband may have a right of action to recover for loss of service¹¹

v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96. See also Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72, and authorities cited in following notes:

⁷ Cleveland &c. R. Co. v. Stewart, 24 Ind. App. 374, 56 N. E. 917; Wyman v. Leavitt, 71 Maine 227, 36 Am. Rep. 303; Bucknam v. Great Northern R. Co., 76 Minn. 373, 79 N. W. 98; ante § 2860n, 171.

⁸ Black v. Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586; Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372; Cowden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633; Flemmington v. Smithers, 2 C. & P. 292, 12 E. C. L. 131; Long v. Chicago &c. R. Co., 15 Okla. 512, 86 Pac. 289, 6 L. R. A. (N. S.) 883, and note.

⁹ Hyatt v. Adams, 16 Mich. 180; Western &c. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. 772; Gulf &c. R. Co. v. Box, 81 Tex. 670, 17 S. W. 375.

¹⁰ See Fuller v. Naugatuck R.

Co., 21 Conn. 556; Baltimore City R. Co. v. Kemp, 61 Md. 74; McCauley v. Detroit United Ry., 167 Mich. 297, 133 N. W. 11; Chicago &c. R. Co. v. Krempel, 116 Ill. App. 253.

¹¹ Washington &c. R. Co. v. Hickey, 12 App. Cas. (D. C.) 259; Metropolitan St. R. Co. v. Johnson, 91 Ga. 466, 18 S. E. 816; Georgia R. &c. Co. v. Tice, 124 Ga. 459, 52 S. E. 916; Citizens St. R. Co. v. Twiname, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352; McDonald v. Chicago &c. R. Co., 26 Iowa 124, 96 Am. Dec. 114; Hopkins v. Atlantic &c. R. Co., 36 N. H. 9; Filer v. New York &c. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Gulf &c. R. Co. v. Younger, 90 Tex. 387, 38 S. W. 1121, 40 S. W. 423. And in many states for loss of society and companionship. Indianapolis &c. R. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936; Union Pac. R. Co. v. Jones, 21 Colo. 340, 345, 40 Pac. 891; 6 Thomp. Neg. (2d ed.) § 7341.

and the expense of medical attention and nursing,¹² where, as is generally the case, he is liable therefor.¹³ But he cannot recover for her personal suffering;¹⁴ nor for depriving him of prospective offspring.¹⁵ A parent may recover for loss of service caused by injury to his child,¹⁶ and for necessary medical ex-

¹² Hazard Powder Co. v. Volger, 58 Fed. 152; Birmingham So. R. Co. v. Lintner, 141 Ala. 420, 38 So. 363, 109 Am. St. 40; Union Pac. R. Co. v. Jones, 21 Colo. 340, 40 Pac. 891; Tuttle v. Chicago &c. R. Co., 42 Iowa 518; Northern Cent. R. Co. v. Mills, 61 Md. 355; Smith v. St. Joseph, 55 Mo. 456; Hawkins v. Front St. &c. R. Co., 3 Wash. St. 592, 28 Pac. 1021.

¹³ But, where she is in business for herself or the like under most of the modern statutes, and sole credit is given to her, she is the one to recover therefor. *Lacas v. Detroit R. Co.*, 92 Mich. 412, 52 N. W. 745; *Columbus v. Strassner*, 138 Ind. 301, 34 N. E. 5, 37 N. E. 719; *Atlantic &c. R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. 319; *Ashby v. Elsberry &c. Co.*, 111 Mo. App. 79, 85 S. W. 957; *Adams Exp. Co. v. Aldridge*, 20 Colo. App. 74, 77 Pac. 6. But compare *Pomereene Co. v. White*, 70 Nebr. 177, 98 N. W. 1040; *Kimmell v. Interurban R. Co.*, 87 N. Y. S. 466. See generally *Haynes v. North Carolina R. Co.*, 143 N. Car. 154, 55 S. E. 516, 9 L. R. A. (N. S.) 972n.

¹⁴ *Union Pac. R. Co. v. Jones*, 21 Colo. 340, 40 Pac. 891.

¹⁵ *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46. Nor can the husband re-

cover both the value of his wife's services and the sums paid to domestics who did her work in consequence of the injury. *Indianapolis &c. Rapid Transit Co. v. Reeder*, 42 Ind. App. 520, 85 N. E. 1042.

¹⁶ *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Brunke v. Missouri &c. Co.*, 112 Mo. App. 623, 87 S. W. 84; *Matthews v. Missouri &c. R. Co.*, 26 Mo. App. 75; *Jackson v. Pittsburgh &c. R. Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. 192; *Gilligan v. New York &c. R. Co.*, 1 E. D. Smith (N. Y.), 453, note in 48 Am. Dec. 622. See also *Lake Erie &c. R. Co. v. Chriss*, 57 Ind. App. 145, 105 N. E. 62. This is usually limited to a period not exceeding the minority of the child. *Traver v. Eighth Ave. R. Co.*, Abb. (N. Y.) 422; *Barnes v. Keene*, 132 N. Y. 13, 29 N. E. 1090. And the cost of maintenance and support should usually be deducted. *Benton v. Chicago &c. R. Co.*, 55 Iowa 496, 8 N. W. 330; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Morgan v. Southern Pac. R. Co.*, 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. 143; *St. Louis &c. R. Co. v. Freeman*, 36 Ark. 41. But see *Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380.

penses and nursing.¹⁷ It has also been held that he may recover for the future increased expense in bringing up the child caused by the injury.¹⁸ But, as shown in the last preceding section, he can not recover for mental suffering caused by such injury, although it has been held that the pain suffered by the child, in so far as it prevents the child from being of service to the parents, may be considered.¹⁹ The rule permitting the father to recover for loss of services during the minority of his child applies where, as is usually the case, the services and earnings belong to the father, and in such cases, the infant cannot, in most jurisdictions, recover for loss of such services prior to the commencement of the action,²⁰ nor during minority.²¹ But it has been held proper to allow the infant to recover for impairment of earning capacity after minority,²² and he may usually recover where he has been emancipated and is entitled to his own serv-

¹⁷ *Birmingham R. &c. Co. v. Chastain*, 158 Ala. 421, 48 So. 85; *Cuming v. Brooklyn R. Co.*, 109 N. Y. 95, 16 N. E. 65; *Devine v. New York City R. Co.*, 96 N. Y. S. 1058; *Jackson v. Pittsburgh &c. R. Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. 192; *Dennis v. Clark*, 56 Mass. 347, 48 Am. Dec. 671. See also *Elwood St. R. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535; *Houston &c. R. Co. v. Miller*, 49 Tex. 322; *Johnson v. St. Paul &c. Coal Co.*, 131 Wis. 627, 111 N. W. 722.

¹⁸ *Lang v. New York &c. R. Co.*, 51 Hun 603, 4 N. Y. S. 565.

¹⁹ *Walker v. Second Ave., R. Co.*, 27 N. Y. St. 961, 6 N. Y. S. 536.

²⁰ *Farrar v. Wheeler*, 145 Fed. 482; *Gulf &c. R. Co. v. Evanish*, 63 Tex. 54; *Wilder v. Great Western &c. Co.*, 134 Iowa 451, 109 N. W. 789; *Nemorofskie v. Interurban &c. Co.*, 87 N. Y. S. 463.

²¹ *St. Louis &c. R. Co. v. War-*

en, 65 Ark. 619, 48 S. W. 222; *Chicago &c. R. Co. v. Seaman*, 182 Ind. 370, 105 N. E. 234; *Chicago &c. R. Co. v. Krayenbuhl*, 65 Nebr. 889, 91 N. W. 880, 59 L. R. A. 920; *Houston &c. R. Co. v. Boozer*, 70 Tex. 530, 8 S. W. 119, 8 Am. St. 615; *Gulf &c. R. Co. v. Grisom*, 36 Tex. Civ. App. 630, 82 S. W. 671; *Comer v. W. M. Ritter Lumber Co.*, 59 W. Va. 688, 53 S. E. 906, 6 L. R. A. (N. S.) 552, and note.

²² *Schmitz v. St. Louis &c. R. Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250. See also *Murphy v. Ludowici Gas &c. Co.*, 96 Kans. 321, 150 Pac. 581. In most jurisdictions the infant sues by next friend and for his own pain and suffering. *Durkee v. Central Pac. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59; *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483n; *Wilton v. Middlesex R. Co.*, 125 Mass. 130.

ices and earnings,²³ or there has been a waiver of the right of the parent to such services.²⁴

§ 2866 (1823.) **Ejection of passengers.**—The measure of damages for the wrongful ejection of a passenger is usually such sum as would compensate him for all the consequences and injuries directly and naturally flowing from the wrongful act.²⁵ Among other things, damages may be recovered in a proper case for loss of time,²⁶ where its value is shown,²⁷ inconvenience,²⁸

²³ See *Pecos &c. R. Co. v. Blasingame*, 42 Tex. Civ. App. 66, 93 S. W. 187; *Berry v. Louisville &c. R. Co.*, 128 Ind. 484, 28 N. E. 182; *Wabash R. Co. v. McDoniels*, 183 Ind. 104, 107 N. E. 291; *Singer v. St. Louis &c. R. Co.*, 119 Mo. App. 112, 95 S. W. 944; *Swift & Co. v. Johnson*, 138 Fed. 867.

²⁴ *Chesapeake &c. R. Co. v. Davis*, 22 Ky. L. 1156, 60 S. W. 14; *Abeles v. Bransfield*, 19 Kans. 16. See also *Scott v. White*, 71 Ill. 287; *Aulger v. Badgley*, 29 Ill. App. 336; *Story &c. Co. v. Davy*, 68 Ind. App. 150, 119 N. E. 177. As to whether there is any right to recover for injuries to child before birth and who has such right, if any one, see *Buel v. United Rys. Co.*, 248 Mo. 126, 154 S. W. 71, Ann. Cas. 1914C, 613; *Prescott v. Robinson*, 74 N. H. 460, 69 Atl. 522, 124 Am. St. 987, 17 L. R. A. (N. S.) 594n.

²⁵ *Paddock v. Atchison &c. R. Co.*, 37 Fed. 841, 4 L. R. A. 231; *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Pennsylvania R. Co. v. Connell*, 127 Ill. 419, 20 N. E. 89; *Jeffersonville &c. R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276; *Arnold v. Atchison &c. R. Co.*, 81 Kans. 400, 105 Pac. 541; *Quigley v.*

Central Pac. R. Co., 11 Nev. 350, 21 Am. St. 757; *Baltimore &c. R. Co. v. Bambrey*, 2 Monag. (Pa.) 109, 16 Atl. 67.

²⁶ *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. St. 757; *Paddock v. Atchison &c. R. Co.*, 37 Fed. 841, 4 L. R. A. 231; *International &c. R. Co. v. Campbell*, 1 Tex. Civ. App. 509, 20 S. W. 845; *Du Laurans v. First Division &c. R. Co.*, 15 Minn. 49, 2 Am. Rep. 102; *Missouri &c. R. Co. v. Smith*, 6 Ind. Ter. 99, 89 S. W. 668.

²⁷ *Chicago &c. R. Co. v. Newburn*, 27 Okla. 9, 110 Pac. 1065, 30 L. R. A. (N. S.) 432n; *Gulf &c. R. Co. v. Daniels* (Tex. Civ. App.), 29 S. W. 426.

²⁸ *Proctor v. Southern Cal. R. Co.*, 130 Cal. 20, 62 Pac. 306; *Central R. &c. Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352; *Glover v. Atchison &c. R. Co.*, 129 Mo. App. 563, 108 S. W. 105; *Boehm v. Duluth &c. R. Co.*, 91 Wis. 592, 65 N. W. 506. But a person carried beyond his station while asleep, and ejected for refusal to pay fare, cannot recover compensation for inconvenience in having to walk back to the station in the dark. *Texas &c. R. Co. v. James*, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

exposure to the weather,²⁹ and indignity, humiliation and disgrace,⁸⁰ and this latter, in most jurisdictions, though the conductor acted in good faith in the matter,⁸¹ and, in many jurisdictions, though no physical injuries were actually inflicted.⁸²

²⁹ *Serwe v. Northern Pac. R. Co.*, 48 Minn. 78, 50 N. W. 1021; *Cross v. Kansas City &c. R. Co.*, 56 Mo. App. 664; See also *Lake Erie &c. R. Co. v. Close*, 5 Ind. App. 444, 32 N. E. 588. But not so where the exposure was unnecessary on his part. *Galveston &c. R. Co. v. Turner* (Tex. Civ. App.), 23 S. W. 83; *Ohio &c. R. Co. v. Burrow*, 32 Ill. App. 161; *Louisville &c. R. Co. v. Fleming*, 82 Tenn. 128. Compare also *Caher v. Grand Trunk R. Co.*, 75 N. H. 125, 71 Atl. 225. See as to ejection of sick passenger, *Birmingham R. &c. Co. v. Turner*, 154 Ala. 542, 45 So. 671; *Pennsylvania R. Co. v. Palmer*, 127 Fed. 956. Where a passenger takes cold as a result of wrongful ejection on a rainy night this is an element of damages. *Davis v. Lusk* (Mo. App.), 190 S. W. 362.

⁸⁰ *McGhee v. Cashin* (Ala.), 40 So. 63; *St. Louis &c. R. Co. v. Brown*, 97 Ark. 505, 134 S. W. 1194; *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 31 Pac. 112, 33 Am. St. 157; *Sloane v. Southern Cal. &c. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Bleecker v. Colorado &c. R. Co.*, 50 Colo. 140, 114 Pac. 481, 33 L. R. A. (N. S.) 386n; *Chicago &c. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Chicago &c. R. Co. v. Chisholm*, 79 Ill. 584; *Chicago &c. R. Co. v. Adams*, 60 Ill. App. 571; *Lake Erie &c. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Chi-*

cago &c. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837; *Chicago &c. R. Co. v. Conley*, 6 Ind. App. 9, 32 N. E. 96, 865; *Louisville &c. R. Co. v. Goben*, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890; *Curtis v. Sioux City &c. R. Co.*, 87 Iowa 622, 54 N. W. 339; *Louisville &c. R. Co. v. Wilsey*, 11 Ky. L. 419, 12 S. W. 275; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. 589; *Harding v. New York &c. R. Co.*, 36 Hun (N. Y.), 72; *Smith v. Pittsburgh &c. R. Co.*, 23 Ohio St. 10; *Hays v. Houston &c. R. Co.*, 46 Tex. 272; *International &c. R. Co. v. Leak*, 64 Tex. 654; *Gulf &c. R. Co. v. Moody* (Tex. Civ. App.) 30 S. W. 574; *Wilson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146.

⁸¹ *Southern Kansas R. Co. v. Hinsdale*, 38 Kans. 507, 16 Pac. 937; *Wilson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146; *Lake Erie &c. R. Co. v. Arnold*, 8 Ind. App. 297, 34 N. E. 742. But see *Georgia R. Co. v. Homer*, 73 Ga. 251; *Glover v. Atchison &c. R. Co.*, 129 Mo. App. 563, 108 S. W. 105.

⁸² *Mabry v. City Electric R. Co.*, 116 Ga. 624, 42 S. E. 1025, 59 L. R. A. 590; *Georgia R. & Elec. Co. v. Baker*, 120 Ga. 991, 48 S. E. 355; *Cleveland &c. R. Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. 245; *Boling v. St. Louis*

Neither is it essential that the indignity occur in the presence of a number of people. It has been held enough that only the trainmen were present.³³ On the question of the extent of injury to the feelings of a passenger, it has been held that the jury may consider his professional standing, but cannot allow anything for injury to his business or professional reputation.³⁴ A passenger is not entitled to recover for injury to his feelings where he entered the train for the purpose of being ejected and then to sue for damages.³⁵ And if the passenger obstinately refuses to pay an additional fare, wrongfully demanded, when he is able to do so, but insists upon being expelled from the train, it has been held that the jury may take into consideration that fact in mitigation of damages, and disallow any compensation for wounded feelings, although the conductor may have been mistaken in his action.³⁶ The passenger may also recover, in many jurisdictions for the damages occasioned to his person by his making a reasonable resistance to prevent his removal.³⁷ Where

&c. R. Co., 189 Mo. 219, 88 S. W. 35; *Breen v. St. Louis Transit Co.*, 108 Mo. App. 443, 83 S. W. 998; *Missouri &c. R. Co. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327; *Missouri &c. R. Co. v. Tarwater*, 33 Tex. Civ. App. 116, 75 S. W. 937; *International &c. R. Co. v. Henderson* (Tex. Civ. App.), 82 S. W. 1065. So held where there was merely a threat to eject in the presence of others because of alleged worthlessness of a good check. *Austro-Am. S. S. Co. v. Thomas*, 248 Fed. 231, L. R. A. 1918D, 873, and note.

³³ *Kansas City &c. R. Co. v. Little*, 66 Kans. 378, 71 Pac. 820, 61 L. R. A. 122, 97 Am. St. 376.

³⁴ *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195, 61 N. W. 834; *Proctor v. Southern Cal. R. Co.*, 130 Cal. 20, 62 Pac. 306.

³⁵ *St. Louis &c. R. Co. v. Trimble*, 54 Ark. 354, 15 S. W. 899.

³⁶ *Gibson v. East Tennessee &c. R. Co.*, 30 Fed. 904; *Hall v. Memphis &c. R. Co.*, 15 Fed. 57.

³⁷ *Louisville &c. R. Co. v. Wolfe*, 128 Ind. 347, 27 N. E. 606, 25 Am. St. 436; *English v. Delaware &c. Co.*, 66 N. Y. 454, 23 Am. Rep. 69; *Southern Kans &c. R. Co. v. Rice*, 38 Kans. 398, 16 Pac. 817, 5 Am. St. 766; *Lake Erie &c. R. Co. v. Acres*, 108 Ind. 548, 9 N. E. 453; *Chicago &c. R. Co. v. Holdridge*, 118 Ind. 281, 20 N. E. 837. See also *Camden &c. R. Co. v. Frazier*, 30 Ky. L. 186, 97 S. W. 776; *Sprenger v. Tacoma Trac Co.*, 15 Wash. 660, 47 Pac. 17, 43 L. R. A. 706. But, as elsewhere shown, there is some conflict upon the general subject in certain cases. See ante, §§ 2417, 2486, 2487, also *Morrill v. Minne-*

his ticket is wrongfully taken away from him at the time, he may recover the cost of a ticket from the point where he was expelled to his destination.³⁸ It is always essential to a recovery in this class of actions, that the damage should have been the proximate result of the wrongful ejection.³⁹ On the ground of remoteness, it has been held improper to allow an ejected passenger damages for the loss of a job of work, caused by delay due to his wrongful ejection.⁴⁰ For a similar reason it has been held that the jury should not take into consideration the fact that a passenger was compelled to borrow money to pay an illegal fare demanded by the conductor, to avoid being put off the train.⁴¹ It has been held, however, where the passenger was wrongfully ejected and his baggage carried to the destination called for by his ticket, leaving him without a change of clothing, by reason of which he was compelled to buy others, that he was entitled to have the jury take into consideration the inconvenience and discomfort caused, as well as the pecuniary loss, although not the cost of other clothing purchased.⁴² So, in some cases the courts have gone very far in holding various items of damages in such cases a proximate result of the ejection.⁴³ Within the rules heretofore considered,⁴⁴ exemplary damages are recoverable

apolis St. R. Co., 103 Minn. 362, 115 N. W. 395, 123 Am. St. 341.

³⁸ Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; Arnold v. Atchison & C. R. Co., 81 Kans. 400, 105 Pac. 541. As to whether value of unused portion of ticket is recoverable compare Pierson v. Illinois Cent. R. Co., 159 Mich. 110, 123 N. W. 576, with St. Louis & C. R. Co. v. McAnellia (Tex. Civ. App.), 110 S. W. 936.

³⁹ Ohio & C. R. Co. v. Burrow, 32 Ill. App. 161; Caher v. Grand Trunk R. Co., 75 N. H. 125, 71 Atl. 225.

⁴⁰ See for judgment held excessive: Cleveland & C. R. Co. v. Quillen, 22 Ind. App. 496, 53 N. E. 1024. But compare Cleveland & C. R. Co.

v. Beckett, 11 Ind. App. 547, 39 N. E. 429; Carsten v. Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. 589.

⁴¹ Hoffman v. Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312.

⁴² Proctor v. Southern Cal. R. Co., 130 Cal. 20, 62 Pac. 306.

⁴³ Cincinnati & C. R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179. See Lake Erie & C. R. Co. v. Close, 5 Ind. App. 444, 32 N. E. 588; Brown v. Chicago & C. R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41. But compare Texas & C. R. Co. v. Cole, 66 Tex. 562, 1 S. W. 562, 27 Am. & Eng. R. Cas. 144; Lewis v. Flint & C. R. Co., 54 Mich. 55, 18 Am. & Eng. R. Cas. 263.

⁴⁴ Ante, §§ 2843, 2844.

where the expulsion is accompanied by cruelty, wantonness and willfulness.⁴⁵ It seems hardly necessary to add that they are not to be allowed where the passenger has been ejected without malice or willfulness, by a mere mistake on the part of the conductor,⁴⁶ particularly where the passenger does nothing to show the conductor his mistake,⁴⁷ but, as elsewhere shown, there is considerable conflict upon the general subject.

§ 2867 (1824). Interest.—It is well settled that in the absence of a statute to the contrary no interest, before verdict or judgment, can be included in the recovery for personal injuries.⁴⁸

⁴⁵ *Kansas City &c. R. Co. v. Little*, 66 Kans. 378, 71 Pac. 820, 61 L. R. A. 122, 97 Am. St. 376; *Lexington R. Co. v. O'Brien*, 27 Ky. L. 336, 84 S. W. 1170; *Louisville &c. R. Co. v. Gobon*, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890; *Berger v. Chicago &c. R. Co.*, 97 Mo. App. 127, 71 S. W. 102; *Sommerfield v. St. Louis Transit Co.*, 108 Mo. App. 718, 84 S. W. 172; *Rose v. Wilmington &c. R. Co.*, 106 N. Car. 168, 11 S. E. 526; *Richardson v. Atlantic Coast Line R. Co.*, 71 S. Car. 444, 51 S. E. 261; *Choctaw &c. R. Co. v. Hill*, 110 Tenn. 396, 75 S. W. 963; *Denison &c. R. Co. v. Randall*, 29 Tex. Civ. App. 460, 69 S. W. 1013; *Patry v. Chicago &c. R. Co.*, 77 Wis. 218, 46 N. W. 56. See also *Georgia R. &c. Co. v. Baker*, 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. 246, 5 Ann. Cas. 484; *Illinois Cent. R. Co. v. Reid*, 93 Miss. 458, 46 So. 146, 17 L. R. A. (N. S.) 344n; *Smith v. Southern R. Co.*, 88 S. Car. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708; note in L. R. A. 1915C, 146. See as to liability of receiver for exemplary damages,

Gardner v. Martin, 123 Miss. 218, 85 So. 182, 10 A. L. R. 1054, and note.

⁴⁶ *Hoffman v. Northern &c. R. Co.*, 45 Minn. 53, 47 N. W. 312. See also *Little Rock R. &c. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97N, 10 Ann. Cas. 273; *Louisville &c. R. Co. v. Summers*, 133 Ky. 684, 118 S. W. 926; *Pine v. St. Paul City R. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347; *Eddy v. Syracuse Rapid-Transit Co.*, 50 App. Div. 109, 63 N. Y. S. 645. But compare *Calloway v. Mellett*, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. 238; *Laird v. Pittsburgh Trac. Co.*, 166 Pa. St. 4, 31 Atl. 51.

⁴⁷ *Georgia R. &c. Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. 490.

⁴⁸ *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684; *Western &c. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320; *Pittsburgh &c. R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580; *Louisville &c. R. Co. v. Wallace*, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548; *Emerson v. Schoonmaker*, 135 Pa. St. 437, 19 Atl. 1025.

The cases of loss of property—in which interest may be included—cannot apply in cases of personal injury. As pointed out by one court, a personal injury “does not cease when inflicted and is not susceptible to definite and accurate compensation. It never creates a debt or becomes one until it is judicially ascertained and determined. Only from that time can it draw interest.”⁴⁹ Another court has said: “To add interest to discretionary damages is to multiply uncertainty by certainty, the indefinite by the definite, a mixture of incongruous elements which subjects one of the parties to the burden, and gives the other the benefit of both kinds.”⁵⁰ But the jury has been allowed in some jurisdictions at least, to take into consideration the length of time that has elapsed since the injury, and allow a sum for this, not as interest, but as compensation for the delay.⁵¹

§ 2868 (1825). **Amount of damages—Whether excessive.**—The jury may not allow damages in excess of the amount demanded by the plaintiff,⁵² and this, it seems, will be the case though evidence, admitted without objection, fixes the damages

⁴⁹ *Louisville &c. R. Co. v. Wallace*, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548. See also to same effect *Cochran v. City of Boston*, 211 Mass. 171, 97 N. E. 1100, 39 L. R. A. (N. S.) 120, Ann. Cas. 1913B, 206, and note.

⁵⁰ *Western &c. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320.

⁵¹ *Emerson v. Schoonmaker*, 135 Pa. St. 437, 19 Atl. 1025; *Richards v. Natural Gas Co.*, 130 Pa. St. 37, 18 Atl. 600; *Clement v. Speer*, 56 Vt. 401; *Reading &c. R. Co. v. Balthaser*, 126 Pa. St. 1, 17 Atl. 518; *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94.

⁵² *Griffin v. Witherspoon*, 8 Ga. 113; *Stephens v. Sweeney*, 7 Ill. 375; *Winslow v. People*, 117 Ill. 152, 7 N. E. 135; *Johnson v. Hawkins*, 2

Blackf. (Ind.) 459; *Blue Grass Trac. Co. v. Ingles*, 140 Ky. 488, 131 S. W. 278 (recovery of medical expenses limited to amount demanded therefor in complaint); *Campbell v. Hancock*, 26 Tenn. 75; *Texas Short Line R. Co. v. Patton* (Tex. Civ. App.), 96 S. W. 774 (no recovery for medical expenses in excess of amount demanded in the pleadings). As to amount and measure of damages, how apportioned, etc., under Federal Employers' Liability Act, see *McLain v. Chicago &c. R. Co.*, 140 Minn. 35; 167 N. W. 349, 12 A. L. R. 688, and note on p. 712, et seq.; *Sweat v. Hines* (Nebr.), 184 N. W. 927. As to damages to estate in case of death, see notes in 7 A. L. R. 1306, 1310, 1314-1355.

at a larger amount.⁵³ Within the amount as laid, however, the jury may award damages in excess of the amount testified to by the plaintiff if there is other evidence in the case to sustain their award.⁵⁴ But if the plaintiff makes it clear that he claims nothing for a certain element of damages pleaded, then a charge by the court authorizing a recovery for this element is clearly erroneous, and a verdict indicating that the element was allowed should be set aside.⁵⁵ The determination of the amount of the damages is a matter for the jury, under the court's instructions, subject generally, however, to the right of the court to set aside the verdict where it is clearly against the evidence, or the amount is so large, or so small, as to indicate the jury were influenced by passion, bias, or prejudice in making their award.⁵⁶ On the question of this power of the court, Chancellor Kent has said:

⁵³ *Galveston &c. R. Co. v. Eckles*, 25 Tex. Civ. App. 179, 60 S. W. 830. But a complaint might be deemed amended on appeal.

⁵⁴ *Illinois Cent. R. Co. v. Abernathey*, 106 Tenn. 722, 64 S. W. 3; *Borneman v. Chicago &c. R. Co.*, 19 S. Dak. 459, 104 N. W. 208; *Einolf v. Thompson*, 95 Minn. 230, 103 N. W. 1026, 104 N. W. 547. In some jurisdictions the complaint could probably be amended to conform to the proof.

⁵⁵ *Southern R. Co. v. Clariday*, 120 Ga. 465, 47 S. E. 901. See also *Simeone v. Lindsay*, 6 Pen. (Del.) 224, 65 Atl. 778; *Blue Grass Trac. Co. v. Ingles*, 140 Ky. 488, 131 S. W. 278. Possibly in many jurisdictions the error might be cured by remittitur.

⁵⁶ *Ross v. Texas &c. R. Co.*, 44 Fed. 44; *Mobile &c. R. Co. v. Ashcraft*, 48 Ala. 15; *Clare v. Sacramento Elec. &c. R. Co.*, 122 Cal. 504, 55 Pac. 326; *East St. Louis &c. R. Co. v. Frazier*, 26 Ill. App. 437; *Par-*

sons &c. R. Co. v. Montgomery, 46 Kans. 120, 26 Pac. 403; *Danville &c. R. Co. v. Stewart*, 2 Met. (Ky.) 122; *Kimball v. Bath*, 38 Maine 222; *Lang v. New York &c. R. Co.*, 51 Hun 603; 4 N. Y. S. 565, 22 N. Y. St. 110; *Jones v. New York &c. R. Co.*, 99 App. Div. 1, 90 N. Y. S. 422; *St. Louis &c. R. Co. v. McClain*, 80 Tex. 85, 15 S. W. 789; *Gulf &c. R. Co. v. Necco (Tex.)*, 15 S. W. 1102; *St. Louis &c. R. Co. v. Berry (Tex. Civ. App.)*, 15 S. W. 48; *Houston &c. R. Co. v. Batchler*, 37 Tex. Civ. App. 116, 83 S. W. 902. In order to induce the appellate court to interfere it must usually be so excessive as to strike one at first blush as outrageous and to indicate that it is the result of passion, prejudice or the like. See further on the general subject. *Wellman v. Metropolitan St. R. Co.*, 219 Mo. 126, 118 S. W. 31; *Lewis v. Northern Pac. R. Co.*, 36 Mont. 207, 92 Pac. 469; *Texas &c. R. Co. v. Matkin (Tex. Civ. App.)*, 142 S. W. 604.

"The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partially, or corruption, we cannot consistently with the precedents, interfere with the verdict. It is not enough to say that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury and not the judgment of the court which is to assess the damages in actions for personal torts and injuries."⁶⁷ Generally, the question whether the damages were excessive will not be considered in the appellate court unless it has been assigned as a ground for a new trial in the court below. The reason for this rule is that the court below should be given an opportunity to correct its own errors.⁶⁸

§ 2869 (1826). Excessive damages—Judgments or verdicts held excessive.—Although courts are very slow to interfere with verdicts or judgments in personal injury cases on the ground of excessive damages, yet there are many decided cases in which judgments were reversed or the amount reduced on that ground. So much must depend, however, on the earning capacity of the injured person, permanency of the injury, and other circumstances of the particular case, as well as the particular part of the body injured or particular kind of injury, that it would be of little advantage, and might be misleading, to undertake to state the amounts held excessive for particular injuries. Cases

⁶⁷ *Coleman v. Southwick*, 9 Johns (N. Y.) 45, 6 Am. Dec. 253. See also *Goshen v. Alford*, 154 Ind. 58, 55 N. E. 27; *Terre Haute & C. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434.

⁶⁸ *Wilson v. Everett*, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. ed. 286; *St. Louis & C. R. Co. v. Cantrell*, 37 Ark. 519; *Elliott App. Proc.* §§ 828, 855,

856; 6 *Thomp. Neg.* (2d ed.) § 7349. Many cases relating to the power of appellate courts to grant new trials for excessive damages, and showing amounts held excessive, are cited in the note to *Burdick v. Missouri Pac. R. Co.*, 123 Mo. 221, 27 S. W. 453, 45 Am. St. 528, 26 L. R. A. 384, 391.

in which the amounts were held excessive, however, are cited below.⁵⁹

§ 2870 (1827). **Excessive damages—Judgments or verdicts held not excessive.**—Verdicts and judgments for thousands of dollars have been upheld in many cases of personal injury. Thus, an award of twenty-five or thirty thousand dollars, and even more, for permanent injuries of certain kinds, especially where the former earning capacity was very great and was practically destroyed by the injury, has been held not to be so excessive as to require the interference of the court, particularly upon appeal.⁶⁰ So, verdicts of from ten to twenty-five thousand dollars have been upheld in many instances,⁶¹ in some of which the per-

⁵⁹ Wood v. Louisville &c. R. Co., 88 Fed. 44; Missouri Pac. R. Co. v. Dwyer, 36 Kans. 58, 12 Pac. 352; Chicago &c. R. Co. v. McAra, 52 Ill. 296; Standard Oil Co. v. Tierney, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. 595, and note where many cases are reviewed in which damages were held excessive and many in which the court refused to interfere, the nature of the injury and amount in each case being briefly stated; Gahagan v. Aerometer Co., 67 Minn. 252, 69 N. W. 914; Hurt v. St. Louis &c. R. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. 374; Becker v. Albany R. Co., 35 App. Div. 46, 54 N. Y. S. 395, 5 Am. Neg. 231, where many other cases are referred to in the note; Waterman v. Chicago &c. R. Co., 82 Wis. 613, 52 N. W. 247, 1136. See also Missouri &c. Ry. Co. v. Smith (Tex. Civ. App.), 172 S. W. 750; Galveston H. &c. R. Co. v. Kellogg (Tex. Civ. App.), 172 S. W. 180, and illustrative cases in 6 Thomp. Neg. (2d ed.) §§ 7354, 7355, and Whites Supp.

§ 7363; note in L. R. A. 1915F, 30.

⁶⁰ Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 Pac. 513; Chicago &c. R. Co. v. Holland, 18 Ill. App. 418; Hall v. Chicago &c. R. Co., 46 Minn. 439, 49 N. W. 239; McMahon v. Illinois Cent. R. Co., 127 Minn. 1, 148 N. W. 446; Harold v. New York &c. R. Co., 24 Hun (N. Y.) 184; Alberti v. New York &c. R. Co., 43 Hun (N. Y.) 421; Dieffenbach v. New York &c. R. Co., 5 App. Div. 91, 38 N. Y. S. 788; Ehr Gott v. Mayor, 96 N. Y. 264; Ehrman v. Brooklyn R. Co., 38 N. Y. St. 990, 14 N. Y. S. 336.

⁶¹ Illinois &c. R. Co. v. Cheek, 152 Ind. 663, 53 N. E. 641; Terre Haute &c. R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434; Shaw v. Boston &c. R. Co., 8 Gray (Mass.) 45; Louisville &c. R. Co. v. Thompson, 64 Miss. 584, 1 So. 840; John v. Northern Pac. R. Co., 42 Mont. 18, 111 Pac. 632, 32 L. R. A. (N. S.) 85; Solen v. Virginia &c. R. Co., 13 Nev. 106; Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Chicago &c. R. Co. v.

manent injury was merely the loss of a limb.⁶² Many instances of comparatively large verdicts upheld for somewhat minor injuries will be found in the cases cited below.⁶³ It is also held that the increase in the cost of living and decrease in the purchasing power of money now and recently should be considered and may result in a verdict being upheld where it would have been held excessive years ago.⁶⁴

§ 2871 (1828). *Remittitur*.—The practice is very general, in cases where there is no other error than an excess of damages due to a misapprehension of the law or facts on the part of the jury, for the court to require a remission of the amount regarded by it as excessive as a condition to allowing the verdict or judgment to stand. And this seems a very proper proceeding where the amount of the excess can be reasonably estimated and it is apparent that no injury can be done the parties by such action.⁶⁴

De Vore, 43 Okla. 534, 143 Pac. 864, L. R. A. 1915F, 21n, citing numerous other cases; *Missouri &c. R. Co. v. Chambers*, 17 Tex. Civ. App. 487, 43 S. W. 1090; *Johnson v. Union Pac. R. Co.*, 35 Utah 285, 100 Pac. 390.

⁶² *Lee v. Southern Pac. R. Co.*, 101 Cal. 118, 35 Pac. 572; *Chicago &c. R. Co. v. Wilcox*, 33 Ill. App. 450; *Louisville &c. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Ketcham v. Texas &c. R. Co.*, 38 La. Ann. 777; *White v. Chicago &c. R. Co.*, 49 Mont. 419, 143 Pac. 561; *Galveston &c. R. Co. v. Hynes*, 21 Tex. Civ. App. 34, 50 S. W. 624, 6 Am. Neg. 208; *Southern R. Co. v. Smith*, 107 Va. 553, 59 S. E. 372.

⁶³ *Central R. &c. Co. v. Ryles*, 84 Ga. 420, 11 S. E. 499; *Georgia R. &c. Co. v. Keating*, 99 Ga. 300, 25 S. E. 669; (\$9,000 for loss of foot); *Lake Shore &c. R. Co. v. Hundt*, 41 Ill. App. 220; *Murtaugh v. New*

York &c. R. Co., 49 Hun 456, 3 N. Y. S. 483; (\$6,000 for loss of three fingers); *Missouri &c. R. Co. v. Huff* (Tex. Civ. App.), 32 S. W. 551; *San Antonio &c. R. Co. v. Beauchamp*, 54 Tex. Civ. App. 123, 116 S. W. 1163; *Baltzer v. Chicago &c. R. Co.*, 89 Wis. 257, 60 N. W. 716. Many cases of verdicts held not excessive are reviewed in *Henderson v. Kansas City*, 177 Mo. 477, 76 S. W. 1045, 1048; also in note in 14 L. R. A. 677, and in L. R. A. 1915F, 30, and in 8 Am. & Eng. Ency. of Law (2d ed.), 631, and in 6 Thomp. Neg. (2d ed.) § 7353.

^{63a} *Noyes v. Des Moines Club*, 186 Iowa 378, 170 N. W. 466, 3 A. L. R. 605, and note; *Hurst v. Chicago &c. R. Co.*, 280 Mo. 566, 219 S. W. 566, 10 A. L. R. 194, and note. See also *Philadelphia &c. R. Co. v. McKibben*, 259 Fed. 476.

⁶⁴ *Southern Pac. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710; *Gila*

But it is held by many courts that a remittitur will not cure the error where the damages are so excessive as to be accounted for only on the ground of passion or prejudice on the part of the jury. Where this is the case the court cannot tell whether or not this passion or prejudice did not enter into the finding of other material facts in the case, if not to the entire issue involved.⁶⁵ So where improper evidence has been admitted and must have influenced the jury in assessing the damages, and there is no way of telling what damages were allowed on account thereof, the error cannot be cured remitting a portion of the damages.⁶⁶ It goes without saying, however, that a remittitur of a part of the damages will be allowed where it is offered voluntarily by the successful party.⁶⁷ So, there are many cases in which trial

Valley &c. R. Co. v. Hall, 13 Ariz. 270, 112 Pac. 845; Florida R. &c. Co. v. Webster, 25 Fla. 394, 5 So. 714; Amann v. Chicago Consol. Trac. Co., 243 Ill. 263, 90 N. E. 673; Chicago &c. R. Co. v. Hogan, 56 Ill. App. 577; Wichita &c. R. Co. v. Gibbs, 47 Kans. 274, 27 Pac. 991; Smith v. Wabash &c. R. Co., 92 Mo. 359, 4 S. W. 129, 1 Am. St. 729; Smoot v. Kansas City, 194 Mo. 513, 92 S. W. 363; Holmes v. Atchison &c. R. Co., 48 Mo. App. 79; Omaha &c. R. Co. v. Ryburn, 40 Nebr. 87, 58 N. W. 541; Cleveland &c. R. Co. v. Himrod Furnace Co., 37 Ohio St. 434; International &c. R. Co. v. Sampson (Tex. Civ. App.), 64 S. W. 692; Lynch v. Burns (Tex. Civ. App.), 79 S. W. 1084; St. Louis &c. R. Co. v. Haynes (Tex. Civ. App.), 86 S. W. 934; Chicago &c. R. Co. v. Rhodes, 35 Tex. Civ. App. 432, 80 S. W. 869

⁶⁵ Southern Pac. Co. v. Fitchett, 9 Ariz. 128, 80 Pac. 359; Tunnell Min. &c. Co. v. Cooper, 50 Colo. 390, 115 Pac. 901, 39 L. R. A. (N. S.) 1064n, Ann. Cas. 1912C, 504 and note; Sea-

board &c. R. Co. v. Randolph, 129 Ga. 796, 59 S. E. 1110; Loewenthal v. Streng, 90 Ill. 74; West Chicago St. R. Co. v. Krueger, 68 Ill. App. 450; Pittsburg &c. R. Co. v. Story, 104 Ill. App. 132; Steinbuchel v. Wright, 43 Kans. 307, 23 Pac. 560; Atchison &c. R. Co. v. Dwelle, 44 Kans. 394, 24 Pac. 500; Atchison &c. R. Co. v. Plaskett, 47 Kans. 107, 26 Pac. 401; Kopp v. Northern Pac. R. Co., 41 Minn. 310, 43 N. W. 73; Chitty v. St. Louis &c. R. Co., 148 Mo. 64, 49 S. W. 868; Fremont &c. R. Co. v. French, 48 Nebr. 638, 67 N. W. 472; Schultz v. Chicago &c. R. Co., 48 Wis. 375, 4 N. W. 399.

⁶⁶ Oldfather v. Zent, 14 Ind. App. 89, 41 N. E. 555. See also Terre Haute &c. R. Co. v. Jarvis, 9 Ind. App. 438, 432, 39 N. E. 774; Elliott App. Proc. § 571; Farrar v. Wheeler, 145 Fed. 482. See also Hughes v. Chicago &c. R. Co., 150 Iowa 232, 129 N. W. 956. But compare Amann v. Chicago Consol. Trac. Co., 243 Ill. 263, 90 N. E. 673.

⁶⁷ Hinson v. Williamson, 74 Ala. 132; Walker v. Fuller, 29 Ark. 448;

courts have been upheld in ordering a remittitur or permitting a verdict to stand upon condition that a certain amount be remitted, and in some of them there was certainly no way of telling that the jury were not influenced by prejudice and passion.⁶⁸ And in some cases the order has been made by the court on appeal.⁶⁹

Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; *Macon &c. R. Co. v. Stewart*, 125 Ga. 88, 54 S. E. 197; *Louisville &c. R. Co. v. Harlan*, 31 Ill. App. 544; *Chicago &c. R. Co. v. Grimes*, 71 Ill. App. 397; *Rose v. Des Moines Val. R. Co.*, 39 Iowa 246; *McCoy v. Treichler*, 90 Iowa 1, 57 N. W. 631; *Attrill v. Patterson*, 58 Md. 226; *Kimes v. St. Louis &c. Co.*, 85 Mo. 611; *Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380; *Cross v. Wilkins*, 43 N. H. 332; *San Antonio &c. R. Co. v. Kniffen*, 4 Tex. Civ. App. 484, 23 S. W. 457.

⁶⁸ *Cleveland &c. R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. 429. Other cases in which the trial court was upheld, are: *Goshen v. Alford*, 154 Ind. 58, 55 N. E. 27; *Little Rock &c. R. Co. v. Barker*, 39 Ark. 491 (but see vigorous dissenting opinion); *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52; *Chicago &c. R. Co. v. Des Launers*, 40 Ill. App. 654; *Tucker v. Hyatt*, 151 Ind. 332, 51 N. E. 469; *Hall v. Chicago &c. R. Co.*, 46 Minn. 439, 49 N. W. 239; *Sorenson v. Oregon &c. Co.*, 47 Ore. 24, 82 Pac. 10; *Brown v. Southern Pac. R. Co.*, 7 Utah 288, 26 Pac. 579.

⁶⁹ *St. Louis &c. R. Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886; *Kinsey v. Wallace*, 36 Cal. 462; *Lombard v. Chicago &c. R. Co.*, 47 Iowa 494; *Peyton v. Texas &c. R. Co.*, 41 La. Ann. 861, 6 So. 690, 17 Am. St. 430;

Stafford v. Adams, 113 Mo. App. 717, 88 S. W. 1130; *Kennon v. Gilmer*, 5 Mont. 251, 5 Pac. 847; *Murray v. Hudson &c. R. Co.*, 47 Barb. (N. Y.) 196; *St. Louis &c. R. Co. v. Foster* (Tex. Civ. App.), 89 S. W. 450. See *Chicago &c. R. Co. v. Brown*, 157 Ind. 544, 60 N. E. 346, and numerous cases pro and con reviewed in note in 26 L. R. A. 384, also *St. Louis &c. R. Co. v. Brown*, 100 Ark. 107, 140 S. W. 279; *Clifton v. Kansas City &c. R. Co.*, 232 Mo. 708, 135 S. W. 40; *Doyle v. Southern Pac. Co.*, 56 Ore. 495, 108 Pac. 201. But, where damages are unliquidated and there is no way of determining that the jury were not influenced by prejudice or passion and no way of separating the illegal part from the other or the like, it seems to us that, on principle at least, it is very doubtful whether a court, and especially an appellate court, has any right to order a remittitur and overrule a motion for a new trial or affirm a judgment on such condition. See authorities cited in first note to this section; also, *Potter v. Chicago &c. R. Co.*, 22 Wis. 615; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110; *Duke v. St. Louis &c. R. Co.*, 172 Fed. 684; *St. Louis R. Co. v. Mathis*, 76 Ark. 184, 91 S. W. 763, 113 Am. St. 85; *Gurley v. Missouri Pac.*

§ 2872. **Inadequacy of damages.**—The verdict of a jury in a personal injury case is very seldom set aside or interfered with on the sole ground of inadequacy of damages.⁷⁰ But where the award is so small and grossly inadequate as to indicate prejudice, improper motives, or disregard of instructions, or the like, the verdict will generally be set aside in most jurisdictions and a new trial granted.⁷¹

R. Co., 104 Mo. 211, 16 S. W. 11; Smoot v. Kansas City, 194 Mo. 513, 92 S. W. 363; Pendleton St. R. Co. v. Rahmann, 22 Ohio St. 446; Hanson v. Henderson, 20 S. Dak. 456, 107 N. W. 670; Nashville &c. R. Co. v. Foster, 10 Lea (Tenn.), 351. See generally Elliotts App. Proc. §§ 570-572. In Galveston &c. Ry. Co. v. Kellogg (Tex. Civ. App.), 172 S. W. 180, it is held that while court may often correct an excessive verdict and judgment by requiring a remittitur an appellate court should not do so and affirm the judgment where the excess is so gross as to indicate passion or prejudice and the evidence is unsatisfactory.

⁷⁰ Montgomery Light & Trac. Co. v. King, 187 Ala. 619, 65 So. 998, L. R. A. 1915F, 491n, Ann. Cas. 1916B, 449n; Boggess v. Metropolitan St. R. Co., 118 Mo. 328, 23 S. W. 159, 24 S. W. 210; Blakely v. Omaha &c. St. R. Co., 94 Nebr. 119, 142 N. W. 525. See also as to where damages assessed are so small as to make the verdict contrary to law or not sustained by the evidence, F. & B. Livery Co. v. Indianapolis Trac. &c. Co. (Ind. App.), 124 N. E. 493; Paxton v. Dean, 31 Ind. App. 46, 48, 50; Rossi v. Jewell &c. Co. (Ky.), 163 S. W. 220; Ellsworth v. City of Fairbury

(Nebr.), 60 N. W. 336; Miller v. Delaware &c. R. Co., 28 N. J. L. 428, 33 Atl. 950. The doctrine of the above cases is supported by English cases and there is considerable reason for it at least where the damages are not merely general, such as for pain and suffering, but are more specific and can be approximately measured and determined by the court under the evidence. See also Bailey v. City of Cincinnati (Ohio), 1 Handly's Rep. 438, 439; Landneier v. Cincinnati St. Ry. Co., 4 Ohio Dec. 265.

⁷¹ Doody v. Boston &c. R. Co., 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846, and note, also note in L. R. A. 1915F, 492; Clark v. New York &c. R. Co., 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356. For illustrative cases in which this rule was applied and damages held inadequate, see Henderson v. St. Paul &c. R. Co., 52 Minn. 479, 55 N. W. 53; Scott v. Yazoo &c. R. Co., 103 Miss. 522, 60 So. 215; Fischer v. St. Louis, 189 Mo. 567, 88 S. W. 82, 107 Am. St. 380; De Yaulus v. New York City R. Co., 49 Misc. 648, 97 N. Y. S. 995; Bodie v. Charleston &c. R. Co., 66 S. Car. 302, 44 S. E. 943; Michalke v. Galveston &c. R. Co. (Tex. Civ. App.), 27 S. W. 164; Byrd v. Texas &c. R. Co. (Tex. Civ. App.), 99 S. W. 734.

CHAPTER LXXXVIII.

INSTRUCTIONS IN ACTIONS FOR PERSONAL INJURIES.

Sec.	Sec.
2880. Injuries to railroad employees.	2891. Taking up of passengers.
2881. Injuries to passengers — In general.	2892. Setting down passengers.
2882. Degree of care required of carriers of passengers.	2893. Injuries to passengers from collision or derailment.
2883. Care required of passengers.	2894. Burden of proof in actions for injuries to passengers.
2884. Contributory negligence and assumption of risks by passengers.	2895. Must be confined to issues.
2885. Wilful injury of passengers.	2896. Must be confined to the evidence.
2886. Improper speed of cars.	2897. Invasion of province of jury.
2887. Injuries to passengers by trainmen or other passengers.	2898. Assumption of facts in issue.
2888. Ejection of passengers.	2899. Damages for injuries to passengers.
2889. Liability to persons accompanying stock.	2900. Injuries to trespassers and licensees.
2890. Condition of depots, cars and premises.	2901. Injuries at railroad crossings.
	2902. Injuries to persons near railroad tracks.

§ 2880 (1829). Injuries to railroad employees.—In an action by a railroad employe for personal injuries, an instruction which defined ordinary care as that degree of care which a person of ordinary prudence and caution is accustomed to exercise under like circumstances, was held not to be erroneous in the use of word “accustomed” instead of the words “would ordinarily use.”¹

¹ St. Louis &c. R. Co. v. Smith, 30 Tex. Civ. App. 336, 70 S. W. 789. For other instructions defining “ordinary care,” or negligence and contributory negligence see Eggert v. Penna. Co., 189 Ill.

App. 58; Indianapolis St. R. Co. v. Seerley, 35 Ind. App. 467, 471, 72 N. E. 169; Shirley Hill Coal Co. v. Moore, 181 Ind. 513, 103 N. E. 802. Where an instruction, in an action for the death of a brake-

But an instruction that, although the plaintiff was negligent he may recover unless his negligence was the proximate cause of the injury, has been held to be erroneous, since the jury may have inferred from the use of the word "the" before "proximate cause" that although the plaintiff was guilty of negligence amounting to "a" proximate cause of the injury, he may nevertheless recover, unless such negligence was the sole cause of the injury.² A charge that an employer is not an insurer of the lives and limbs of his employees, and is not liable for injury to an employee, unless the employer is guilty of some negligence resulting in injury to the employee not contributed to by the negligence of the latter, is a correct statement of the law, without referring to the doctrine of proximate and remote cause.³ In an action

man because of the engineer's failure to promptly stop the cars, when standing alone, made it the duty of the engineer to stop the train when the signals were given, this objectionable feature was obviated by another instruction given, which told the jury that before they would be warranted in returning a verdict for the plaintiff they must find that the engineer used ordinary care in observing the signals and in stopping the train, and that they could not return a verdict for the plaintiff unless the injury was due to the defendant's negligence, which the court defined as a failure to use ordinary care. *Missouri &c. R. Co. v. O'Connor*, (Tex. Civ. App.), 78 S. W. 374. In an action by an employee for injury from an explosion of dynamite in a caboose, an instruction that if the jury believed that it was dangerous to ship dynamite in a caboose, with the door open, and that the danger could have been avoided if a safer way known or

easily ascertainable by the defendant had been adopted, was held not erroneous because there was no allegation or proof of a safer way of shipment, since the danger in so shipping the dynamite was patent. *Rush v. Spokane Falls &c. R. Co.*, 23 Wash. 501, 63 Pac. 500.

² *Wastl v. Montana Union R. Co.*, 24 Mont. 159, 61 Pac. 9. See also *Central of Ga. R. Co. v. Hyatt*, 151 Ala. 355, 43 So. 867. But it may be questioned whether this would mislead a jury, especially if other instructions correctly stated the rules.

³ *Baltimore &c. R. Co. v. Spaulding*, 21 Ind. App. 323, 52 N. E. 410. In an action for injuries sustained from defective tools, it was held not error for the court to refuse to instruct that the matter does not impliedly warrant that the tools and appliances furnished a servant are sound and fit for use. *Southern R. Co. v. McGowan*, (Ala.), 43 So. 378. And an

by a railroad employe for injuries by an explosion of dynamite while it was being carried in a caboose, an instruction that the employer impliedly engages with his employes that the place in which they are put to work shall be reasonably safe, was held not to be erroneous as outside the issue.⁴ Where a fireman sued for injuries received in a collision, an instruction is not objectionable which states that the defendant is liable if the injury was caused by the negligence of the engineer, unless he was a fellow servant of the fireman, for failure to define "fellow servant," a definition thereof not having been requested.⁵ In an action for injuries received while operating a hand-car, it has been held proper to charge that the verdict should be for the plaintiff if the defective condition of the hand-car was due to the defendant's negligence, and the defendant negligently failed to repair the hand-car, unless the plaintiff negligently contributed to his injuries.⁶ If the defendant's plea of contributory negligence fails to state any facts of negligence, but only alleges the general

instruction, in an action for injuries from defective appliances, that it is the defendant's duty to exercise reasonable care in keeping machinery and appliances in reasonably safe condition for use, does not put on the defendant the burden of proof. *Chicago & N. W. R. Co. v. Kellogg*, 55 Nebr. 748, 76 N. W. 462.

⁴ *Rush v. Spokane Falls & N. W. R. Co.*, 23 Wash. 501, 63 Pac. 500. In such case, an instruction that it is the master's duty to ascertain and make known to its employes the danger of the dynamite, and to instruct them as to the proper method of handling it, and that the master's ignorance in regard thereto is no excuse, if by reasonable diligence and ordinary care it might have obtained such knowledge, is relevant to the issue.

⁵ *Houston & N. W. R. Co. v. Stuart* (Tex. Civ. App.), 48 S. W. 799. A requested instruction denying a fireman the right of recovery for injuries sustained by putting his head out of the cab window while going through a bridge was properly refused, where the court gave an instruction putting the burden on plaintiff to show that he did not contribute to his injury by his own negligence. *Missouri & N. W. R. Co. v. Parker*, 20 Tex. Civ. App. 470, 49 S. W. 717, 50 S. W. 606.

⁶ *Southern R. Co. v. McGowan* (Ala.), 43 So. 378. An instruction that if the plaintiff's contributory negligence has been established by a preponderance of the evidence the plaintiff cannot recover, correctly states the law without regard to the source of the evidence. *Pittsburgh & N. W. R. Co. v. Collins*, 168 Ind. 467,

charge of negligence and want of ordinary care on the part of the plaintiff, it has been held that the defendant is not entitled to an instruction grouping the evidence on such issue.⁷ Where

80 N. E. 415. See also *Terre Haute &c. T. Co. v. Young*, 56 Ind. App. 25, 104 N. E. 780. See for instruction where an employe sued for injuries received while carrying a rail, because of failure to provide a sufficient number of men. *Galveston &c. R. Co. v. Bonn*, 44 Tex. Civ. App. 631, 99 S. W. 413. In the case last cited it was also held that an instruction authorizing a verdict for the plaintiff if he was not guilty of contributory negligence and did not assume the risk, is not objectionable as submitting the case without reference to the negligent method adopted by the plaintiff and his co-employees in performing the work and without regard to the negligence of his co-employees, when followed by an instruction that the plaintiff cannot recover if he assumed the risk, or if the injury was caused by the negligence of his co-employees. Where the plaintiff sued for the death of his decedent, a railroad employe, an instruction which would permit the jury to find for the plaintiff solely on the ground of the defendant's negligence, was held to be erroneous. *Western &c. R. Co. v. Jackson*, 113 Ga. 355, 38 S. E. 820. In an action for injuries to a call boy, eleven years old, who was injured by stumbling over a ladder left between the railroad tracks, whereby he was thrown under a freight train, it was held that the court might properly charge that al-

though the jury believed that the boy stumbled over the ladder, yet if they believed that in the use of reasonable care, under the circumstances, he would not have fallen over it, they should find for the defendant, as the instruction properly placed on the plaintiff the duty of exercising such care as a boy of his age should exercise under like circumstances. *Chicago &c. R. Co. v. Conners* (Tex. Civ. App.), 101 S. W. 480.

⁷ *Missouri &c. R. Co. v. Parker*, 20 Tex. Civ. App. 470, 49 S. W. 717, 50 S. W. 606. See also *Chicago Union Trac. Co. v. Jacobson*, 118 Ill. App. 383. But it is proper to give a specific charge on the issue of contributory negligence, grouping the facts under such issue and submitting them to the jury, where the negligence of the plaintiff is specifically pleaded. *Texas &c. R. Co. v. Higgins*, 44 Tex. Civ. App. 523, 99 S. W. 200. See also *Pennsylvania Co. v. Sheeley*, 221 Fed. 901; *St. Louis &c. R. Co. v. Everett*, 40 Tex. Civ. App. 285, 89 S. W. 457. It is proper to instruct that the plaintiff cannot recover unless the jury believe that he was not guilty of contributory negligence and did not assume the risk. *Galveston &c. R. Co. v. Stoy* (Tex. Civ. App.), 99 S. W. 135. The court should not refuse to instruct that if the plaintiff voluntarily put his foot under the car wheels, and was thereby injured, he cannot recover, if there is

the court instructed that the plaintiff must show that he was exercising "reasonable and ordinary care," or was injured "while in the exercise of due care," before he can recover, it was held to sufficiently submit the question whether the plaintiff knew that the appliances causing the injury were dangerous.⁸ Where a railroad employe was injured by the backing of an engine against cars between which he was standing in assisting to make up a train, and the employe put his arm between the drawheads to close a defective anglecock, with knowledge that the engine was backing up against the cars, the court should not refuse to instruct on the question of assumed risk and open and visible danger.⁹ In an action by a brakeman for injuries that resulted from a defect in the track, of which the defendant had knowl-

testimony to support it; and an instruction that if the plaintiff voluntarily loosened his hold on the car and voluntarily placed his foot under the wheels so that it might be run over he cannot recover, was not objectionable on the theory that it required the jury to find two facts before they could find for the defendant, where either fact entitled the defendant to a verdict. *Missouri &c. R. Co. v. Mason* (Tex. Civ. App.), 99 S. W. 186. An instruction, in an action for injuries to a brakeman, that if he performed his work as the great mass of men act under like circumstances, he was not guilty of contributory negligence, was held not to be erroneous. *Hayes v. Chicago &c. R. Co.*, 131 Wis. 399, 111 N. W. 471. An instruction, in an action for injuries to a brakeman, that if he was not guilty of contributory negligence, and did not assume the risk of the injury the jury should find for the plaintiff, was held not to be erroneous as authorizing a ver-

dict for the plaintiff unless he was guilty of both contributory negligence and assumed risk. *Galveston &c. R. Co. v. Worcester* (Tex. Civ. App.), 100 S. W. 990.

⁸ *Chicago &c. R. Co. v. Knapp*, 176 Ill. 127, 52 N. E. 927. But contributory negligence and assumption of risks are not the same thing.

⁹ *St. Louis &c. R. Co. v. Nelson*, 20 Tex. Civ. App. 536, 49 S. W. 710. A charge is not rendered misleading by failure to instruct on the question of contributory negligence and assumed risk, where the court gave other paragraphs making plaintiff's right to recover dependent on his freedom from contributory negligence and assumption of risk. *International &c. R. Co. v. Mills*, 34 Tex. Civ. App. 127, 78 S. W. 11. An instruction in an action by a brakeman for injuries sustained while uncoupling cars, that "employees are not presumed to take risks arising from the negligence of the employer," was held not to be erroneous when followed

edge, an instruction that if the defendant was informed of the defect and agreed to remedy it, the plaintiff was not guilty of tributary negligence by remaining in the defendant's employ a reasonable time thereafter, was held to be erroneous as ignoring the question whether the plaintiff knew that the promise to repair had not been fulfilled.¹⁰ Even where there was evidence that a rule forbidding the coupling of cars while in motion had become a nullity by its violation having been acquiesced in by the employer, it was held that the court should not refuse to instruct that if such rule was in force and the plaintiff voluntarily violated it, and was injured in consequence thereof he cannot recover, since it is applicable to one phase of the evidence.¹¹

by an instruction that if the plaintiff knew, or by the use of ordinary care could have known that the appliances were defective, and undertook to use them, and was injured, he was guilty of contributory negligence. *International &c. R. Co. v. Gourley*, 21 Tex. Civ. App. 579, 54 S. W. 307. But it has been held error to instruct that the plaintiff is entitled to recover if he has established certain facts, without including the definition of assumption of risk, such defense being pleaded and evidence introduced to sustain it, although other instructions as to such defense were given in another place. *Quinn v. Chicago &c. R. Co.*, 107 Iowa 710, 77 N. W. 464. An instruction that a railroad employe engaged in repair work assumes those risks which are incidental to the work, and cannot rely on his employer to make his working place safe, was held to be properly modified by inserting the word "wholly" after rely, since the employe has a right to presume that the master will

not maliciously or negligently invest the place with unexpected dangers. *Indianapolis &c. R. Co. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721. (The syllabus in this case seems to be incorrect, and we think the above is a correct statement of what the court held.

¹⁰ *Alabama &c. R. Co. v. Davis*, 119 Ala. 572, 24 So. 862. An instruction that if upon complaint of defective machinery the employer promises to repair it, but fails to do so within a reasonable time, and the employe was injured thereby, the verdict should be for the plaintiff, unless he failed to exercise reasonable care, considering his experience, or unless the danger was so palpable that none but a reckless person would expose himself to it, is not erroneous as failing to make the presence of danger a necessary element of recovery, and in not stating that plaintiff relied on the promise to repair. *Virginia &c. R. Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

¹¹ *Cleveland &c. R. Co. v. Baker*,

Where a co-employee, while acting as vice-principal, placed a stake which caused the plaintiff's injuries, and gave directions to the other employees how to perform their work, it was held not error to instruct that, if the master conferred authority on such employee to control other of his workmen in the performance of particular work, the employee thus directing the movements of other employees was a vice-principal, whose negligence is that of the employer, since the instruction could only have been applied to the act of the employee in directing other employees, and not to the act of placing the stake.¹² Nor is it error in submitting the issues to treat the allegations of negligence as a single proposition, in a proper case, although they were charged in separate counts.¹³ Where the plaintiff sues for injuries alleged to be due to coupling pins being out of repair, an instruction that the plaintiff may recover if he was injured because of a defect in the pin "or some other apparatus provided for his use," is as to the quoted clause, outside of the issue, and therefore erroneous.¹⁴ If a general instruction is given that the plaintiff cannot recover if he has been guilty of contributory negligence, and the instructions which group the facts under which the plaintiff is entitled to recover refer to such general

91 Fed. 224. In *Louisville &c. R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125, it is held that the instruction should specify the rule and not refer merely to violation of rules in general terms. Where there was evidence that at the time of his death the plaintiff was violating a rule of the employer, and that the rule was commonly disregarded both by employees and officers of the company, but such violation was not set up in defense, nor specifically submitted to the jury as a bar to the action, it was held that the court might properly refuse to instruct on the effect of habitual violation of the rule by

the officers and employees of the company. *Horton v. Ft. Worth &c. R. Co.*, 33 Tex. Civ. App. 150, 76 S. W. 211.

¹² *Chicago &c. R. Co. v. Rathneau*, 225 Ill. 278, 80 N. E. 119. See also *Texas &c. R. Co. v. Johnson* (Tex. Civ. App.), 99 S. W. 738.

¹³ *International &c. R. Co. v. Villareal*, 36 Tex. Civ. App. 532, 82 S. W. 1063. But in many instances the issues under each court or paragraph should be specified or stated separately.

¹⁴ *Cleveland &c. R. Co. v. McClintock*, 91 Fed. 223. See also *Wild v. Chicago &c. R. Co.*, 151 Ill. App. 110.

instruction as qualifying the plaintiff's right of recovery, the charge is not subject to the objection that it authorizes a verdict for the plaintiff notwithstanding his contributory negligence.¹⁵ In an action based on the Employer's Liability Act, an instruction was held not erroneous which informed the jury that the action was based on the statute, and substantially stated the statute in so far as it relates to the cause of action.¹⁶ Where an injured employe was attended by the employer's physician, an instruction in an action for the injuries, that in assessing the damages the jury may take into consideration all necessary expenses incurred by the plaintiff in endeavoring to effect a cure, was held misleading, since the jury may have been induced thereby to include in the damages the value of the services of the company's physician.¹⁷

§ 2881 (1830). **Injuries to passengers—In general.**—In an action for injury to a passenger, it has been held proper to direct the jury to take into consideration all the circumstances surrounding the case, and specifically point out the circumstances, even though the evidence is conflicting;¹⁸ and that if they believe from the preponderance of the evidence that the plaintiff became a passenger on defendant's car, and in the exercise of due care for his safety, was injured by the negligence of the de-

¹⁵ *International &c. R. Co. v. Zapp*, (Tex. Civ. App.), 49 S. W. 673.

¹⁶ *Pittsburgh &c. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845. As to instructions under Federal Employers' Liability Act, see *Grand Trunk Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. 581; *Norfolk &c. R. Co. v. Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C, 172; *Louisville &c. Ry. Co. v. Holloway*, 246 U. S. 525, 62 L. ed. 867, 38 Sup. Ct. 379; *Karagas v. Union Pac. R. Co.* (Mo. App.), 232 S. W. 1100.

¹⁷ *Alabama &c. R. Co. v. Davis*, 119 Ala. 572, 24 So. 862. An instruction has been held not to be erroneous which states that an injured employe must submit to such treatment as a reasonably prudent person would submit to in order to improve his condition, and that the employer is not liable for damages that might have been prevented by reasonable care. *Texas &c. R. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. ed. 905.

¹⁸ *Chicago &c. R. Co. v. Otto*, 52 Ill. 416.

fendant, as charged in some count of the declaration, the defendant would be liable.¹⁹ The court, it has been said, must charge on the whole duty of the carrier to its passengers, where a passenger was injured by the derailment of a train, but the evidence does not disclose the particular cause of the injury, so that the jury can determine whether the defendant was negligent in any particular.²⁰ Where a street car passenger was injured, in an overcrowded car, it was held that the court should not refuse, in an action for the injury, to charge that it was not negligence, as a matter of law, to permit the car to become overcrowded, but that such fact was merely a circumstance for the consideration of the jury.²¹ And where a passenger was injured while alighting from a car, it was not misleading, in instructing the jury, to use the word "accident," as it did not tend to cause the jury to believe that the plaintiff's injuries were not the result of the defendant's negligence.²² So, an instruction that if the plaintiff was injured as the result of an accident pure and simple, and the railroad company was not negligent "through its agents and employes," then plaintiff would not be entitled to recover, was not erroneous in the use of the words quoted.²³ It was held that the court properly instructed the jury, in an action for injuries

¹⁹ *Alton Light & Traction Co. v. Oller*, 217 Ill. 15, 75 N. E. 419, affirming 119 Ill. App. 131. But see *American Hominy Co. v. La Forge*, 184 Ind. 600, 111 N. E. 8. Where a street car passenger sued for injuries resulting from alleged negligence of the defendant, and the pleas were "not guilty," and "contributory negligence," it was held proper for the court to charge that the plaintiff cannot recover unless the injuries were caused solely by the defendant's negligence. *McDonald v. Montgomery St. Ry. Co.*, 110 Ala. 161, 20 So. 317.

²⁰ *Sproule v. St. Louis &c. R. Co.*, (Tex. Civ. App.), 91 S. W. 657.

²¹ *Schmidt v. Interborough Rapid Trans. Co.*, 49 Misc. 255, 97 N. Y. S. 390.

²² *Rambie v. San Antonio &c. R. Co.* (Tex. Civ. App.), 100 S. W. 1022. See also generally as to instructions in cases of injury in alighting. *Steptoe v. St. Louis &c. Ry. Co.* (Ark.), 177 S. W. 417; *Thomure v. St. Louis &c. Ry. Co.*, 191 Mo. App. 640, 177 S. W. 708; *Davis v. Metropolitan St. Ry. Co.* (Mo. App.), 177 S. W. 1097; post § 2892.

²³ *Seaboard Air Line R. Co. v. Bradley*, 125 Ga. 193, 54 S. E. 69, 114 Am. St. 196.

to a passenger while on the defendant's train, that they should take into consideration the testimony bearing upon the question whether the plaintiff paid his fare, and that it mattered not how the fare was paid, if it was in fact paid, and that if the plaintiff did pay his fare he thereby became a passenger, but that if he gave incorrect testimony in regard to the manner of paying his fare such circumstance may be considered on the question of his credibility, and in relation to testimony of other witnesses in regard to the manner of payment.²⁴ And, where one sues for damages for being put off a freight train, which he had boarded with a ticket, believing it to be his train, the court may properly instruct that it is the duty of passengers to inquire whether the train stops at their station; and that it is the duty of trainmen to warn passengers not to board, or remain on, the wrong train.²⁵ In submitting the theory of the plaintiff, in an action for injuries to passengers, the court may in its instructions group the facts essential to recovery by the plaintiff, if it is done so as not to confuse or invade the province of the jury or indicate the opinion of the court.²⁶ And where the court, in an action for injuries to a passenger, instructed that if the conductor wilfully jostled the plaintiff, or the accident resulted from the involuntary act of the conductor in the presence of his own peril, or from the plaintiff's falling to the platform of the car, without negligence in starting the car, the defendant was not liable, the court should also have given an instruction requested by the defendant, that if the accident was caused by the act of the conductor seeking to avoid actual peril to himself, as a person of ordinary prudence would have acted under the circumstances, the defendant was not guilty of negligence.²⁷

²⁴ Reem v. St. Paul City R. Co., 82 Minn. 98, 84 N. W. 652.

²⁵ Boehm v. Duluth &c. R. Co., 91 Wis. 592, 65 N. W. 506.

²⁶ St. Louis &c. R. Co. v. Byers. (Tex. Civ. App.), 70 S. W. 558.

²⁷ Kantrowitz v. Metropolitan St. Ry. Co., 63 App. Div. 65, 71 N. Y. S. 394. Where a street car pas-

senger sues for injuries because of the car getting beyond the control of the gripman and running down an incline, an instruction that, although the plaintiff was injured without his fault, the defendant was not liable unless the jury find that the car went down the incline because of the defendant's negligence,

It has been held that an instruction that the jury may take into consideration the fact that no conductor was on the car is not erroneous, in the absence of a request that it did not constitute evidence of negligence.²⁸ The court should not refuse to instruct, in an action for injuries against a railroad company, caused by an embankment being undermined by a rain storm of unprecedented violence, that the jury should not take into consideration the fact that the defendant had altered the embankment since the accident, to provide against further accident from the same cause.²⁹ An instruction in an action for injuries to a passenger, that the defendant was responsible for "the slightest neglect resulting in injury" to the plaintiff, was held not to be erroneous for failure to limit the defendant's liability to such negligence as was the proximate cause of the injury, in view of other instructions that the plaintiff could not recover unless the injury was shown to be the direct and proximate result of the defendant's negligence.³⁰ And it has been held that the court should not refuse, in an action for injury from a derailment of a train, where the question whether the defendant's negligence was the proximate cause of the injury was in issue, to instruct that it is not enough to prove that the injury to the plaintiff was the natural consequence of the defendant's negligence, but it must also be shown that it was the probable consequence, and that the injury must have been foreseen in the exercise of ordinary diligence.³¹ Where the only fact put in issue by the pleadings

and that if by reason of an unavoidable casualty the car got beyond the control of the gripman, there was no negligence, properly stated the law applicable to the case. *Feary v. Metropolitan St. R. Co.*, 162 Mo. 75, 62 S. W. 452.

²⁸ *Allen v. Dry Dock & Ry. Co.*, 2 N. Y. S. 738.

²⁹ *Ely v. St. Louis & R. Co.*, 77 Mo. 34.

³⁰ *Indianapolis St. R. Co. v. Hockette*, 159 Ind. 677, 66 N. E. 39; *International & R. Co. v.*

Williams, 20 Tex. Civ. App. 587, 50 S. W. 732; *Birmingham R. & Elec. Co. v. James*, 121 Ala. 120, 25 So. 847; *Pelly v. Denison & R. Co.*, (Tex. Civ. App.), 78 S. W. 542. But compare *Davis v. Metropolitan St. Ry. Co.*, (Mo. App.), 177 S. W. 1097.

³¹ *Davis v. Chicago & R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 57 Am. St. 935. But where plaintiff claimed that the injury resulted from the violent and sudden starting of the train while he was in

and the proof was the failure of the railroad company to maintain its track in safe condition, an instruction that if the injuries were caused by the defendant's carelessness in the maintenance of its track, "or the operation of its train," without fault of the passenger, the verdict should be for the plaintiff, was held to constitute reversible error.⁸² And an instruction is erroneous, in an action wherein several injuries are specified, that the jury

the act of alighting, and the defendant charged that the plaintiff's injuries were due to his jumping from the train while it was in motion, it was held that an instruction on the question of proximate cause should not be given, as the only issue was that of negligence. *Gulf &c. R. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756.

⁸² *St. Louis &c. R. Co. v. Sweet*, 63 Ark. 563, 40 S. W. 463. The following have been held to be erroneous: An instruction that if the plaintiff was standing on the platform of the car, and was not seen by the porter when he opened the car door, and that the porter could not have seen the plaintiff, in the exercise of reasonable diligence, and the plaintiff was leaning against the door, and when the door was opened began to fall, and to prevent him from falling the porter shut, or attempted to shut, the door, whereby plaintiff was injured, the defendant was not liable. *St. Louis &c. R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879; an instruction that the rule of the railroad company might be regarded as abrogated if it had not been kept in full force and effect. *Houston &c. R. Co. v. Norris*, (Tex. Civ. App.), 41 S. W. 708;

an instruction that if plaintiff was a passenger on defendant's car, he was entitled to courteous treatment by the conductor, and if, without fault on his part, he was not treated with care and courtesy, he is entitled to recover, *Little Rock R. &c. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 10 Ann. Cas. 273; an instruction "that the appliances used by the defendant must be the best that skill and science have provided, and which are in practical use," *Wynn v. Central Park &c. R. Co.*, 10 App. Div. 13, 41 N. Y. S. 595; an instruction directing the jury to find for the plaintiff if they found certain facts, without including the question of contributory negligence, *Texas Southern R. Co. v. Long*, 35 Tex. Civ. App. 339, 80 S. W. 114; an instruction that "a carrier is liable for injuries on street cars, caused by a sudden jolting of the car in starting or coming to a stop, and the railroad company is not relieved from liability by reason of its failure to equip its train, intended for passengers, with all the appliances which extraordinary diligence would require on trains adapted for transporting passengers," *Macon &c. R. Co. v. Moore*, 99 Ga. 229, 25 S. E. 460.

must find for the defendant if one of the specified injuries was not caused or aggravated by the accident, notwithstanding the jury were told in other instructions that if they find for the plaintiff they should award him such damages as will compensate him for all injuries received.³³ Where, by agreement, it was the duty of a passenger to identify himself as the original purchaser of a ticket, when required by the conductor or other agent of the railroad company to do so, an instruction that the passenger was bound to identify himself "to the satisfaction of the train agent," was properly refused, since the passenger was only required to produce reasonable evidence of his identity, within his reach, as would satisfy a reasonable and fairminded person.³⁴ An instruction that negligence cannot be presumed, but must be proven, and that, although the plaintiff was injured in getting off the car, such fact alone will not entitle the plaintiff to recover, but she must prove that her injury was the direct consequence of the defendant's negligence, does not inform the jury that negligence cannot be inferred from the circumstances.³⁵

§ 2882 (1831). Degree of care required of carriers of passengers.—In an action for injuries to a passenger the court should instruct the jury, defining the degree of care required of carriers of passengers, and also, usually instruct as to the degree of care required of passengers for their own safety.³⁶ And in such an action it has been held proper in some jurisdictions to define the negligence in receiving, carrying and discharging passengers as the failure to use that degree of care which very cautious, prudent and competent persons usually exercise under the same or similar circumstances.³⁷ It has been held that an instruction as

³³ Moore v. Des Moines &c. R. Co., 69 Iowa 491, 30 N. W. 51.

³⁴ Brigham v. Southern Pac. Co., 2 Cal. App. 522, 84 Pac. 306.

³⁵ Olfermann v. Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. 483.

³⁶ South Covington &c. R. Co. v. Riegler, 26 Ky. L. 666, 82 S. W.

382; Houghton v. Louisville R. Co., 26 Ky. L. 393, 81 S. W. 695.

³⁷ St. John v. Gulf &c. R. Co., (Tex. Civ. App.), 80 S. W. 235. See also Rathbone v. Detroit United Ry., 187 Mich. 586, 154 N. W. 143; Norris v. St. Louis &c. R. Co., 239 Mo. 695, 144 S. W. 783. In defining the care required of car-

to the care required of carriers of passengers is erroneous which does not refer to such care as is consistent with the practical operation of the road.⁸⁸ An instruction that it is the duty of the railroad companies to exercise the highest degree of care and caution, consistent with the practical operation of the road, to provide for the safety and security of passengers while being transported, was held to be proper, where the evidence tends to show that the injury complained of was caused by the negligent management and operation of the car on which the plaintiff was a passenger, and this is probably the preferable statement of the rule.⁸⁹ The following expressions in instructions relating to the

riers of passengers, where the highest degree of care is required, it was held improper to use the term "proper care" in the charge to the jury. *Missouri &c. R. Co. v. Mitchell*, 34 Tex. Civ. App. 394, 79 S. W. 94.

⁸⁸ *Tri-City R. Co. v. Gould*, 217 Ill. 317, 75 N. E. 493, reversing 118 Ill. App. 602. Where the court undertakes to define the degree of care required of carriers of passengers, it should not omit the qualification that the care required is practically consistent with the efficient use of the mode of transportation adopted by the carrier. *Cleveland &c. St. R. Co. v. Scott*, 111 Ill. App. 234.

⁸⁹ *Chicago Traction Co. v. Kallberg*, 107 Ill. App. 90. The following cases, as well as those cited, ante, § 2397, substantially support the rule laid down in the text as to the degree of care required of carriers for the protection of passengers. *St. Louis &c. R. Co. v. Leamons*, 82 Ark. 504, 102 S. W. 363; *Dillahunty v. Chicago &c. R. Co.*, 119 Ark. 392, 178 S. W. 420;

Fisher v. Southern Pac. R. Co., 89 Cal. 399, 26 Pac. 894; *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756; *Chicago &c. R. Co. v. Murphy*, 198 Ill. 462, 64 N. E. 1011; *Frank Parmelee Co. v. Wheelock*, 224 Ill. 194, 79 N. E. 652; *Chicago R. Co. v. Pural*, 224 Ill. 324, 79 N. E. 686; *Chicago R. Co. v. Smith*, 226 Ill. 178, 80 N. E. 716; affirming *Bagley v. Murphy*, 99 Ill. App. 126; *Louisville &c. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Conner v. Citizens' St. R. Co.*, 146 Ind. 430, 45 N. E. 662; *Chicago &c. R. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. 640; *Vandalia R. Co. v. Darby*, 60 Ind. App. 294, 108 N. E. 778; *Douglass v. Sioux City R. Co.*, 91 Iowa 94, 58 N. W. 1070; *Larkin v. Chicago &c. R. Co.*, 118 Iowa 652, 92 N. W. 891; *Wynn v. Paducah R.*, (Ky.) 102 S. W. 824; *Louisville &c. R. Co. v. Fox*, 74 Ky. 495; *South Covington &c. R. Co. v. Constans*, 25 Ky. L. 158, 74 S. W. 705; *Raymond v. Portland R. Co.*, 100 Maine 529, 62 Atl. 602; *Galligan v. Old Colony St. R. Co.*, 182 Mass. 211, 65 N. E. 48; *Dol-*

degree of care required of carriers of passengers have not been condemned, although not in all instances unqualifiedly commended by the courts; that the law imposes on the carrier the "utmost" care for the protection of its passengers,⁴⁰ "an extra high degree of care;"⁴¹ extraordinary care,⁴² greatest or highest

phin v. Worcester Consol. R. Co., 189 Mass. 270, 75 N. E. 635; Smith v. Chicago &c. R. Co., 108 Mo. 243, 18 S. W. 971; Grace v. St. Louis &c. R. Co., 156 Mo. 295, 56 S. W. 1121; Logan v. Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126; Posch v. Southern Electric R. Co., 76 Mo. App. 601; Deming v. Chicago &c. R. Co., 80 Mo. App. 152, 2 Mo. App. R. 547; Fillingham v. St. Louis &c. Co., 102 Mo. App. 573, 77 S. W. 314; Mathew v. Wabash R. Co., 115 Mo. App. 468, 78 S. W. 271; affirmed by Wabash R. Co. v. Mathew, 199 U. S. 605, 26 Sup. Ct. 752, 50 L. ed. 329; Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860; Union Pac. R. Co. v. Sue, 25 Nebr. 772, 41 N. W. 801; Shay v. Camden &c. R. Co., 66 N. J. L. 334, 49 Atl. 547; Buck v. Manhattan R. Co., 15 Daly 276, 6 N. Y. S. 524; Walsh v. Yonkers R. Co., 114 App. Div. 797, 100 N. Y. S. 278; Millwood Coal &c. Co. v. Madison (Pa.), 2 Atl. 39; Atchison &c. R. Co. v. Frier, (Tex. Civ. App.), 22 S. W. 6; Missouri Pac. R. Co. v. Foreman, (Tex. Civ. App.), 46 S. W. 834; Missouri &c. R. Co. v. Scarborough, (Tex. Civ. App.), 51 S. W. 356; Galveston &c. R. Co. v. Morrison, (Tex. Civ.

App.), 102 S. W. 143; Texas &c. R. Co. v. Humphries 20 Tex. Civ. App. 28, 48 S. W. 201; Moore v. Northern Texas Traction Co., 41 Tex. Civ. App. 583, 95 S. W. 652; Major v. Oregon &c. R. Co., 21 Utah 141, 59 Pac. 522; Payne v. Spokane St. R. Co., 15 Wash. 522, 46 Pac. 1054; Foster v. Seattle E. R. Co., 35 Wash. 177, 76 Pac. 995; Hemmingway v. Chicago &c. R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. 823. But see Union Trac. Co. v. Berry, 188 Ind. 514, 121 N. E. 655, and cases cited; Pittsburgh &c. R. Co. v. Arnott, 189 Ind. 350, 126 N. E. 13 (holding only ordinary or reasonable care required).

⁴⁰ Smith v. Chicago &c. R. Co., 108 Mo. 243, 18 S. W. 971. See also Mathew v. Wabash R. Co., 115 Mo. App. 468, 78 S. W. 271; Fillingham v. St. Louis &c. R. Co., 102 Mo. App. 573, 77 S. W. 314; Buck v. Manhattan R. Co., 15 Daly 276, 6 N. Y. S. 524; Hemmingham v. Chicago &c. R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. 823n.

⁴¹ Central R. Co. v. Johnson, 106 Ga. 130, 32 S. E. 78.

⁴² Toledo &c. R. Co. v. Bladdeley, 54 Ill. 19, 5 Am. Rep. 71. See also Pennsylvania Co. v. Clark, 266 Fed. 182.

degree of care;⁴³ considerable degree of care;⁴⁴ very high degree of care;⁴⁵ high degree of care;⁴⁶ the utmost care of very cautious railroad men under the same or similar circumstances.⁴⁷ In one case it was held error to charge that the carrier was required to observe the utmost care and diligence for the safety of its passengers, without stating the standard of diligence that would be observed by very prudent and thoughtful persons;⁴⁸ and in another case an instruction that carriers are liable only for want of such care and diligence as would be exercised by cautious persons was held to be insufficient, as being too indefinite as to the degree of care required.⁴⁹ The jury having been instructed that carriers are not absolute insurers of the safety of passengers, it was held proper to add that they are required to use all means that care, diligence and foresight can reasonably do considering the mode of conveyance, to prevent injuries to passengers;⁵⁰ and an instruction that a railroad company must use the highest degree of care and caution consistent with the practical operation of its road for the safety of its passengers was held not to be erroneous and not to require more care than is "reasonably" consistent with the practical operation of the road.⁵¹ It has been held that the court properly refused

⁴³ *Chicago &c. R. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. 640. See also *Seaboard &c. Ry. Co. v. Mobley*, 194 Ala. 211, 69 So. 614; *Washington &c. Ry. v. Slyder*, 43 App. D. C. 95; *Raymond v. Portland R. Co.*, 100 Maine 529, 62 Atl. 602, 3 L. R. A. (N. S.) 94. But as shown in, note 39 recent Indiana cases hold that such an instruction is erroneous and that only ordinary or reasonable care is required.

⁴⁴ *Shay v. Camden &c. R. Co.*, 66 N. J. L. 334, 49 Atl. 547.

⁴⁵ *Regensburg v. Nassau Elect. R. Co.*, 58 App. Div. 566, 69 N. Y. S. 147.

⁴⁶ *International &c. R. Co. v. Anthony*, 24 Tex. Civ. App. 9, 57 S. W. 897; *International &c. R. Co. v.*

Bibolet, 24 Tex. Civ. App. 4, 57 S. W. 974; *Moore v. Northern Tex. Traction Co.*, 41 Tex. Civ. App. 583, 95 S. W. 652; *Galveston &c. R. Co. v. Morrison*, (Tex. Civ. App.), 102 S. W. 143. See also *Norris v. St. Louis &c. R. Co.*, 239 Mo. 695, 144 S. W. 783.

⁴⁷ *Wabash R. Co. v. Mathew*, 199 U. S. 605, 26 Sup. Ct. 752, 50 L. ed. 329; *Posch v. Southern Elect. R. Co.*, 76 Mo. App. 601.

⁴⁸ *East Tennessee &c. R. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660.

⁴⁹ *Galena &c. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323.

⁵⁰ *Chicago &c. R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960.

⁵¹ *Chicago City R. Co. v. Pural*, 224 Ill. 324, 79 N. E. 686.

an instruction declaring that the measure of duty of the carrier is the highest degree of care, skill and diligence for the safety of passengers which is "proper and consistent with the efficient use and operation of the cars," since the word "practicable" should have been used instead of the word "proper."⁵² But where the court instructed that common carriers must do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance and the practical prosecution of its business, to prevent accidents to passengers, it was held not objectionable because of the use of words "practical prosecution of its business," instead of the words "practical operation of its road."⁵³ The court properly refused to instruct in an action by a passenger for personal injuries that the defendant was required to exercise the highest degree of care, and that its failure to do so would amount to "gross negligence," since failure to exercise the highest degree of care would amount only to slight negligence.⁵⁴ An instruction that a railroad company owes a much higher degree of care to its passengers than to the public generally at public crossings, is a correct statement of the law and is not misleading

⁵² *Chicago &c. R. Co. v. Stonecipher*, 90 Ill. App. 511.

⁵³ *Chicago &c. R. Co. v. Smith*, 226 Ill. 178, 80 N. E. 716.

⁵⁴ *Dolphin v. Worcester &c. R. Co.*, 189 Mass. 270, 75 N. E. 635. And in a recent Indiana decision it is held that only reasonable care under the circumstances is required and that it is error to instruct that a carrier owes the highest degree of care to its passengers. *Union Traction Co. v. Berry*, 188 Ind. 514, 121 N. E. 655, 124 N. E. 737. See also *Raymond v. Portland R. Co.*, 100 Maine 529, 62 Atl. 602, 3 L. R. A. (N. S.) 94n. The phrase "highest degree of care consistent with the practical operation of the road,"

or the like, which is generally sanctioned by the authorities, may possibly be subject to verbal criticism, but ordinary and reasonable care under the circumstances is or requires the exercise of the highest or utmost care consistent with such operation, and a jury could not well be misled by such an instruction, while, on the other hand an instruction merely requiring ordinary or reasonable care would probably be too general and apt to mislead and result in the carrier being held to no higher duty or greater liability to its passengers than to an employe or a third person.

when considered in connection with other instructions which define the duties of carriers to passengers as applied to the facts of the case.⁵⁵ A charge that a railroad is bound to furnish safe and sufficient means of transportation for its passengers, was held not to be ground for reversal, where from other parts of the charge the jury must have understood that the means of transportation are not required to be absolutely but reasonably safe.⁵⁶ An instruction which stated that a railroad company is bound to use more than ordinary care and diligence and that too much diligence cannot be required of public carriers using steam for rapid transit, was held erroneous.⁵⁷ An instruction that a street railroad company is not an insurer of the safety of its passengers and if it constructed and maintained its car and its trolley wire with every reasonable safeguard, it thereby performed its duty, and the plaintiff cannot recover, was held to be proper in an action by a passenger on an electric car, where the injuries were sustained by the breaking of the trolley wire.⁵⁸ And an instruction that it is the duty of common

⁵⁵ Union Pac. R. Co. v. Sue, 25 Nebr. 772, 41 N. W. 801.

⁵⁶ Millwood &c. Co. v. Madison, (Pa.), 2 Atl. 39.

⁵⁷ Florida &c. R. Co. v. Lucas, 110 Ga. 121, 35 S. E. 283. See also Illinois Cent. R. Co. v. Minor, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627n; Heazle v. Indianapolis &c. R. Co., 76 Ill. 501. An instruction in an action against a street railroad company, that as a general proposition the railroad company is required to exercise that degree of care which will safely land passengers at their destination, was held to be erroneous as imposing too high a degree of care on the railroad company. Crolley v. Union R. Co., 92 N. Y. S. 313.

⁵⁸ Baltimore City &c. R. Co. v. Nugent, 86 Md. 349, 38 Atl. 779, 39

L. R. A. 161. See also Union Pac. R. Co. v. Sue, 25 Nebr. 772, 41 N. W. 801; Leonard v. Brooklyn Heights R. Co., 57 App. Div. 125, 67 N. Y. S. 985; International &c. R. Co. v. Underwood, 64 Tex. 463; Gulf &c. R. Co. v. Killebrew, (Tex. Civ. App.), 20 S. W. 1005, reversing 20 S. W. 182; Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. 766; Fort Worth &c. R. Co. v. Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61; Clukey v. Seattle Elect. Co., 27 Wash. 70, 67 Pac. 379. An instruction that carriers are not absolute insurers of the safety of their passengers, and that if the carrier exercises reasonable care, diligence and skill, and the accident could not have been prevented by the use of such skill, plaintiff could not recover, was held not to be erron-

carriers to carry their passengers safely, was held to be erroneous as making the carriers insurers of the safety of their passengers.⁵⁹ Where the complaint in an action for the death of a drover charged only negligent inspection of the axle, by the breaking of which the train was derailed, an instruction that the utmost care in managing and running the train, and in all the subsidiary arrangements necessary to the safety of the plaintiff's deceased, was required of the carrier, was held to be erroneous as requiring care with regard to appliances as to which no negligence was alleged.⁶⁰ Where a passenger was injured while waiting for a train, by the explosion by a burning oil tank, an instruction in an action for the injuries, that it was the duty of the carrier to exercise extraordinary vigilance aided by the highest skill, and to exercise the highest degree of care to prevent the interposition of any obstacle by which the plaintiff was exposed to danger while waiting for the train, was held to be erroneous, although the court correctly stated, in another part of the charge, that the carrier only owed the plaintiff ordinary care to protect him from injury from the burning tank.⁶¹ But where the plaintiff, who was struck by an approaching car, was somewhat deaf, an instruction in an action for the injury that the fact that the plaintiff was partially deaf would not affect the degree of care required of him, which was to exercise that care which every prudent man would exercise under similar circumstances, was held to be erroneous as requiring of the defendant no greater care than would have been required if the plaintiff's hearing had been good.⁶² Where an

eous on the theory that by reason of the word "absolute" the jury might have inferred that the defendant was an insurer. *Cronk v. Wabash R. Co.*, 123 Iowa 349, 98 N. W. 884.

⁵⁹ *Birmingham &c. R. Co. v. King*, 149 Ala. 504, 42 So. 612. See also *West Chicago &c. R. Co. v. Luka*, 72 Ill. App. 60; *Moore v. Saginaw &c. R. Co.*, 115 Mich. 103, 72 N. W. 1112; *Galveston &c. R.*

Co. v. Snead, 4 Tex. Civ. App. 31 23 S. W. 277; *Weksi v. Puget Sound Trac. &c. Co.*, 86 Wash. 404, 150 Pac. 443.

⁶⁰ *Western Md. R. Co. v. State*, 95 Md. 637, 53 Atl. 969.

⁶¹ *Conroy v. Chicago St. &c. R. Co.*, 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419.

⁶² *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41.

accident may have been caused by the negligence of other of the defendant's employes, it is proper for the court to refuse an instruction which required a verdict for the defendant if the proof shows due care on the part of its trainmen.⁶³

§ 2883 (1832). **Care required of passengers.**—It has been held not to be erroneous to instruct that plaintiff cannot recover unless ordinary precaution, forethought and care on his part is shown, where the undisputed facts show that prior to the accident the plaintiff had gone around in front of an approaching car and had got on the foot board of another car on the side next to the approaching car and at the time of the accident was swinging his body out in front of the approaching car.⁶⁴ An instruction that if plaintiff's intestate was attempting to protect himself from rain, on leaving his coach and did only what a man of ordinary prudence would have done, he was not thereby negligent, was held to be erroneous as it permitted the jury to find that he acted recklessly, and to also find for the plaintiff if a person of ordinary prudence would have so acted under similar circumstances.⁶⁵ An instruction in an action for injuries by a passenger that even though plaintiff did not employ a

⁶³ *Montgomery &c. R. Co. v. Mallette*, 92 Ala. 209, 9 So. 363. It might be otherwise, however, if the only negligence charged was that of the trainmen.

⁶⁴ *Schneider v. North Chicago St. R. Co.*, 80 Ill. App. 306. But compare *Southern Ry. Co. v. Hayes*, 194 Ala. 194, 69 So. 641. An instruction, in an action by a passenger for personal injuries, that in order to recover he must have been free of fault or negligence contributing to his injury, was held to be erroneous as holding plaintiff to the exercise of extraordinary care and preventing his recovery, although his negligence was slight and did

not amount to want of ordinary care. *Jerolman v. Chicago &c. R. Co.*, 108 Iowa 177, 78 N. W. 855. See also *Sweeney v. Kansas City R. Co.*, 150 Mo. 385, 51 S. W. 682; *Citizens' St. R. Co. v. Shepherd*, 30 Ind. App. 193, 65 N. E. 765; *Werner v. Chicago &c. R. Co.*, 105 Wis. 300, 81 N. W. 416; *Sly v. Union Depot R. Co.*, 134 Mo. 681, 36 S. W. 235.

⁶⁵ *St. Louis &c. R. Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347. See also *Eckhart v. Marion &c. Trac. Co.*, 59 Ind. App. 217, 109 N. E. 224; *Raczewski v. New York &c. R. Co.*, 38 R. I. 194, 94 Atl. 687.

skillful surgeon to attend him yet "if he had exercised such care and attention in regard to his case as a prudent man under his particular circumstances and situation would have done," the plaintiff may recover, was held not to be misleading, when considered in connection with other instructions given stating in detail what facts established by the evidence would constitute contributory negligence.⁶⁶ And where one was injured while riding on the platform of a crowded car an instruction in an action for the injury that the law did not require of him extraordinary care, but only ordinary care, was held to be proper where the court added that ordinary care depends upon the circumstances under which the plaintiff was placed.⁶⁷ Where a street railroad company was sued by one who was thrown from the running board of a car, and the court charged that intoxication is not negligence; that if the plaintiff used that degree of care incumbent on him under the circumstances, his intoxication would not prevent his recovery, and that to prove contributory negligence the defendant must show that the passenger did not exercise ordinary care, without reference to his intoxication, since the question was not whether he was intoxicated but whether he exercised ordinary care, and that if the plaintiff was intoxicated and in a dangerous place, and the defendant's motor-man knew thereof the latter was bound to exercise great care, was held not to be erroneous as eliminating the question of the plaintiff's intoxication, or as imposing on the plaintiff, if intoxicated, the duty of exercising only the care required of intoxicated persons.⁶⁸

§ 2884 (1833). Contributory negligence and assumption of risks by passengers.—An instruction that negligence, as applied to passengers, is the failure on their part to exercise ordinary care for their own safety, that is, such care as an "ordinarily prudent person" would exercise under the same or similar circumstances, is not erroneous in failing to require passengers to use such care as a "person of ordinary prudence" would exercise

⁶⁶ Klutts v. St. Louis &c. R. Co., 141 Ill. 614, 31 N. E. 406, affirming 75 Mo. 642. 38 Ill. App. 33.

⁶⁷ Chicago &c. R. Co. v. Fisher, ⁶⁸ Lawson v. Seattle &c. R. Co., 34 Wash. 500, 76 Pac. 71.

under the circumstances.⁶⁹ It has been held proper to instruct that if the plaintiff was guilty of contributory negligence proximately contributing to her injury in the slightest degree, the verdict must be for the defendant.⁷⁰ But an instruction that "one brought into a sudden danger by the wrong of another is not expected to act with coolness and deliberation as moved a reasonable man under ordinary circumstances," was held to be erroneous as attempting to predicate, as a matter of law, lack of

⁶⁹ *St. Louis &c. R. Co. v. Parks*, 40 Tex. Civ. App. 480, 90 S. W. 343. Where a passenger sues for injuries sustained by jumping from a car an instruction that if in jumping from the step of the car or the platform she was guilty of contributory negligence, that is, if a person of ordinary care would not have done so under the circumstances, and by so doing she contributed to her injury she cannot recover, sufficiently submits the plaintiff's alleged contributory negligence. *Missouri &c. R. Co. v. Wolf*, 40 Tex. Civ. App. 381, 89 S. W. 778. It is held error to omit use of word "negligently." *Selman v. Gulf &c. R. Co.*, (Tex. Civ. App.), 101 S. W. 1030.

⁷⁰ *Sweet v. Birmingham R. &c. Co.*, 145 Ala. 667, 39 So. 767. See also *Wagner v. People's R. Co.*, 7 Pen. (Del.), 393, 75 Atl. 610; *Indianapolis Trac. &c. Co. v. Croly*, (Ind. App.), 96 N. E. 973. But compare *Richmond St. &c. R. Co. v. Beverley*, 43 Ind. App. 105, 84 N. E. 558, 85 N. E. 721. An instruction in an action for the death of a passenger, that if the decedent in attempting to alight from the car failed to do what a prudent man would have done under the

circumstances he was guilty of contributory negligence and cannot recover, was properly refused for failure to hypothesize that the decedent's negligence contributed to his injury and death. *Kansas City &c. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207. The court properly refused an instruction which made the failure of the plaintiff to exercise ordinary care a bar to his recovery without including the further condition that such failure must have contributed to the plaintiff's injuries. *St. Louis &c. R. Co. v. Cannon*, (Tex. Civ. App.), 81 S. W. 778. Where in an action by a street car passenger for personal injury sustained by alighting from the car, the instructions requiring the jury to find against the plaintiff unless she exercised due care for her own safety, and that the giving of notice to the conductor that she desired to alight was involved in her exercise of due care, sufficiently present to the jury the question of notice to the conductor of the plaintiff's desire to alight. *Chicago Union Trac. Co. v. Hawthorn*, 211 Ill. 367, 71 N. E. 1022. Where a pregnant woman sued for personal injuries sustained while she was a passenger, an instruction

coolness and deliberation upon "sudden danger," however slight the danger may have been.⁷¹ An instruction that if the jury find that the plaintiff was guilty of negligence contributing to his injury he cannot recover, does not submit as doubtful the question whether the plaintiff's negligence contributed to his injury.⁷² And the court properly instructed that if the plaintiff and the defendant were negligent and the two causes of negligence together brought about the injury, the plaintiff cannot recover.⁷³ Where the court gave an instruction placing the

that it was the duty of the plaintiff to exercise reasonable care, was held not to be erroneous in failing to state that the degree of care required was the care required of persons in the plaintiff's physical condition. *St. Louis &c. R. Co. v. Ferguson*, 26 Tex. Civ. App. 460, 64 S. W. 797.

⁷¹ *Alabama City &c. R. Co. v. Bates*, 149 Ala. 487, 43 So. 98. See also *Beaty v. Missouri &c. Ry. Co.*, (Tex. Civ. App.), 175 S. W. 450. Compare, however, *Montgomery v. Colorado Springs &c. R. Co.*, 50 Colo. 210, 114 Pac. 659; *Louisville &c. Trac. Co. v. Worrell*, 44 Ind. App. 480, 86 N. E. 78; *Indianapolis Trac. &c. Co. v. Spangler*, (Ind. App.), 112 N. E. 596; *Big Sandy &c. R. Co. v. Blankenship*, 133 Ky. 438, 118 S. W. 316, 23 L. R. A. (N. S.) 345n, 19 Ann. Cas. 264; *Moore v. Metropolitan St. Ry. Co.*, 189 Mo. App. 555, 176 S. W. 1120.

⁷² *Chicago &c. R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W. 853. An instruction in an action by a passenger for personal injuries that if the defendant was negligent and such negligence was the direct cause of the injury the verdict should be for the plaintiff was held

not to be objectionable as undertaking to submit to the jury all the issues and excluding the defense of contributory negligence, where such defense was included in other instructions given. *Galveston &c. R. Co. v. Morrison*, (Tex. Civ. App.), 102 S. W. 143.

⁷³ *Shealey v. South Carolina &c. R. Co.*, 67 S. Car. 61, 45 S. E. 119. Where the court instructed the jury that if the plaintiff was careless and his injury was primarily due to such carelessness which was the proximate cause of his injury, he cannot recover, notwithstanding carelessness of the defendant, and that it is not sufficient for the defendant to show that the plaintiff was negligent to some extent, but that the jury must find such negligence to be the proximate cause of the injury, the instruction was held not to be erroneous on the ground that it might cause the jury to believe that the plaintiff's negligence alone would be considered the proximate cause of the injury, without telling the jury that if any negligence of the plaintiff contributed to the injury he cannot recover. *Easler v. Southern R. Co.*, 59 S. Car. 311, 37 S. E. 938.

burden of proving contributory negligence on the defendant, it was held not error to refuse to modify the instruction by adding that the defendant may avail itself of acts of contributory negligence whether shown by the evidence of the plaintiff of the defendant, although the requested amendment correctly stated the law, the evidence on both sides having been fully introduced.⁷⁴ An instruction may be erroneous which hypothesizes the non-liability of the defendant on the negligence of the plaintiff alone.⁷⁵ Where injuries to a passenger occurred in another state, and it is admitted by the pleadings that under the law of the other state he may recover, notwithstanding his contributory negligence, if the negligence of the carrier was the direct proximate cause of the injury, it is held proper for the court to instruct the jury as to the law of the state where the injury occurred.⁷⁶ And the court should instruct on the question of contributory negligence, where the evidence is conflicting as to whether the plaintiff was warned not to go on to or remain on the platform of the car where he was injured, or whether he was there by invitation of the conductor, special charges having been asked calling the court's attention to the omission to charge on such question.⁷⁷ Where the plaintiff was thrown from the platform of a crowded car by a sudden lurch

⁷⁴ *Chicago &c. R. Co. v. Hoover*, 3 Ind. Ter. 693, 64 S. W. 579. But see ante, § 2697. See also as to instruction as to contributory negligence where not pleaded, *Smiley v. St. Louis &c. R. Co.*, 160 Mo. 629, 61 S. W. 667. Where a passenger was injured after leaving his berth on being called by the conductor just before reaching his station, while he was standing in the aisle of the car eight or ten feet from the smoking compartment, and was thrown against the smoking compartment and injured by the train coming in contact with a freight car which had been driven

onto the main track by a storm, the court was not required, in an action for the injuries, to instruct on the question of contributory negligence, since such question was not raised. *Gulf &c. R. Co. v. Bell*, 93 Tex. 632, 57 S. W. 939.

⁷⁵ *Texas &c. R. Co. v. Atchinson*, (Tex. Civ. App.), 54 S. W. 1075. See also *Watkins v. South Carolina &c. Ry.*, 100 S. Car. 458, 85 S. E. 377.

⁷⁶ *Louisville &c. R. Co. v. Harmon*, 23 Ky. L. 871, 64 S. W. 640.

⁷⁷ *St. Louis &c. R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879.

of the car, which he had boarded without objection of the conductor, an instruction that it is not necessarily negligence for one to ride on the rear platform of a crowded car and that the plaintiff was not negligent in boarding a crowded car and remaining on the platform thereof, unless the danger was so obvious that a reasonably prudent person would have refrained from so doing, was held not to be erroneous as taking from the jury the question of contributory negligence.⁷⁸ The court should not instruct, as a matter of law, that the failure of a street car passenger to take hold of the rail of the car, when riding on the platform preparatory to alighting, was contributory negligence.⁷⁹ But it has been held that the court may charge the jury, as a matter of law, that the plaintiff is guilty of contributory negligence, when it appears from the undisputed facts that the passenger was killed while standing on the footboard of a moving car preparatory to alighting, by coming into contact with an iron post standing within seven inches of the foot board, where the passenger had gone on to the platform of the car in violation of a warning conspicuously posted at each end of the car.⁸⁰ It has been held not to be erroneous, in an action for injury to a passenger while riding on the platform of a car, to instruct that the negligence of the plaintiff must be such as contributed to the accident before it will excuse the defendant from liability.⁸¹

⁷⁸ *Baskett v. Metropolitan St. R. Co.*, 123 Mo. App. 725, 101 S. W. 138.

⁷⁹ *Chicago Union Traction Co. v. Hanthorn*, 211 Ill. 367, 71 N. E. 1022. It has been held error to predicate a charge of contributory negligence on the assumption that the plaintiff had taken a position on the rear platform of the car, not for the purpose of getting off at a certain place but for his own convenience in getting off at a point beyond, where the plaintiff's evidence shows that he was on the rear platform in the act of alight-

ing at a place near at hand but was prevented from so doing by the sudden starting of the car and its rapid motion, there being no evidence to the contrary. *Fleming v. St. Louis &c. R. Co.*, 101 Mo. App. 217, 74 S. W. 382.

⁸⁰ *State v. Lake Roland El. R. Co.*, 84 Md. 163, 34 Atl. 1130. See also *Chesapeake &c. R. Co. v. Lang*, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; *Kansas City So. R. Co. v. McGinty*, 76 Ark. 356, 88 S. W. 1001; *Schmidt v. West Penna. Ry. Co. (Pa.)*, 112 Atl. 22.

⁸¹ *Colegrove v. New York &c.*

But the court properly refused to instruct that if the car was in motion when the plaintiff attempted to alight, without distinguishing between rapid and slow motion, the plaintiff cannot recover, where there is some evidence that the car was moving slowly when the plaintiff attempted to alight.⁸² Where injuries were received by a passenger while alighting from the car, and the sole issue is whether the car stopped for the plaintiff to alight and started with a jerk while she was alighting, or was not stopped at all, it was held error to refuse a requested instruction that if the plaintiff stepped from the car while it was in motion, she could not recover.⁸³ An instruction should not be given on a question not raised by the pleadings or the proof.⁸⁴

R. Co., 13 N. Y. Super. Ct. (6 Duer) 382, affirmed in 20 N. Y. 492. An instruction that contributory negligence must have been the proximate cause of the plaintiff's injury need not be given in an action for injuries of the passenger by falling from the platform of the car. *Ebert v. Gulf &c. R. Co.*, (Tex. Civ. App.), 49 S. W. 1105. Where a passenger was injured by being jolted off the car step, an instruction that the question is for the jury whether the plaintiff was negligent in getting down on to the car step while the car was in motion, is not objectionable as stating that if the jury believe that her carelessness contributed to her being jolted off she could not recover. *Foster v. Union Traction Co.*, 199 Pa. 498, 49 Atl. 270. An instruction making it negligence per se for a passenger to attempt to alight from a moving train should be refused, since it is a charge on the weight of the evidence. *Houston &c. R. Co. v. Moss*, (Tex. Civ. App.), 63 S. W. 94.

⁸² *Kuhlman v. Metropolitan St. R. Co.*, 29 Misc. 773, 60 N. Y. S. 989.

⁸³ *Patterson v. Westchester Elec. R. Co.*, 26 App. Div. 336, 49 N. Y. S. 796. An instruction that if plaintiff was guilty of contributory negligence in alighting from the car, and such negligence was the proximate cause of the injury, she can not recover should not be given, where the defendant's evidence warrants a finding that the plaintiff jumped from the car while it was in motion, since if she was guilty of negligence in alighting from the car such negligence was the proximate cause of her injuries. *Parks v. San Antonio Traction Co.*, 100 Tex. Civ. App. 222, 94 S. W. 331, 98 S. W. 1100.

⁸⁴ *Dallas Consol. Elec. St. R. Co. v. McAllister*, 41 Tex. Civ. App. 131, 90 S. W. 933; *Fleming v. St. Louis &c. R. Co.*, 101 Mo. App. 217, 74 S. W. 382. An instruction in an action for the death of plaintiff's decedent, a drover, by jumping from a moving freight train to avoid injury from the derailment

Where a street car passenger sues for injuries sustained in alighting from a car, the court should not ordinarily instruct that it was contributory negligence for the plaintiff to leave the car while in motion, since that is usually a question for the jury.⁸⁵ An instruction in an action for injuries to a passenger that the plaintiff assumed the risks "ordinarily" incident to the coupling of cars, instead of such risks as are "usually" incident thereto, was held not to be objectionable, since the quoted words are synonymous.⁸⁶ It has been held that where instructions have been given on the question of contributory negligence, in an action for injuries sustained by alighting from a car, it is not necessary to also instruct on the question of assumption of risk, since the fact constituting contributory negligence would also constitute assumption of risk.⁸⁷ It has also been held in an action for injury sustained by a passenger in a car while the train was being made up, that the fact that the ticket agent told the plaintiff that his car was on the track ready to go, and he was told by the porter to go aboard, does not

of the train, that the court is entitled to infer the absence of fault on the part of the deceased, because of the general and well known disposition of men to avoid injury, was held to be misleading. *Western Md. R. Co. v. State*, 95 Md. 637, 53 Atl. 969.

⁸⁵ *Willis v. Metropolitan St. R. Co.*, 63 App. Div. 332, 71 N. Y. S. 554.

⁸⁶ *St. Louis S. W. R. Co. v. Morrow*, (Tex. Civ. App.), 93 S. W. 162; *Ft. Worth & C. R. Co. v. Rogers*, 24 Tex. Civ. App. 382, 60 S. W. 61. Where one sustained injuries as a passenger in a freight car, an instruction, in an action for the injuries, that plaintiff assumed the risks incident to whatever jerking and pushing of said car against other cars that are necessary" in

handling car, was held not to be erroneous in the use of the word "necessary," and in failing to instruct that the plaintiff cannot recover if the car was handled in the usual and proper manner. *Texas & C. R. Co. v. Adams*, 32 Tex. Civ. App. 112, 72 S. W. 81.

⁸⁷ *McGovern v. Interurban R. Co.*, 136 Iowa 13, 111 N. W. 412, 125 Am. St. 215. But this is questionable. A requested instruction that if the plaintiff while a passenger unnecessarily occupied a dangerous position, he thereby assumed the risk of the danger and cannot recover, was properly refused, where the instruction does not require that the dangerous position contributed to his injury. *Gulf & C. R. Co. v. Carter*, (Tex. Civ. App.), 71 S. W. 73.

authorize an instruction on the question of assumption of risk by the plaintiff.⁸⁸

§ 2885 (1834). **Wilful injury of passengers.**—Where a boy, about thirteen years old sued for injuries received by being wantonly and wilfully thrown from the steps of a street car by the conductor, without warning, while the car was running at high speed, without asking for his fare, although the boy boarded the car intending to pay his fare, it was held proper to charge, in an action for the injury, that the plaintiff's right of recovery was for wilful injury, and that in determining whether the injury was wilfully committed the jury might consider, with other circumstances of the case, the manner of the conductor, the force used by him, and the effect of his acts, together with the presumption that every person intends the natural and probable consequences of his wilful act, and that an unlawful intent may be inferred from "conduct which shows a reckless disregard of consequences and a willingness to inflict injury" by intentionally doing an act with knowledge that some one is in a situation to be unavoidably injured thereby.⁸⁹ An instruction in an action for injuries to a passenger while alighting from a train, that "to establish the charge of wilfulness as set out in the fourth paragraph of the pleadings, I instruct you that an actual intent to do the particular injury alleged need not be shown; but if you find from the evidence that the misconduct of the defendant's servants was such as to evince an utter disregard of consequences, so as to inflict the injury complained of, this may, of itself, tend to establish wilfulness," correctly states an abstract rule of law.⁹⁰ It has also been held that the court should refuse to instruct, in an action by a passenger for failure of the train to stop, when signaled at a flag station, that if the jury find for the plaintiff they could not award damages in excess of the actual pecuniary loss sustained by the plaintiff, where

⁸⁸ St. Louis & S. W. v. Morrow, (Tex. Civ. App.), 93 S. W. 162.

⁸⁹ Citizens' St. R. Co. v. Willoebey, 134 Ind. 563, 33 N. E. 627.

⁹⁰ Cincinnati & C. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241n, 16 Am. St. 334.

there is evidence which would justify the submission of the question whether the failure to stop was wilful.⁹¹

§ 2886 (1835). Improper speed of cars.—In an action by a passenger for injuries sustained by a car having been run over a switch at a dangerous rate of speed, it was held not error to instruct that if the train ran onto the switch at an “excessive or improper” speed, thereby causing an injury, the defendant was liable, although the use of the word “negligent” would be preferable to the quoted words.⁹² But where a passenger sued for injury sustained by being thrown from a train by a lurch of the car, caused by a curve in the track, it was held error to instruct that the railroad company was liable if the train was run over the curve “at an unusual rate of speed,” since the phrase “unusual rate” is not equivalent to the word “dangerous.”⁹³ In an action by a passenger against a street railroad company for injuries to the plaintiff while standing in a car by being thrown down by a sudden lurch of the car in rounding a curve, it was held that the court properly refused to instruct the jury to find for the defendant if the car was not going at an improper speed, since the injury might have been caused by the irregular motion of the car.⁹⁴

§ 2887 (1836). Injuries to passengers by trainmen or other passengers.—In an action by a passenger because of the assault of a conductor, it was held not error to charge that a railroad company is not released from its contract duty guaranteeing passengers polite and courteous treatment, by the failure of a passenger to smile upon the conductor, and that sneers, looks and contemptuous gestures would not justify an assault on the

⁹¹ Yazoo &c. R. Co. v. Mitchell, 83 Miss. 179, 35 So. 339. But compare Kansas City &c. Ry. Co. v. Cobb, 118 Ark. 569, 178 S. W. 383; Chicago &c. Ry. Co. v. Owens, 118 Ark. 467, 177 S. W. 8.

⁹² Central Ga. R. Co. v. Johnson, 106 Ga. 130, 32 S. E. 78.

⁹³ Chesapeake &c. R. Co. v. Clowes, 93 Va. 189, 24 S. E. 833.

⁹⁴ Brierly v. Union R. Co., 26 R. I. 119, 58 Atl. 451.

passenger by the conductor.⁹⁵ But where the conductor was alleged to have assaulted the plaintiff and ejected him from the car, calling him profane names in a loud voice, it was held error to instruct that the jury might find for the plaintiff if the conductor cursed him and called him vile names, as it authorized recovery by the defendant for mere words unaccompanied by physical violence.⁹⁶ Where the complaint charged that the defendant's servants assaulted the plaintiff and drove him from the car, and then knocked him down upon the street, and there was evidence tending to show that the assault first committed by the conductor was over when the plaintiff left the car, and that several minutes elapsed before the conductor commenced to look for an officer, and as an incident of his search for an officer he again assaulted the plaintiff, an instruction that the jury may find for the plaintiff either under the hypothesis that the assault was a continuous one, or that there were two separate assaults, was held to be erroneous.⁹⁷ In an action for the death of a passenger from a shot by the conductor, where it is alleged that the deceased assaulted the conductor and pulled him from the car, an instruction that if the deceased pulled the conductor off the car, the conductor had the right to strike the deceased in resistance thereof, and if the deceased succeeded in pulling the conductor off the car and then engaged in a fight with him, the conductor had the right to resist an assault made on him by the deceased, and that the railroad company was not liable for the conduct of the conductor if he did more than was neces-

⁹⁵ *East Tennessee &c. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778. Where a passenger was injured by an alleged assault of the conductor, resulting in alleged injury of the spine, and there is evidence that the injury might have resulted from a violent twist or wrench by the passenger in attempting to board the train while in motion, being swung around with his back to the rail, and that he regained his balance by a violent effort, an

instruction was held to be erroneous which ignored the question whether such effort caused the injury. *Wabash &c. R. Co. v. Rector*, 104 Ill. 296.

⁹⁶ *Osteryoung v. St. Louis Transit*, 108 Mo. App. 703, 84 S. W. 179. See also *Widener v. Alabama &c. R. Co.*, 194 Ala. 115, 69 So. 558.

⁹⁷ *McQuerry v. Metropolitan St. R. Co.*, 117 Mo. App. 255, 92 S. W. 912.

sary in resisting the assault, and in so doing shot the deceased, was held to be proper.⁹⁸ So in an action for injuries sustained by the assault of the conductor on a passenger where it appeared that other servants of the company were present but made no effort to prevent the assault, it was held not error to instruct that it was the carrier's duty, through its other servants, to protect the passenger from assault.⁹⁹ An in an action for damages because of an assault by the defendant's conductor, as the result of an altercation with the plaintiff over a defective pass, the court should not refuse an instruction that the jury should not take into consideration the fact that the carrier negligently wrote the date of the pass, making it expire May 1st instead of May 10th, since the assault cannot be considered as the ordinary, reasonable or probable consequence of such negligence.¹ In an

⁹⁸ *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263, 84 S. W. 939. See also the same case for instructions held erroneous.

⁹⁹ *Houston &c. R. Co. v. Batchler*, 37 Tex. Civ. App. 116, 83 S. W. 902, also considering other instructions in such case. And where a street car company was sued by a passenger for injuries from an assault by the conductor, the court properly refused to instruct that if the plaintiff and her companions willfully insulted the conductor, which provoked the assault and language used by the conductor such fact may be considered in mitigation of damages, as it failed to confine consideration to the language or conduct of the conductor which arose from insults first given him by the passengers. *San Antonio Traction Co. v. Lambkin*, (Tex. Civ. App.), 99 S. W. 574; and so where a passenger sued for insults by the defendant's conductor, it was held proper to refuse an instruction relating to mitigation of

damages, if the rude conduct and language of the conductor were responsive to insulting language by plaintiff and her companions, where it fails to confine such insults to those made under the influence of sudden passion. *San Antonio Traction Co. v. Davis*, (Tex. Civ. App.), 101 S. W. 554.

¹ *St. Louis &c. R. Co. v. Harrison*, 76 Ark. 430, 89 S. W. 53. Where a passenger sued for assault and battery by the conductor, an instruction that "even though it be the duty of the conductor to keep plaintiff out of that part of the car for white people, yet it was the duty of the conductor not to use more force than was necessary, and that no more force was necessary, it was the duty of the conductor not to use any force to injure plaintiff," was held not to constitute reversible error, although the instruction may be abstract and argumentative. *Birmingham R. &c. Co. v. Mason*, 144 Ala. 387, 39 So. 590.

action for injuries from jumping from a train because of the alleged misconduct of the conductor, it was held error to charge that reasonable cause is a cause sufficient to have induced the act, regard being had of the passenger's intelligence and experience and his situation and surroundings at the time, since the carrier is liable only for the natural and probable consequence of its conductor's conduct, who was not chargeable with the "intelligence and experience" of the passenger.² Where a husband sued for the alleged humiliation of his wife by language used by the conductor to her, and the fact raised an issue as to the passenger's temperament, it was held proper to refuse to instruct that if the language was not reasonably calculated to cause a person of ordinary prudence and temperament to be humiliated the plaintiff cannot recover.³ As to assaults and misconduct of brakemen and other servants of carriers, where there is no proof that the injury was the result of an unavoidable accident, but all the evidence bears on the question whether the brakeman struck the plaintiff with a foot board, an instruction that if the plaintiff was a passenger, and one of defendant's employes, while in the line of his duty, struck plaintiff and inflicted the injuries complained of, the verdict should be for the plaintiff, was held not objectionable as rendering the defendant liable without regard to the question of negligence.⁴ And an instruction in an action against a railroad company for rape committed on a passenger by a brakeman, which resulted in pregnancy, an instruction that the plaintiff may recover for time lost by reason of the wrong complained of, does not warrant the inference that she may recover damages for time lost in caring for the child.⁵ As to assaults and wrong actions by fellow passengers, the court may properly refuse to include in its charge to the jury a section of a statute of Georgia, making

² *Spohn v. Missouri Pac. R. Co.*, 101 Mo. 417, 14 S. W. 880.

³ *Texas &c. R. Co. v. Tarkington*, 27 Tex. Civ. App. 353, 66 S. W. 137.

⁴ *Louisville &c. R. Co. v. Steenberger*, 24 Ky. L. Rep. 761, 69 S.

W. 1094. See also *St. Louis &c. Ry. Co. v. Tukey*, 119 Ark. 28, 175 S. W. 403, L. R. A. 1915E, 320.

⁵ *Garvik v. Burlington &c. R. Co.*, 131 Iowa 415, 108 N. W. 327, 117 Am. St. 432.

railroad companies liable for damages done by the running of its cars or by persons in its employment or servants, in the absence of due care on its part or on the part of its agents, where the injury complained of was the result of an affray with a fellow passenger.⁶ And in an action by a colored passenger against a carrier for an assault committed on him by a white passenger, in a compartment provided for colored people, the failure of the court in instructing the jury to make any reference to the issue as to the place where the assault was committed, or as to whether the assaulting party was allowed to remain in the car where he had no right to be, and assault the plaintiff, was held to be error.⁷

§ 2888 (1837). **Ejection of passengers.**—In an action by a passenger to recover damages for ejection because a conductor's check was not given to her in exchange for her ticket, it was held not to be erroneous to instruct that a conductor in taking up a passenger's ticket is bound to use extreme care in seeing that the passenger is provided with means to continue her journey.⁸ But it has been held that an instruction that it was the duty of the conductor "to exercise such care to avoid unnecessary injuries to plaintiff's feelings and person, as a humane person of ordinary prudence would use," was improper in the use of the word "humane," as suggesting too high a standard of liability.⁹ Where a passenger sued for damages resulting from ejection, an instruction that the railroad company owes the

⁶ *Davis v. Georgia R. &c. Co.*, 110 Ga. 305, 34 S. E. 1001.

⁷ *Hillman v. Georgia R. &c. Co.*, 126 Ga. 814, 56 S. E. 68. In the same case it was held erroneous to instruct that the passenger assaulted must be in serious danger before it becomes the duty of the conductor to protect him against assault by another passenger.

⁸ *Sloane v. Southern California R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. See also *Sawyer v.*

Norfolk &c. R. Co., 171 N. Car. 13, 86 S. E. 166.

⁹ *Ft. Worth &c. R. Co. v. Peterson*, 24 Tex. Civ. App. 548, 60 S. W. 275. But in an action by a passenger for ejection from the train for alleged failure to pay fare it was held not prejudicial error for the court to instruct in regard to the extraordinary care due by railroad companies to passengers, even though that question was not involved. *Atlanta Consol. St. R. Co.*

duty to passengers to protect them from rude, boisterous and unseemly conduct on the part of other passengers, and from annoyance by profane, obscene or vulgar language, and that if when the plaintiff was expelled from the car he was acting in a rude manner, or using profane or vulgar language in the presence of other passengers, the conductor did no more than he had the right to do in ejecting the plaintiff, was held to sufficiently inform the jury of the carrier's duty to protect its passengers and of the conductor's right to enforce protection.¹⁰ And where a passenger sued for ejection from a freight train, by being compelled to leave the train while it was moving at from ten to fifteen miles an hour, an instruction that if the plaintiff was forcibly and wilfully thrown from the train, the defendant could not be found guilty, unless the jury believes that the defendant's agents were acting in the scope of their employment, was held to be misleading, since the conductor and brakeman who ejected the plaintiff acted within the scope of their authority as a matter of law.¹¹ Where a passenger sues for wrongful ejection and there is evidence on behalf of the defendant that the plaintiff was intoxicated and was using profane language, the failure

v. Kenny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824n.

¹⁰ Williams v. St. Louis &c. R. Co., 119 Mo. App. 663, 96 S. W. 307. An instruction on an assumed state of facts that the plaintiff may recover for expulsion from the train, unless he is found guilty of such misconduct as justified his expulsion, was held defective in that it did not inform the jury as to the facts which would constitute misconduct. Baltimore &c. R. Co. v. Kirby, 88 Md. 409, 41 Atl. 777; but it was held not error, in an action by a passenger for ejection, for the court to fail to instruct that the use of profane and vulgar language in the presence of ladies on board a car was misconduct. Wil-

liams v. St. Louis &c. R. Co., 119 Mo. App. 663, 96 S. W. 307. An instruction that if the plaintiff was guilty of boisterous conduct, but on the request of the conductor desisted, the conductor would not be justified in expelling him from the train after he had desisted from misconduct, does not properly state the law in view of evidence that the plaintiff was in the car where he had no right to be and remained there with a pistol in his hand to the exclusion of other passengers who had a right to the car. Hillman v. Georgia R. &c. Co., 126 Ga. 814, 56 S. E. 68.

¹¹ Sanders v. Illinois Cent. R. Co., 90 Ill. App. 582.

of the court to instruct in regard to the carrier's right to eject the plaintiff under such circumstances, was held not to be cause for exception by the defendant, it appearing that the defendant did not request specific instructions on that point.¹² Where a passenger refused to sign his ticket, in violation of its provisions, and drew a pistol in resistance of an effort to eject him, and, on complaint of the railroad, he was arrested and removed from the train by the constable, who kept him in irons for twenty minutes and then released him, and he was subsequently acquitted of a criminal charge sworn to by an agent of the railroad company, and the constable testified that in making the arrest he acted as a peace officer on information that the plaintiff had drawn a pistol, it was held erroneous to instruct that if the railroad company caused the plaintiff's arrest merely to accomplish his ejection, the constable was its special agent for such purpose and the railroad company would be liable for unnecessary violence to the plaintiff in effecting the ejection, since the instruction fails to discriminate between the acts of the constable while removing the passenger and subsequent acts.¹³ So, in an action for ejection of a passenger for alleged refusal to pay fare and the use of profane and indecent language, it was held improper to instruct that if the plaintiff failed to pay fare the carrier is liable if the conductor instead of using no more force than necessary to eject him, pushed him off the car while it was in motion, without immediate warning, although the defendant's right to eject a passenger for misconduct was not referred to.¹⁴ In an action by a husband for personal injuries to his wife by an officer who was attempting to eject the plaintiff, the jury should be instructed on behalf of the defendant, where there is evidence to justify it, that if the conductor requested the plaintiff to pay fare or leave the train and he refused, then the

¹² *Moore v. Fitchburg R. Corp.*, 4 Gray (Mass.), 465, 64 Am. Dec. 83.

¹³ *Southern Pac. Co. v. Hamilton*, 54 Fed. 468.

¹⁴ *Chicago City R. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. 770. It

has been held that the court need not define the terms "gross negligence," "fraud," "malice" and "cruel or wanton and abusive conduct," which were used in the charge. *Louisville &c. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554.

conductor had the right to call to his aid in ejecting the plaintiff a police officer, and that the latter had the right to use whatever force was necessary in effecting the ejection, and that if the plaintiff's wife interfered and assaulted the officer without provocation, he had the right to use such force as was reasonably necessary to prevent further violence on her part, for which the defendant would not be responsible.¹⁵ And where a passenger traveling on an excursion ticket was required by its provisions to sign it and have it stamped at the company's office at a certain place before starting on the return trip, which provision she did not comply with, and on the return trip the first conductor honored the ticket, but the second conductor refused to do so and ejected her from the train, and she testified that the conductor in ejecting her talked in a loud and ungentlemanly manner in the presence and hearing of the other passengers, but her testimony was contradicted by the conductor, it was held not error to instruct the jury to find for the plaintiff if the conductor used unnecessary force or violence in accomplishing ejection, or ill treated the plaintiff in any way. ¹⁶ An instruction, in an action against a street railway company for assault and ejection by the conductor, that passengers must obey all needful rules for the regulation of the defendant's cars, and that the use of obscene or abusive language, or smoking on the car in violation

¹⁵ *Houston &c. R. Co. v. Ritter*, 16 Tex. Civ. App. 482, 41 S. W. 753. In an action for ejection from a street car, in which unnecessary violence is not averred, an instruction that the carrier had no right to use unnecessary violence in removing plaintiff, was held to be erroneous, as allowing a finding for the plaintiff for lawful ejection with unnecessary force. *Huba v. Schenectady R. Co.*, 85 App. Div. 199, 83 N. Y. S. 157.

¹⁶ *Gulf &c. R. Co. v. Kuenhle*, (Tex. Civ. App.), 16 S. W. 117. Evidence that when the plaintiff

offered the conductor a pass the conductor told him it was bogus and that he would have to get off, and told plaintiff that he considered him a gentleman and did not want to put him off, but on plaintiff's refusal to get off the conductor took him by the arm and led him off, does not authorize an instruction that the plaintiff may recover if the conductor used abusive language or insults to plaintiff, or indignities to his person or character. *Kansas &c. R. Co. v. Scott*, 1 Tex. Civ. App. 1, 20 S. W. 725.

of the rules, would justify ejection of the plaintiff, sufficiently informs the jury that the plaintiff must show that he was riding quietly and peacefully in obedience to the rules of the carrier.¹⁷ Where a conductor on the going trip took the return coupon and gave the plaintiff back the going coupon of a round trip ticket which another conductor refused to accept on the return trip, and the plaintiff testified that he informed the conductor on the return trip of the mistake of the conductor on the going trip, which the plaintiff had not discovered, but this was denied by the conductor, instructions that if a conductor takes the wrong coupon of a return trip ticket by a mistake or otherwise, it would amount to neglect of duty, and the passenger would be entitled to the use of the other coupon on his return trip, and that a passenger's ticket or coupon calling for a passage from one point to another would not entitle the holder to transportation between such point in the reverse order, and that if the passenger presents the conductor such a ticket without explanation or the knowledge thereof on the part of the conductor, the conductor would be justified in refusing to accept it, and might lawfully eject the passenger, unless he paid or tendered his fare, sufficiently informed the jury that the plaintiff was not entitled to be carried on the wrong coupon of a return trip ticket, without explanation on the part of the passenger.¹⁸ And where the plaintiff's uncontradicted testimony shows that she was on the wrong train by an innocent and natural mistake, the defendant is not entitled to an instruction that the plaintiff could be put off the train at any station if she was a trespasser and refused to pay fare.¹⁹ Where a passenger sued for ejection from the train about a mile and a half from the station where he boarded the train, and about ten miles from his home, at ten o'clock on a dark stormy night, with only three cents in his pocket, it was held not error for the court to refuse an instruction that the passenger should have returned to the station where he boarded the train instead of continuing his journey home.²⁰

¹⁷ *Denver Tramway Co. v. Reed*, 4 Colo. App. 500, 36 Pac. 557.

¹⁸ *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439.

¹⁹ *International &c. R. Co. v. Smith*, (Tex.) 1 S. W. 565.

²⁰ *Atchinson &c. R. Co. v. Lamoireux*, 5 Kans. App. 813, 49 Pac. 152.

In an action by a passenger for having been ejected from the defendant's waiting room, an instruction was held to be erroneous which stated that the defendant was not liable if the plaintiff was ejected by a peace officer, without regard to the question whether the officer acted on the direction of the defendant's agent.²¹ A passenger having sued for ejection from a freight train, and there being evidence that the defendant was in the habit of selling passenger tickets for regular freight trains, it was held proper to instruct that if the railroad company ordinarily carried passengers on its freight trains, and the passenger in good faith boarded such train, and was not notified to the contrary before the train left, he became a passenger and was entitled to ride to the first station, if there was nothing in the condition of the train from which plaintiff might have inferred that it did not carry passengers;²² but, in an action by a boy who was knocked off a freight train by a brakeman to whom the boy had paid his fare, where it appears that the company's rules forbade the carrying of passengers on freight trains, an instruction that if the conductor consented to the boy's riding on the train, or knew of his presence and did not object, the boy could recover from the defendant for injuries, was held to be erroneous in allowing recovery, whether the boy knew of the rules of the company or not, and whether the brakeman acted within the scope of his employment.²³ As to mitigation of damages in an action against a street railroad company for assault by the conductor, where the court in its main charge told the jury that provocation by the plaintiff might be considered in mitigation of damages, but subsequently refused to instruct, at the request of the defendant, that the jury might render nominal damages if the plaintiff aggravated the conductor into committing the assault, and told the jury that plaintiff may recover actual compensation however much the conductor may have

²¹ *Rose v. Louisville &c. R. Co.*,
70 Miss. 725, 12 So. 825, 35 Am.
St. 686.

²² *Boehm v. Duluth &c. R. Co.*,
91 Wis. 592, 65 N. W. 506.

²³ *Texas &c. R. Co. v. Hayden*,
6 Tex. Civ. App. 745, 26 S. W.
331.

been irritated by the plaintiff, the charge was held erroneous, since the subsequent language of the charge was controlling.²⁴ If there is evidence, in an action by a passenger for ejection from a train, that the plaintiff was jerked off the car, it seems that it will justify an instruction authorizing damages for physical suffering.²⁵ An instruction in action for wrongful ejection that if the plaintiff was wrongfully ejected he is entitled to exemplary damages, does not assume that the ejection was wrongful.²⁶ And an instruction, in an action by a passenger for being pushed off the train by an employe, that if the employe was acting within the scope of his employment the carrier would be liable, and if the act was done in a grossly negligent or oppressive manner the carrier would be liable for punitive damages was held sufficient without stating what facts were within the scope of the agent's employment.²⁷

²⁴ *Freedman v. Metropolitan St. R. Co.*, 89 App. Div. 486, 85 N. Y. S. 986. An instruction that if the plaintiff resisted the conductor's efforts to eject him, and the resistance increased the plaintiff's nervous trouble of which he was suffering, he could not recover damages on account of such increase of his trouble, and plaintiff's resistance must be considered in mitigation of the damages recoverable by the plaintiff, was held to be objectionable as requiring the jury to allow the defendant undue advantage by refusing the plaintiff any damages on account of injury caused by his resistance and by considering such resistance in mitigation of damages otherwise recoverable. *Pittsburg &c. R. Co. v. Russ*, 57 Fed. 822.

²⁵ *Choctaw &c. R. Co. v. Hill*, 110 Tenn. 396, 75 S. W. 963. See

also *Illinois Cent. R. Co. v. Davenport*, 177 Ill. 110, 52 N. E. 266. Where plaintiff, in an action for ejection for failure to pay fare, testified that he intended to be put off in order that he might bring an action for damages, the court properly refused to submit the issue of humiliation. *Brenner v. Jonesboro &c. R. Co.*, 82 Ark. 128, 100 S. W. 893, 118 Am. St. 56, 12 Ann. Cas. 489.

²⁶ *Illinois Cent. R. Co. v. Davenport*, 177 Ill. 110, 52 N. E. 266, affirming 75 Ill. App. 579. Where there is evidence that plaintiff was forcibly jerked from the train and restrained of his liberty, it was held not error to give an instruction authorizing punitive damages. *Choctaw &c. R. Co. v. Hill*, 110 Tenn. 396, 75 S. W. 963.

²⁷ *Louisville &c. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554.

§ 2889 (1838). **Liability to persons accompanying stock.**—Where one sued for injuries received while accompanying stock, by being struck by a bridge while walking on the top of the cars from the stock car to the caboose, after the train started, an instruction that the plaintiff was a passenger, and that it was the duty of the carrier to use the highest degree of care towards its passengers, was held to be proper or at least not cause for reversal, where the court added, that this general rule cannot be applied without qualification to one who becomes a passenger on a freight train to look after stock.²⁸ And in such a case an instruction was held not to be misleading which stated that if the carrier started the train, over the protest of the shipper, and before he had time to securely fasten his horse, and while the door of the car was open, and that while the car was being moved to the yards the horse became frightened, and the shipper was injured while attempting to prevent injury to the horse, the plaintiff was entitled to recover.²⁹ In an action of this kind, where the plaintiff was riding on the engine, an instruction that the contract by which the plaintiff agreed to ride in the caboose was valid, and that he was entitled to recover if in riding on the engine he was acting as a reasonably prudent man would have done, was held not to be objectionable as containing inconsistent propositions, as a violation of the contract was merely prima facie evidence of negligence.³⁰ But the court properly refused to instruct that, if the contract of transportation did not contemplate the carriage of the plaintiff with the horses, and he was on the car without the knowledge or consent of the carrier, he could not recover, where the defendant's agent was notified by the shipper that the plaintiff would accompany the horses, to which the agent assented.³¹ Where a person who sued for injuries while accompanying stock, testified that

²⁸ *Chicago &c. R. Co. v. Carpenter*, 56 Fed. 451. See also *Norfolk &c. R. Co. v. Chatman*, 222 Fed. 802.

²⁹ *Houston &c. R. Co. v. Wilkins*, (Tex. Civ. App.), 98 S. W. 202.

³⁰ *Missouri &c. R. Co. v. Avis*, 41 Tex. 72, 91 S. W. 877, affirmed in 93 S. W. 424.

³¹ *Gulf &c. R. Co. v. Carter*, (Tex. Civ. App.), 71 S. W. 73.

while he was asleep in the car he was dragged therefrom when the car was in motion, by persons unknown to him, and the evidence does not show that the train stopped between the place where the plaintiff went to sleep and the place of the occurrence, and the servants of the carrier testified that no one was on the train except the plaintiff and themselves, it was held to be prejudicial to give an instruction authorizing a recovery by the plaintiff, if he was injured by being thrown from the train by persons other than the defendant's servants in charge of the train, or if such servants permitted such act.³²

§ 2890 (1839). Condition of depots, cars and premises.—It has been held error to refuse to charge that the law only requires a railroad company to have fire in its depot when necessary, and that whether the company was negligent in failing to have fire in its depot depends on the facts, and that the mere failure to have a fire in its depot would not amount to negligence, unless a person exercising the degree of care that would be exercised by very prudent persons would have had a fire in the depot, where the only charge given on the question was that it is the duty of railroad companies to heat their depots for the comfort of passengers.³³ But in an action for damages caused by the failure of the carrier to properly heat its waiting room, it was held not error to give an instruction making the railroad liable if it failed to keep a fire in its depot waiting room when the weather required a fire to make it comfortable, as eliminating the question of the defendant's negligence and making it an insurer.³⁴ An instruction that if the plaintiff's wife and children were received by the defendant as passengers, when the weather was cold, and the defendant failed to properly heat its car, by

³² Louisville &c. R. Co. v. Board, 25 Ky. L. 2180, 80 S. W. 218.

³³ Gulf &c. R. Co. v. Turner, (Tex. Civ. App.), 93 S. W. 195.

³⁴ St. Louis &c. R. Co. v. Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. 74. See also the same case for instructions relating to

punitive damages on account of annoyances and insults and failure to properly heat depot. Compare Kansas City &c. Ry. Co. v. Cobb, 118 Ark. 569, 178 S. W. 383; St. Louis &c. R. Co. v. Duncan, 119 Ark. 287, 177 S. W. 1132.

reason of which the plaintiff's wife and children became sick and plaintiff was compelled to spend money for medical treatment, the verdict should be for the plaintiff, was held to be erroneous in that in order to entitle the plaintiff to recover the instruction required the jury to find that both the wife and children were sick.³⁵ In such an action an instruction that "if you believe . . . the defendant furnished the plaintiff . . . with a reasonably comfortable car to ride in, . . . then the defendant performed all the duty he owed the plaintiff, and if you so believe, your verdict should be for defendant," was held not to be objectionable as making the carrier an insurer of the condition of its car.³⁶ And an instruction in an action for injuries for failure to properly heat a coach, was held not to be misleading, as authorizing the jury to allow damages for injuries occasioned while the plaintiff was being transported between other points, which authorized the jury to allow the plaintiff such a sum as will compensate him for injuries sustained as alleged in the petition.³⁷ As to failure of a railroad company to keep its depot open, an instruction that if the plaintiff went to the depot to take passage on one of the defendant's trains, and the defendant knowingly permitted the depot to be locked and to remain locked after notice that it was locked a verdict should be for the plaintiff, was held not to be prejudicial, the defendant having denied any knowledge of the depot being locked.³⁸ As to injuries resulting from defective or insufficiently lighted depot platforms, where one was injured while on her way to a train by falling over a piece of iron left on the platform an in-

³⁵ *Duck v. St. Louis &c. R. Co.*, (Tex. Civ. App.), 63 S. W. 891, also holding that the court should, in the absence of an admission that the railroad company was a common carrier, have instructed the jury to the effect that the company was a common carrier, without submitting the question, in view of section 2 of article 10

of the Constitution, declaring railroads to be common carriers.

³⁶ *Missouri &c. R. Co. v. Harrison*, 97 Tex. 611, 80 S. W. 1139, rev'g 77 S. W. 1036.

³⁷ *St. Louis S. W. R. Co. v. Haney*, (Tex. Civ. App.), 94 S. W. 336.

³⁸ *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136, 66 S. W. 661, 91 Am. St. 74.

struction that if negligence on the part of the defendant is proved, and the plaintiff "was in no manner and to no material degree negligent that contributed to her injury, she was entitled to recover," was held to be proper.³⁹ In regard to defective depot platform and insufficient lighting, an instruction that "this case must be treated precisely as though this suit had been directly against the conductor and engineer, if the accident happened through the fault of the conductor and engineer," did not withdraw from the consideration of the jury the question of negligence resulting in a defective platform and insufficient lights, which had been submitted to them.⁴⁰ Where the plaintiff sued for injuries alleged to have been received by the negligence of the carriers' servants in extricating plaintiff from a hole in the

³⁹ *Matthieson v. Burlington &c. R. Co.*, 125 Iowa 90, 100 N. W. 51. In an action for injuries received while alighting from a car, where the only evidence as to the faulty construction of the platform, related to a space between the car door and the platform, it was held not to be prejudicial error to instruct that it is the duty of the carrier "to keep in safe condition all portions of its platform and the approaches thereto." *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. 1016, 26 Am. St. 811. But compare *Chicago &c. Ry. Co. v. Owens*, 118 Ark. 467, 177 S. W. 8. An instruction that "the law imposes the duty on railroad companies to keep in safe condition all portions of their platforms, the approaches thereto and the exits therefrom, to which the public are invited, or would naturally resort, and all portions of their station grounds reasonably near to the platforms where passengers take passage on, or are discharged

from, their cars," does not amount to reversible error, although the statement is too broad. *Illinois Cent. R. Co. v. Davidson*, 76 Fed. 517.

⁴⁰ *Doyle v. Boston &c. R. Co.*, 82 Fed. 869. Where the plaintiff alleged that the railroad failed to provide suitable platform and to properly light its depot and grounds, and permitted the steps to the platform of its coaches to be covered with ice, and that it was its duty to provide some one at the point where passengers were to be received to assist plaintiff's wife in boarding the train and warn her of the dangerous condition of the steps and platforms of its coaches, it was held error to submit to the jury, as an independent ground of recovery, the negligence of the carrier in failing to provide an employe to assist her in boarding the train. *Fort Worth &c. R. Co. v. Work*, (Tex. Civ. App.), 100 S. W. 962.

depot platform, which the company had negligently permitted, it was held not error to embody in an instruction, as a ground of recovery, the negligence in permitting the hole to be in the platform.⁴¹ And where the plaintiff was injured by reason of a space about ten inches between the passenger train and the depot platform, through which the plaintiff fell, the court properly left to the jury the question whether the platform was properly constructed and the train properly operated.⁴² An instruction was held to be properly refused in an action against a street railway company for injury by being pushed off a station platform because of its crowded condition, which stated that the defendant could not be held responsible for accidents which happened solely from being pushed and crowded during rush hours.⁴³ And where a child five years old was injured by the alleged negligent starting of the train while the child was in a dangerous place, and had been carelessly abandoned by the conductor, and the depot platform was not properly lighted, the failure to properly light the platform being the only evidence of negligence, it was held that the jury should be instructed as to the defendant's liability for failure to properly light the platform.⁴⁴ An instruction in an action for injuries because of the alleged failure of the defendant to properly light its depot platform, that if the platform and all its parts were not lighted, and the lack of light was not the cause of the plaintiff's injury, or that there was sufficient light where plaintiff alighted, it was immaterial whether other portions of the platform were sufficiently lighted, was held not to be objectionable as singling out only one of the elements of negligence.⁴⁵ In relation to defective cars, in an action for injuries to a child passenger, caused

⁴¹ *Robertson v. Wabash R. Co.*, 152 Mo. 382, 53 S. W. 1082.

⁴² *Illinois Central R. Co. v. Treat*, 179 Ill. 576, affirming 75 Ill. App. 327.

⁴³ *Beverley v. Boston El. R. Co.*, 194 Mass. 450, 80 N. E. 507.

⁴⁴ *Hiatt v. Des Moines &c. R. Co.*, 96 Iowa 169, 64 N. W. 766.

⁴⁵ *Harvey v. Chicago &c. R. Co.*, 221 Ill. 242, 77 N. E. 569.

See also for other cases as to liability due to casual or temporary condition of station or its approaches. *Davis v. South Side El. R. Co.*, 292 Ill. 378, 127 N. E. 66, 10 A. L. R. 254, and note on pp. 259-271.

by the falling of a car window, an instruction authorizing a verdict for the plaintiff if the carrier was guilty of any negligence which might have been foreseen by human care, vigilance and foresight, was held to be erroneous in failing to limit the right of recovery to the acts of negligence alleged.⁴⁶ And in an action for injuries from a defective car floor, an instruction that if the car had been inspected on the day it was sent out and was found to be in a safe condition, and a trap door formed a part of the floor through which the plaintiff fell, then the allegation as to defendant's negligence in maintaining the door was not established, was properly refused as basing the carrier's liability on inspection without regard to the character thereof.⁴⁷ Where a passenger was injured by reason of the car being stopped near a dangerous precipice, where there was no light and no warning given the plaintiff of the danger, it was held proper to refuse to give unmodified an instruction requested by the defendant that the carrier is not required to furnish landings for passengers where none are expected or required to be.⁴⁸ And where a passenger was injured in alighting from a car which had been pulled beyond the station platform alleged to be defective and not long enough, but there was no evidence that the platform was defective, the court properly refused to instruct that there was evidence that the platform was defective.⁴⁹ In regard to injury by objects too near the track, where a passenger was injured by being struck by an open gate of a stock chute near the track, and one of the carrier's employees testified that he fastened the gate, and that just prior to the arrival of the train he saw some small boys near the track, and that the gate was then open, it was held error to refuse a charge that the carrier was not liable if the gate was opened by a stranger, after it had been closed by the defendant's employee.⁵⁰ As to a defective track, a street

⁴⁶ *Cleveland &c. St. R. Co. v. Scott*, 111 Ill. App. 234. *Fed.* 848, 238 U. S. 636, 35 Sup. Ct. 939, 59 L. ed. 1485.

⁴⁷ *Jordan v. St. Louis &c. R. Co.*, 122 Mo. App. 330, 99 S. W. 492. ⁴⁸ *Texas &c. R. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R.

⁴⁹ *Smith v. Central R. &c. Co.*, 80 Ga. 526, 5 S. E. 772. See also *A.* 395n, 23 Am. St. 308. ⁵⁰ *Gulf &c. R. Co. v. Phillips*, 32 Tex. Civ. App. 238, 74 S. W.

railroad company can not complain of the fact that the court in an action for injuries resulting from a defect in its track, only charged the jury in relation to defendant's duty to keep its tracks and appliances in reasonably safe condition.⁵¹ In relation to the contributory negligence of the plaintiff, an instruction that it is the duty of the passenger to exercise reasonable care, in walking on a station platform, to look where she is going and that if she fails to do so, and in consequence thereof falls over an object on the platform and is injured, and with proper diligence she could have seen the object and avoided the fall, she cannot recover, was held to be properly refused as limiting the plaintiff's negligence to the effect of her failure to look where she was stepping.⁵² And the court also properly refused an instruction in an action by a husband for injuries to his wife, alleged to have resulted from a defective board in the station platform which stated without qualification that the wife was guilty of negligence if she stepped into the hole or on a rotten board without taking any precaution to ascertain the danger, since the situation may have been such that she could not have seen the hole, or the appearance of the plank may not have indicated that it was defective.⁵³

793. Where a passenger's arm was injured while the train was passing a cattle chute, an instruction that "the controversy in this case seems to be as to the position of the arm of the plaintiff at the time of the injury," although erroneous as making the case turn solely on the position of the plaintiff's arm, was cured by other instructions fully defining negligence and contributory negligence. *Chicago &c. R. Co. v. Hoover*, 3 Ind. Ter. 693, 64 S. W. 579. See also *North Chicago St. R. Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793.

⁵¹ *Nashville R. Co. v. Howard*, 112 Tenn. 107, 78 S. W. 1098, 64 L. R. A. 437.

⁵² *Matthieson v. Burlington &c. R. Co.*, 125 Iowa 90, 100 N. W. 51. In an action by a passenger for injuries just after alighting from defendant's train, by falling from a station platform which was unlighted except by a small lamp, the court properly refused to instruct as to the comparative negligence to the plaintiff, to the effect that if she was guilty of negligence which caused or contributed to the injuries she could not recover, although her negligence was less in degree than that of the defendant. *Missouri &c. R. Co. v. Cannady*, 36 Tex. Civ. App. 646, 82 S. W. 1069.

⁵³ *Indianapolis St. R. Co. v. Rob-*

§ 2891 (1840). **Taking up of passengers.**—An instruction defining a passenger as “one who is boarding a car, or who is attempting to board a car, at the station of the company operating the car, for the purpose of being carried in the car from one point to another,” was held to be erroneous, as was also a statement in the charge that “he becomes a passenger when, with the intention of boarding the train he attempts to board, for the purpose of riding.”⁵⁴ Where there was evidence bearing on the duty of employes of the carrier to assist the plaintiff in alighting from the car, it was held proper for the court to call attention to such fact and leave it to the jury to determine whether the failure to give such assistance was negligence, since the duty to give a passenger assistance in alighting arises only under special circumstances.⁵⁵ And where a passenger sued for an injury resulting from a premature starting of the car, it was held not error to instruct as to the duty of the carrier to stop its car a reasonable time to allow passengers to get safely on the car, whether the car was standing still when the attempt was made to get on, or was moving slowly and started suddenly without making a full stop.⁵⁶ As to the sufficiency of the time allowed for board-

inson, 157 Ind. 414, 61 N. E. 936. See also *Missouri &c. R. Co. v. Turley*, 1 Ind. Ter. 275, 37 S. W. 52; *Lehigh Valley R. Co. v. Dupont*, 128 Fed. 840; *Texas &c. R. Co. v. Taylor*, (Tex. Civ. App.), 58 S. W. 844, rev'g 58 S. W. 166.

⁵⁴ *Alabama City &c. R. Co. v. Bates*, 149 Ala. 487, 43 So. 98. See also *Schifalacqua v. Atlantic &c. R. Co.*, 249 Pa. St. 602, 95 Atl. 260. And compare *Trapnell v. Hines*, 268 Fed. 504.

⁵⁵ *McGovern v. Interurban R. Co.*, 136 Iowa 13, 111 N. W. 412, 125 Am. St. 215.

⁵⁶ *O'Mara v. St. Louis Transit Co.*, 102 Mo. App. 202, 76 S. W. 680, also *Dillahunt v. Chicago &c. Ry. Co.*, 119 Ark. 392, 178 S. W. 420; *Coles v. Interurban St. R.*

Co., 49 Misc. (N. Y.) 246, 97 N. Y. S. 289; *Galveston &c. R. Co. v. Fink*, 44 Tex. Civ. App. 544, 99 S. W. 204. An instruction declaring it to be negligence in a street railroad company, after stopping a car to take on a passenger, to start the car before he had a reasonable time to board the car and get to a place of safety, was held to be proper and not inconsistent with an instruction making it the duty of a carrier to hold cars stationary a reasonable time to enable persons to safely board them. *Maguire v. St. Louis Transit Co.*, 103 Mo. App. 459, 78 S. W. 838. See also *St. Louis &c. R. Co. v. Cannon*, (Tex. Civ. App.), 81 S. W. 778.

ing cars, an instruction that if the plaintiff's averment that she had been promised ten minutes by the conductor in which to check her baggage, and that the train started before such time had expired, and she was injured by attempting to board the train were found true the verdict should be for the plaintiff was held not erroneous as laying too much stress on the time the conductor promised her to hold the train.⁵⁷ In an action for injuries while the plaintiff was boarding a train which he had left to procure dinner and to purchase cigars, an instruction that the carrier was under no obligations to hold its train for a passenger to purchase cigars and to attend to other private matters, and that if he stopped for such purpose, when by going to the train, he could have boarded it before it started, he was guilty of negligence and cannot recover, was held to be properly refused, as it denied the plaintiff's right to recover although the jury might find that the train did not stop a reasonable time for passengers to board it.⁵⁸ And the court also properly refused to give an instruction that if the plaintiff attempted to board the defendant's street car after the conductor had given the signal to start, and just after the car started, the defendant was not liable for the act of the conductor in pushing the plaintiff off, since it ignored the question of the plaintiff's knowledge or means of knowing that the signal to start had been given, and also of the plaintiff's contributory negligence.⁵⁹ As to attempts to board trains or cars while in motion, it was held error to charge that failure of the train to stop at a station does not justify a person in attempting to board it while in motion, the jury having already been instructed that the plaintiff cannot recover if he attempted to board the train while it was in motion if an ordinarily prudent person would not have attempted to do so.⁶⁰ And an instruc-

⁵⁷ *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636.

⁵⁸ *Choctaw &c. R. Co. v. Hickey*, 81 Ark. 579, 99 S. W. 839. Purchase of ticket after ejection is held not to entitle one to re-enter train. *Chicago &c. R. Co. v. Wat-*

kins, 117 Ark. 488, 175 S. W. 1157, L. R. A. 1915E, 311n.

⁵⁹ *Ferris v. Interurban St. Ry. Co.*, 89 App. Div. 361, 85 N. Y. S. 806.

⁶⁰ *Kansas &c. R. Co. v. Dorough*, 72 Tex. 108, 10 S. W. 711. See also

tion that if the conductor invited the plaintiff to board the train while it was in motion the jury must determine whether he was negligent, and, in so determining, his conduct must be viewed in the light of his experience and danger to be apprehended by a reasonably prudent person when confronted with the situation known to the conductor, was held to properly submit the issue of the plaintiff's negligence.⁶¹ In an action for injuries while boarding a car, where the controlling issue is whether the car had come to a standstill and the court's charge to the jury did not present such question to them, it was held to be error to refuse an instruction requested by the defendant, that if the jury believed the car did not come to a standstill their verdict should be for the defendant.⁶² But an instruction was not objectionable as allowing one the right to board a car irrespective as to its speed, which authorized a recovery for injuries in attempting to board a street car if the plaintiff believed that the car was stopping for passengers, where the evidence shows that the car was moving very slowly when the plaintiff attempted to board it.⁶³ And an instruction in an action against a street railroad company for injuries sustained by one in attempting to board a car while it was in motion, which states that if the plaintiff got on the car after it had started, she cannot recover, was properly modified by adding, unless the jury find that the conductor saw her hanging to the car but did not stop it to avoid injury to her.⁶⁴ Where it appears that the plaintiff was an infirm woman sixty-nine years old, and that she carried one arm in a sling and carried a telescope and had a small grip slung from her shoulder, and that the railroad men saw her difficulty, and the conductor attempted to assist her in boarding the train which started when she had gotten on the steps, and the testimony is not conflicting as to her falling on the steps and sus-

Chicago &c. R. Co. v. Gore, 96 Ill. App. 553; Missouri &c. R. Co. v. Mills, 27 Tex. Civ. App. 245, 65 S. W. 74.

⁶¹ Arkansas Cent. R. Co. v. Bennett, 82 Ark. 393, 102 S. W. 198.

⁶² Savage v. Third Ave. R. Co.,

29 App. Div. 556, 51 N. Y. S. 1066.

⁶³ Maguire v. St. Louis Transit Co., 103 Mo. App. 459, 78 S. W. 838.

⁶⁴ Foland v. Southwest Mo. Elec. R. Co., 119 Mo. App. 284, 95 S. W. 958.

taining injuries, it was held proper for the court to submit to the jury the questions whether the defendant stopped its train a sufficient time to give her reasonable opportunity to board it with safety, and whether the carrier's agents knew of her need of assistance and negligently failed to assist her.⁶⁵ The words "not knowing," "having no reasonable grounds to suspect," "knew," "know," or "had reasonable grounds to suspect," have been held to be legal equivalents when used in an instruction in an action for injuries to a passenger while attempting to board a train in consequence of the starting of the train prematurely, where such expressions relate to the knowledge of the conductor in starting the train before plaintiff had boarded it.⁶⁶ Where the plaintiff's evidence shows that his injuries resulted from the sudden starting of the car, and the defendant's evidence shows that the plaintiff walked off the end of the depot platform without touching the car, an instruction directing a verdict for the plaintiff if the car started while he was in the act of boarding it, and authorizing a verdict for the defendant if the plaintiff fell from the depot platform before reaching the car, or if the plaintiff relied on a third person and the latter was guilty of negligence directly contributing to the injury, was held to properly submit the question to the jury.⁶⁷ An instruction having been given at the plaintiff's request, that elevated railroads are required not to start their cars until the gates have been closed and that a train should not be started until every passenger on the platform desiring to board the car has actually boarded it, and that the plaintiff had the right to assume that the train would not be prematurely started, it was held error to refuse, on the request of the defendant, to instruct that when persons who desired to stop at the station at which the plaintiff was injured

⁶⁵ *Louisville &c. R. Co. v. Arnold*, (Ky.), 102 S. W. 322.

⁶⁶ *Choctaw &c. R. Co. v. Hickey*, 81 Ark. 579, 99 S. W. 839. See also *Doyle v. Boston &c. R. Co.*, 82 Fed. 869; *Plum v. Metropolitan St. R. Co.*, 91 App. Div. 420, 86 N. Y. S. 827; *Ward v. Metropolitan*

St. R. Co., 99 App. Div. 126, 90 N. Y. S. 897; *Maggioli v. St. Louis Transit Co.*, 108 Mo. App. 416, 83 S. W. 1026; *Dehsoy v. Milwaukee Elec. R. Co.*, 110 Wis. 412, 85 N. W. 973.

⁶⁷ *Barr v. St. Louis &c. R. Co.*, 114 Mo. App. 425, 90 S. W. 107.

had left the train and persons evidencing a desire to board the train had done so, the defendant had the right to close the gates and start the train.⁶⁸ It has been held proper to refuse an instruction in an action for injuries to a passenger while boarding a train, that if the train was started without a jerk other than that incident to the proper handling of trains, the carrier is not liable for the plaintiff's injuries, and that if the passenger had reached the first or second steps of the car and was injured by the starting of the train he could not recover, if the train was started in a careful manner, since the instruction denied the plaintiff's right of recovery, although the train was started without allowing a sufficient time for the plaintiff to get aboard.⁶⁹ An instruction in an action against a street railroad company, which authorized a recovery by the plaintiff if the car was suddenly started without allowing a reasonable time in which to board the car and become seated, was held not objectionable as charging as a matter of law that the company was under duty to hold the car stationary until the plaintiff had been allowed a reasonable time in which to be seated, although the petition charged and the plaintiff's evidence showed that she was thrown by the sudden and violent start of the car while she was stepping onto the footboard to become a passenger, which was contradicted by the defendant's witness, and the jury were also instructed that the plaintiff should recover on no other ground than that the plaintiff was thrown from the footboard before she could secure a footing.⁷⁰ As to the duty of the carrier to stop its cars at certain places, an instruction in an action for injuries in attempting to board a street car that the car should have stopped at the point where the plaintiff attempted to board it, was held not objectionable as imposing on the carrier a special duty whether there were passengers at such places or not.⁷¹

⁶⁸ *Brown v. Manhattan R. Co.*, 82 App. Div. 222, 81 N. Y. S. 755.

⁶⁹ *Choctaw &c. R. Co. v. Hickey*, 81 Ark. 579, 99 S. W. 839. Sudden start and jerk may make carrier liable. *St. Louis Ry. Co. v. Williams*, 117 Ark. 329, 175 S. W. 411.

⁷⁰ *Miller v. Metropolitan St. R. Co.*, 125 Mo. App. 414, 102 S. W. 502.

⁷¹ *Maguire v. St. Louis Trans. Co.*, 103 Mo. App. 459, 78 S. W. 838. See also *Tompkins v. Portland Ry. &c. Co.*, 77 Ore. 174, 150

Where a passenger was injured while running after a train in the dark, which had pulled beyond the station, and in doing so ran into another train, it was held proper to instruct that the railroad company was bound to exercise only ordinary diligence for the protection of passengers who needlessly neglect starting signals and unreasonably attempt to board the train.⁷³ And where a passenger was injured in attempting to board a train by being struck by a passing train, and the evidence shows that he voluntarily went to a dangerous place where passengers were not ordinarily received, an instruction in an action for the injuries, abstractly defining contributory negligence and stating that all the circumstances should be considered in determining whether plaintiff was negligent, was held to be a sufficient application of the law to the facts of the case so as to justify a refusal of an instruction requested by the defendant to find for it if the jury believed the evidence.⁷⁴ As to the proper use to be made of the footboard of a street car, it has been held that the court properly refused to instruct in an action for injuries to a passenger while passing along the footboard to a seat, by being struck by another car, that the foot-board was only intended for use in boarding and alighting from cars.⁷⁵ In an action for injuries to an infant while attempting to board a moving train, an instruction that in determining the question of contributory negligence the jury should consider the infant's age, intelligence and discretion, was held to have been properly given, there being evidence that the infant, on account of his age, was so wanting in intelligence that he was unable to appreciate the danger of boarding a moving train.⁷⁶

Pac. 758. But compare *Missouri &c. Ry. Co. v. Vaughan*, (Tex. Civ. App.), 178 S. W. 721, (attempt to board at other than regular place).

⁷³ *Perry v. Central R. Co.*, 66 Ga. 746.

⁷⁴ *St. Louis S. W. R. Co. v. Casseday*, 92 Tex. 525, 50 S. W. 125.

⁷⁵ *Kreimelmann v. Jourdan*, 107 Mo. App. 64, 80 S. W. 323.

⁷⁶ *San Antonio &c. R. Co. v. Trigo*, (Tex. Civ. App.), 101 S. W. 254. For recent cases as to the law where passengers are boarding cars, see also *Pond v. Connecticut Co.* (Conn.), 111 Atl. 621; *Little v. Peoria Ry. Co.*, 215 Ill. App. 385; *Grubb v. Kansas City Ry. Co.* (Mo. App.), 230 S. W. 675; *Rhodehouse v. Director General* (N. J.), 111 Atl. 662.

§ 2892 (1841). **Setting down passengers.**—In an action for injuries to a passenger while alighting from a train, where the court instructed that the railroad company carrying passengers is held to a high degree of care to prevent injury to them, a further instruction that it is the duty of the carrier at each station where passengers get off its trains, to have the passway from the train so lighted as to enable passengers getting off, and using reasonable care and diligence, to get off with safety, was held not to be objectionable as a mere repetition of the former instruction, since it is an application of the rule laid down in the former instruction to the facts of the case.⁷⁶ And in an action for injuries to a passenger sustained while alighting from a train it was held error for the court to refuse an instruction that the defendant is entitled to dispute every material fact of the case and every element of damage claimed; and the fact that the defendant disputed the testimony of the plaintiff and introduced evidence as to the character of the plaintiff's injuries, cannot be regarded as an admission that the defendant was guilty of negligence.⁷⁷ Where plaintiff was carried beyond her destination and in her suit for damages alleged that the train did not stop at her destination, which the defendant denied, and pleaded that the plaintiff was negligent in getting off the train, and that if she was injured as alleged by remaining in a damp cold depot at the next station where she alighted, it was the result of her not seeking comfortable quarters which were available, the

⁷⁶ *Galveston &c. R. Co. v. Thornsberry*, (Tex.), 17 S. W. 521. Where plaintiff testified that in alighting from a car she was pushed from the steps and injured by two men on the platform who were quarreling, and it appeared that it was the defendant's custom to have an employe at the car steps to assist passengers in alighting, but that no one was present to assist plaintiff, it was held proper to charge that it is the duty of railroad companies to ex-

ercise a high degree of care so as to enable passengers to alight safely from trains, and that the degree of care required is in proportion to the nature and risks of the business and is such as would ordinarily be exercised by persons of great care under similar circumstances. *Missouri &c. R. Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. 1042.

⁷⁷ *Chicago &c. R. Co. v. Stonecipher*, 90 Ill. App. 511.

allegations present distinct issues which it was held should have been presented by separate instructions.⁷⁸ In an action for injuries by being thrown from the step of a street car while attempting to alight, an instruction that a street car passenger has the right to alight from the car at any time he may desire, if the car is stopped for any purpose, without giving any notice thereof, was held to be improper as an abstract statement and as being inapplicable to the facts.⁷⁹ And in such an action it has been held error for the court to recite to the jury a number of precautions which the defendant might have taken, and then instruct the jury that they may determine whether any of such precautions were reasonable, and that if they were, the failure of the defendant to take them would amount to negligence, since it tends to withdraw the jury's attention from the defendant's negligence as shown by the facts and circumstances.⁸⁰ Where a passenger was injured while alighting from a train which had carried her beyond the station and she was suffering from an ordinary case of varicose veins, it was held error for the court to refuse to require the jury, in order to return a verdict for the plaintiff, to believe that "the varicose veins in plaintiff's legs were in consequence of the injuries sustained by her in attempting to get off of the defendant's train, and that such injuries resulted from the negligence of the defendant."⁸¹ In regard to preparing to alight before the car stops, it was held error to charge that if the plaintiff was exercising ordinary care while preparing to alight from the car, and such preparation was not negligence, and the motorman suddenly stopped the car, thereby throwing the plaintiff to the ground, and such stopping amounted to negligence on the part of the motorman, and the plaintiff was injured in the exercise of due care, the defendant would be liable therefor.⁸² And an instruction that the invita-

⁷⁸ St. Louis &c. R. Co. v. Ricketts, 22 Tex. Civ. App. 515, 54 S. W. 1090.

⁷⁹ Holmes v. Ashtabula Rapid Transit Co., 10 O. C. D. 638.

⁸⁰ Buck v. Manhattan R. Co., 15 Daly 276, 6 N. Y. S. 524.

⁸¹ Louisville &c. R. Co. v. Keith, 22 Ky. L. Rep. 593, 58 S. W. 468. Compare Bailey v. Georgia &c. Ry., 144 Ga. 139, 86 S. E. 326.

⁸² Savannah Elec. Co. v. Mullikin, 126 Ga. 722, 55 S. E. 945.

tion of the conductor on nearing the station to get ready to get off, was too remote a cause of an injury received from alighting from the moving train at the station, was held to be properly refused as a charge on the facts of the case.⁸³ As to personal assistance to a passenger in alighting, an instruction submitting the issue whether the defendant in undertaking to furnish personal assistance to a passenger was guilty of negligence in failing to furnish such assistance as was necessary to prevent her from falling was held not to be erroneous as imposing on the defendant the duty to furnish passengers personal assistance in alighting from its trains.⁸⁴ And in regard to safe means of alighting from trains an instruction in an action for injuries from stepping on a small box placed under the car steps, and on even ground, that the jury should find for the plaintiff if they believed that the carrier's servants were negligent in failing to furnish safe means of alighting from the train was held not to be erroneous as rendering the carrier an insurer of the safety of passengers.⁸⁵ As to injuries sustained by alighting from moving trains and cars, it has been held error to instruct that the failure of the defendant to stop the train was such negligence as entitled the plaintiff to recover and that contributory negligence of the plaintiff would not be a bar to recovery, but would go

⁸³ *Cooper v. Georgia &c. R. Co.*, 61 S. Car. 345, 39 S. E. 543. See also *Payne v. Thurston* (Ark.), 230 S. W. 561; *Gosnell v. Central of Ga. Ry. Co.*, (Ga.), 86 S. E. 90.

⁸⁴ *Missouri &c. R. Co. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593. See also *Walker v. Quincy &c. R. Co.*, (Mo.), 178 S. W. 108.

⁸⁵ *Missouri &c. R. Co. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593; *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368n; *Texas &c. R. Co. v. Beezley*, 46 Tex. Civ. App. 108, 101 S. W. 1051; *Selman v. Gulf &c. R. Co.*, (Tex. Civ. App.),

101 S. W. 1030. Evidence in an action for injuries from alighting from a train, that the step box was too small and was placed on uneven and slanting ground was sufficient to support an instruction submitting the issue as to whether the size of the box or the condition of the ground was the proximate cause of the injury. *Missouri &c. R. Co. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593. See also as to providing safe place and means of alighting, *Hamilton v. Louisiana Ry. &c. Co.*, 147 La. 616, 85 So. 611.

to mitigation of damages.⁸⁶ And in such an action where there is evidence that the passenger was engaged in conversation and his attention was not called to the fact that he had reached his station, and in consequence was carried beyond the station, where he jumped from the train, the court should on request give an instruction covering the facts although the court has given a charge on the general rule as to the duty of the carrier in stopping its train and notifying its passengers.⁸⁷ And in an action for injury from alighting from a moving train it was held not error to refuse to instruct that the calling of the station by a brakeman did not amount to an invitation to alight from the train or that if it did amount to an invitation to alight, it was not an invitation to alight until the train had come to a stop at the station, where the court instructed that the plaintiff "was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to presume it simply because the brakeman had announced the station and the train had stopped. She must use her senses."⁸⁸ In an action for injury by being thrown from a moving train while standing on the step of the car, in his effort to get off the train it was held proper to charge that if the plaintiff was standing on the lower step of the car while it was in motion and there was room for him inside the car, and he was thrown from the step by the negligence of the motorman, and would not have been thrown and injured if he had been sitting or standing inside the car, he cannot recover.⁸⁹ It has been held proper to instruct that if the plaintiff alighted from the train at her destination while the train was in motion, and it amounted to negligence for her to do so, and such negligence proximately caused or contributed to her injuries, the jury should find for the defendant regardless of whether the car was suddenly started with-

⁸⁶ *Louisville &c. R. Co. v. Collier*, 104 Tenn. 189, 54 S. W. 980. See *Co.*, 28 Del. 389, 93 Atl. 903.

⁸⁷ *Central Texas &c. R. Co. v. Hoard*, (Tex. Civ. App.), 49 S. W. also, *Behen v. Philadelphia &c. R.* 142.

⁸⁸ *Barry v. Boston &c. R. Co.*, 172 Mass. 109, 51 N. E. 518.

⁸⁹ *McDonald v. Montgomery St. R. Co.*, 110 Ala. 161, 20 So. 317. See *Maisels v. Dry Dock &c. R. Co.*, 16 App. Div. 391, 45 N. Y. S. 4.

out warning.⁹⁰ And an instruction that the plaintiff may recover if the carrier negligently moved the train more rapidly after slowing it down at the station where the plaintiff desired to alight, provided the plaintiff acted on the motion and the slower motion was such as to warn the plaintiff in believing that it was safe to act upon it and that the injury was occasioned by the increasing speed, was held to be erroneous in hypothesizing the defendant's negligence on the plaintiff's belief and not on the belief of a reasonably prudent person.⁹¹ Where a passenger while acting on information obtained from the porter, got on the wrong train and on discovering the fact the porter told him after the train had started to jump off, which the plaintiff did and was injured by slipping on a greasy platform, it was held proper to instruct that the porter should be regarded as the employe of the carrier and that if the plaintiff discovered that he was on the wrong train and the porter told him to jump off, and the train was moving at such speed as to render it dangerous to jump off, of which the plaintiff was unaware, and could not have known by the exercise of ordinary care, but which was known, or could have been known by the porter in the exercise of ordinary care, the defendant was guilty of negligence.⁹² An instruction that if the jury believed that a person of ordinary prudence would not have attempted to alight from the train under the circumstances, or that the defendant's servants stopped the train at the station for a time reasonably sufficient for the plaintiff to safely alight, or used such a high degree of care as to enable her to safely alight as very cautious and prudent persons would have done under the circumstances, the verdict should be for the defendant, was held to sufficiently guard the rights of the defendant on the issue of contributory negligence.⁹³

⁹⁰ *San Antonio &c. R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445. But compare *Anderson v. Canadian &c. Ry. Co.*, 130 Minn. 373, 153 N. W. 863.

⁹¹ *Sweet v. Birmingham R. &c. Co.*, 145 Ala. 667, 39 So. 767.

⁹² *Newcomb v. New York Cent.*

&c. R. Co., 182 Mo. 687, 81 S. W. 1069.

⁹³ *St. Louis &c. R. Co. v. Massay*, (Tex. Civ. App.), 76 S. W. 585. An instruction in an action for injury sustained while alighting from a train that a suggestion by the defendant's employes would not alone

Where the conductor stated that the train was at the station, which was not true, and the passenger was injured while attempting to alight, an instruction that the plaintiff in an action for injuries could not recover if the danger of alighting was as open to the plaintiff as to the conductor, was held properly refused as misleading since the situation or information of the conductor and passenger with respect to the danger was not equal.⁹⁴ As to injury to passengers by prematurely or suddenly starting trains or cars while passengers are in the act of alighting, an instruction that if the plaintiff was injured while attempting to alight from the car, while exercising proper care, by the motorman suddenly starting the car the plaintiff may recover, has been upheld although the motorman's act was not required to have been negligent, since the starting of the car while the passenger is alighting is *prima facie* evidence of negligence.⁹⁵ And in an action for injuries sustained by the sudden starting of the car while the passenger was in the act of alighting where the court instructed that it was the duty of the defendant to so start its cars as to enable passengers to alight in safety at the point of destination and the evidence showed that the accident occurred before the plaintiff's destination was reached, it was held proper to refuse a modifying instruction requested by the defendant that it was not the carrier's duty to begin to stop the

justify the plaintiff in alighting, but that it is a circumstance to be considered with all the other evidence to determine whether the plaintiff was in the exercise of due care in attempting to alight, although bearing on the weight of the evidence, would not alone justify the plaintiff in alighting, was held not prejudicial to the defendant.

⁹⁴ *International &c. R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190. It has been held not to amount to error for the court to refuse an instruction that the calling of the station by a brakeman and

the stopping of the train did not warrant a finding that defendant negligently led plaintiff to suppose that the train had reached the place for her to alight, where there are other circumstances bearing on the question of the plaintiff's belief that the train had reached the station. *Barry v. Boston &c. R. Co.*, 172 Mass. 109, 51 N. E. 518.

⁹⁵ *Indianapolis St. R. Co. v. Brown*, 32 Ind. App. 130, 69 N. E. 407; *West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718, affirming 99 Ill. App. 591.

car as soon as a passenger signifies his desire to get off, nor when he gets down on the footboard of the car.⁹⁶ Where the plaintiff's evidence in an action for injury while alighting from a car tends to show that the injury was caused by the sudden starting of the car after it had been stopped to permit the plaintiff to alight, and the defendant's evidence tends to show that the injuries were sustained in the plaintiff's attempt to get off the car while it was in motion, it was held error to refuse an instruction that if the plaintiff stepped off the car while it was in motion the verdict should be for the defendant.⁹⁷ And in such an action an instruction that to warrant a recovery it must be shown that the plaintiff was injured as the proximate result of the negligent starting of the car; that it is for the jury to determine whether the defendant was negligent in the alleged starting of the car, whether the injuries were caused thereby, and that they might consider whether the car was fully stopped and whether there was sufficient time for the passenger to safely alight, and whether the car was so crowded as to make it difficult for her to alight; that it is the duty of the carrier to stop the car a sufficient time and provide sufficient facilities for safely alighting; and that if the car did not start while the passenger was in the act of alighting, but that she fell from some other cause she could not recover, was held not to be objectionable as confusing and contradictory in that it embraced two theories of the plaintiff's cause of action.⁹⁸ And an instruction

⁹⁶ *Grace v. St. Louis R. Co.*, 156 Mo. 295, 56 S. W. 1121.

⁹⁷ *Cunningham v. Dry-Dock & C. R. Co.*, 31 Misc. 471, 64 N. Y. S. 350 rev'g 29 Misc. 772, 60 N. Y. S. 990.

Where plaintiff's theory was that she was thrown from the car by the sudden and violent jerk of the train while attempting to alight, and defendant's theory was that she was injured by jumping from a moving train without invitation by the carrier, it was held that the plaintiff was not entitled to a charge on the

theory that the injuries resulted from "an express or implied invitation" to alight while the train was in motion. *Payne v. Nashville & C. R. Co.*, 106 Tenn. 167, 61 S. W. 86.

⁹⁸ *Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39. See also *Birmingham Ry. & C. Co. v. Washington*, 192 Ala. 617, 69 So. 65. And see further as to the necessity of giving reasonable time to alight, *Payne v. Thurston* (Ark.), 230 S. W. 561; *Vietta v. Hines* (Cal. App.), 192 Pac. 80; *Walten v. Des Moines*

that if the carrier's employes failed to assist the plaintiff in alighting from the car the defendant was guilty of negligence, was held to be erroneous, although evidence on such issue was received without objection.⁹⁹ In an action for injuries alleged to have been sustained by the premature starting of the car while the passenger was in the act of alighting, where the defendant claims that the plaintiff attempted to alight while the car was in motion, and before it could be stopped, the defendant was entitled to an instruction that although it was the defendant's duty to stop the cars and afford the plaintiff an opportunity to alight, yet its failure to do so would not give the plaintiff the right to attempt to jump from the moving car.¹ And in an action by a passenger on a freight train it was held error for the court to refuse to instruct that if the plaintiff was a passenger on a freight train which stopped at the station with the caboose reasonably near the station platform with due regard to the surrounding situation and location and stopped a sufficient time to enable plaintiff to safely alight, but he refused to do so because the caboose was not at the station platform, the carrier is not liable.² And where a passenger sued for injuries in alighting on a dark night after the train had passed the usual stopping place, where there was no platform or landing, it was held proper to refuse an instruction as to the care required of carriers in maintaining platforms and landings since it was not responsive to the issues of the case.³ An instruction that a reasonably safe place must be chosen for the landing of street car passengers was held not objectionable in that it instructs the

City Ry. Co. (Iowa), 179 N. W. 865. It is held that it is not negligence for a street car conductor to urge alighting passengers to "step lively." *Ritchie v. Boston Elev. Ry. Co.* (Mass.), 131 N. E. 67.

⁹⁹ *Indiana R. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 156.

¹ *McDonald v. City Elec. R. Co.*, 137 Mich. 392, 100 N. W. 592. See also *Gosnele v. Central of Ga. Ry. Co.*, (Ga.), 86 S. E. 90.

² *Chicago &c. R. Co. v. Stonecipher*, 90 Ill. App. 511.

³ *Henry v. Grant St. Elec. R. Co.*, 24 Wash. 246, 64 Pac. 137. See also as to contributory negligence, *Murray v. Southern Pac. Co.*, 225 Fed. 297. Where plaintiff was injured in alighting from a train which had run past the depot platform, an instruction that if the conductor offered to back the train to the platform, but was requested by plaintiff

jury that failure to do so would constitute negligence per se.⁴ Where the evidence showed that an interurban railroad company did not maintain platforms at a highway crossing but that it was usual for passengers to alight on to the plank approach to the crossing, and that the car was not stopped until it had passed the approach, it was held proper to instruct that if the car was stopped for passengers to alight and the passengers were notified to alight at a suitable place the jury might find that the defendant was negligent.⁵ In regard to allowance of a sufficient time for passengers to alight, an instruction that if the jury believed that the employes in charge of the train negligently and carelessly failed to stop the train a sufficient time to allow the plaintiff to alight in safety, and that by reason of such negligence therein the plaintiff was injured, was held not to render the carrier an insurer of the passenger's safety in attempting to alight.⁶ And in such an action a charge that if the defendant started the train without allowing a reasonable time for the plaintiff to alight, and the plaintiff while the train was moving so slowly that a prudent person would not apprehend danger in

not to do so, and he thereupon assisted her with ordinary care, the plaintiff can not recover, was held not objectionable as including only the defense of contributory negligence. *Conwill v. Gulf &c. R. Co.*, 85 Tex. 96, 19 S. W. 1017; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441.

⁴ *Macon R. &c. Co. v. Vining*, 123 Ga. 770, 51 S. E. 719; *Kennedy v. So. R. Co.*, 59 S. Car. 535, 38 S. E. 169; *Foley v. Brunswick Traction Co.*, 66 N. J. L. 637, 50 Atl. 340.

⁵ *McGovern v. Interurban R. Co.*, 136 Iowa 13, 111 N. W. 412, 125 Am. St. 215. See also *Morris v. Kansas City Ry. Co.* (Mo. App.), 223 S. W. 784.

⁶ *Missouri &c. R. Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 843.

See also *Missouri &c. R. Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. 583. An instruction that the defendant must hold its train a sufficient time for passengers to alight from the train "with ease," was held to be misleading. *Louisville &c. R. Co. v. Eakins*, 103 Ky. 465, 45 S. W. 529, 46 S. W. 496 (dissenting opinion). And an instruction that a passenger is entitled to a reasonable time to leave the car, and what will constitute such time depends on the age and physical condition of the passenger, was held to be erroneous as inferentially declaring that the age and decrepitude of the passenger must determine the time allowed for alighting. *Toledo &c. R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71.

alighting from it, attempted to get off the car and while in the act of stepping off the motion of the car was suddenly increased by the defendant's negligence whereby the plaintiff sustained injuries complained of, the verdict must be for the plaintiff, unless the jury find him guilty of contributory negligence, was held to be a correct statement of the law.⁷ Where the testimony is that the train stopped a sufficient time to enable the plaintiff to alight in the exercise of reasonable diligence and the court in its main charge did not present such issue, it was held proper to refuse an instruction that if the plaintiff failed to exercise proper diligence in leaving the train before it started, and thereafter alighted from the train she assumed the risk of injury.⁸

⁷ Louisville &c. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443; Henning v. Louisville Ry. Co., 24 Ky. L. Rep. 2419, 74 S. W. 209; Alabama &c. R. Co. v. Dear, 87 Miss. 339, 39 So. 812; Owens v. Kansas City St. &c. R., 95 Mo. 169, 8 S. W. 350, 6 Am. St. 39; Ft. Worth &c. R. Co. v. Viney, (Tex. Civ. App.), 30 S. W. 252; St. Louis &c. R. Co. v. Harrison, 32 Tex. Civ. App. 368, 73 S. W. 38; International &c. R. Co. v. Anchonda, 33 Tex. Civ. App. 24, 75 S. W. 557. An instruction that it was the duty of the carrier to stop the train a sufficient time to permit passengers to alight with safety, was held to have been properly modified by substituting the word "reasonable" for "sufficient." Barringer v. St. Louis &c. R. Co., 73 Ark. 548, 85 S. W. 94, 87 S. W. 814. And where it appeared that the train stopped a minute or a minute and a half, when the usual stop was two minutes and a half, and that the conductor knew that the plaintiff had three small children and a heavy valise, and that the station was her destination, it was held

proper to instruct as to the diligence of the plaintiff in getting off the train "under the circumstances and conditions by which she was surrounded." St. Louis &c. R. Co. v. Ross, (Tex. Civ. App.), 89 S. W. 1105. A requested instruction that if the conductor gave the signal for the train to start under the belief that the plaintiff had left the train, and if in doing so the conductor acted as a reasonably prudent person would have done under the same circumstances, was held to be erroneous as making the question of negligence depend on the conductor's belief and as requiring only ordinary care for the safety of passengers. St. Louis S. W. R. Co. v. Harrison, 32 Tex. Civ. 368, 73 S. W. 38. An instruction that the plaintiff cannot recover if the train started while he was in the act of alighting, unless the conductor knew he was so acting, was held properly amended by inserting "or by the exercise of reasonable care could have known." Cullar v. Missouri & R. Co., 84 Mo. App. 347.

⁸ Texas &c. R. Co. v. McKenzie,

In an action by a passenger for injuries by the alleged premature start of the car while the plaintiff was alighting, it was held error for the court to refuse an instruction that if the car came to a full stop, and, before the plaintiff's wife had fully alighted from it the car was started on a signal to start, given by someone not authorized to do so and the accident could not have been prevented as to the giving of the unauthorized signal by the exercising of due care by the conductor or motorman the verdict should be for the defendant.⁹ As to the failure of the carrier to warn passengers of danger, where it appeared that the plaintiff had descended the steps of the car with the knowledge of the brakeman who failed to warn him of danger, and there was evidence tending to show such facts, it was held proper to instruct that if the train stopped before reaching the station, or was moving so slowly as to lead the plaintiff as a prudent person, to believe that he had reached the depot, and that the train was stationary and that the brakeman saw he was attempting to alight before the train had reached the station and failed to warn him of the danger of doing so, the defendant was guilty of negligence.¹⁰ With regard to carrying passengers beyond their destination, a requested charge that if the passenger deceived or mislead the conductor as to his destination by conduct which would have mislead or deceived a person of ordinary prudence, and that by reason thereby the conductor carried the passenger beyond his destination, the carrier would not be liable, should have been given, where such issue was raised and was not presented to the court in its charge.¹¹ And in an action for injuries to a passenger in alighting from a train after he had been carried beyond his destination it was held not error to instruct that if the pas-

30 Tex. Civ. App. 293, 70 S. W. 237. And see *St. Louis & C. R. Co. v. Ross*, (Tex. Civ. App.), 89 S. W. 1105. See also *St. Louis & C. R. Co. v. Bryant*, (Tex. Civ. App.), 92 S. W. 813 (as to delay of passenger in alighting).

⁹ *Moore v. Woonsocket St. R. Co.*, 27 R. I. 450, 63 Atl. 313, 114 Am. St. 59.

¹⁰ *Smitson v. Southern Pac. Co.*, 37 Ore. 74, 60 Pac. 907.

¹¹ *St. Louis & C. R. Co. v. Ricketts*, (Tex. Civ. App.), 62 S. W. 424. See as to punitive damages, etc., *Yazoo & C. R. Co. v. Smith*, 82 Miss. 656, 35 So. 168; *Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

senger had made out a prima facie case he was entitled to a verdict, unless the carrier had established an affirmative defense by a preponderance of evidence, it appearing that the court was simply instructing that contributory negligence was an affirmative defense.¹² Where a passenger was injured by alighting from a street car in the middle of a block and the plaintiff's testimony showed that his place of business was in the middle of the block and that the motorman saw him go to the door to get off at the crossing and it was shown by the motorman that the plaintiff was in the habit of riding to the middle of the block before getting off, it was held not error to refuse an instruction that if the car came to a stop and the plaintiff got up to leave, and was seen by the motorman it was not necessary for the plaintiff to have rung the bell, although it was the rule for passengers to do so.¹³ Where the evidence tended to show that the plaintiff was injured by her dress catching on the platform or door of the car in her efforts to alight, and the starting of the car before she could free herself, and the court instructed the jury that if a careful and prudent lady would, under the circumstances, have gathered up her skirts, and the plaintiff's failure to do so was the proximate cause of her injury, she could not recover, the court was held to have erred in refusing a further charge that if the plaintiff was exercising ordinary care in leaving the car, and had no cause to apprehend danger by permitting her dress to trail, her doing so did not amount to contributory negligence.¹⁴

§ 2893 (1842). **Injuries to passengers from collision or derailment.**—Where the evidence shows that by reason of the crowded condition of the car the plaintiff was standing on the front platform and was pushed off the car by persons who were attempting to escape a threatened collision, before the collision occurred, an instruction imposing on the defendant the duty of

¹² *Henry v. Grant St. Elec. R. Co.*,
24 Wash. 246, 64 Pac. 137.

¹³ *McDonald v. Montgomery St.*
R. Co., 110 Ala. 161, 20 So. 317.

¹⁴ *Patterson v. Inclined Plane R.*
Co., 12 Ohio C. C. 274, 1 Ohio C. D.
665.

carrying passengers safely as far as capable by the exercise of human care, and making the defendant liable for the slightest negligence, and stating that if a collision results between two cars running in opposite directions on a single track the carrier is prima facie negligent, was held not to be erroneous as being based on the theory that the plaintiff was injured by the collision.¹⁵ Where it appeared that a train on which the plaintiff was riding was closely followed by another train which ran into it, and that as soon as the front trains stopped the conductor sent a brakeman back to signal the following train, and as the brakeman jumped from the train he fell down an embankment, and afterwards when running back he fell while passing over a bridge, and there was no evidence as to the time lost by reason of the fall on the bridge, it was held proper to refuse an instruction that the carrier was not liable if the collision was caused by the brakeman's fall in crossing the bridge, by reason of which he was prevented from signaling the following train in time to avoid collision, the court having given a general charge that the plaintiff was required to show negligence on the part of the defendant.¹⁶ In an action by a passenger on a street car for injuries from a collision while riding on the footboard preparatory to alighting, an instruction that the carrier is liable if the injury to the plaintiff was the result of even slight negligence in the management of the train, was held not erroneous as enlarging the issue, where the plaintiff alleged that the injury was due to the negligence of the carrier in that the collision could have been avoided by the exercise of ordinary care.¹⁷ As to presumptive negligence of the carrier by reason of the accident, where the plaintiff sues for injuries resulting

¹⁵ *Magrane v. St. Louis & Suburban R. Co.*, 183 Mo. 119, 81 S. W. 1158. See as to instruction where cars were going in same direction. *Chicago &c. R. Co. v. Schmidt*, 117 Ill. App. 213, affirmed in 217 Ill. 396, 75 N. E. 383.

¹⁶ *Missouri &c. R. Co. v. Cook*, 12 Tex. Civ. App. 203, 33 S. W. 669.

¹⁷ *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385, 51 S. W. 682. See for instruction as to standing room inside and where plaintiff ought to be, *Chesapeake &c. R. Co. v. Long*, 100 Ky. 221, 19 Ky. L. 65, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271.

from a collision of cars, and there was evidence that the plaintiff was standing in the car when the collision occurred, a charge that the plaintiff was guilty of contributory negligence if in standing she was not acting as an ordinarily prudent person would have done rendered proper a charge that if the plaintiff was not guilty of contributory negligence the fact of the collision raised a presumption of negligence, thereby casting on the defendant the burden of showing absence of negligence on its part.¹⁸ Where there is evidence that one killed on the defendant's train by a collision, had declared his intention of beating his way, and was riding on the train without the defendant's knowledge, it was held not error to refuse an instruction, in an action for his death, that "in the absence of evidence to the contrary," the law will presume that he was a passenger, and that the burden of showing the contrary is on the defendant.¹⁹ The negligence of both the carrier and its servants having been put in issue by the pleadings in an action by a passenger for injuries sustained in a collision, it was held proper to instruct that the carrier is bound to use the utmost care in transporting passengers, and that if neglect thereof either by itself or through its agents, results in injury to a passenger it will be held liable.²⁰ In regard to injuries sustained by a collision at railroad crossings, it has been held proper to refuse an instruction requested

¹⁸ *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713. The *res ipsa loquitur* doctrine has been fully discussed in another chapter, but see for instructions thereon and statements of the doctrine, *Pennsylvania Co. v. Clark*, 266 Fed. 182; *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 361, 368, 71 N. E. 201; *Terre Haute &c. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Union Trac. of Ind. v. Berry*, 188 Ind. 514, 121 N. E. 655, 124 N. E. 739; *Arnett v. Illinois Cent. R. Co.* (Iowa), 176 N. W. 322; *Cloud v.*

Kansas &c. R. Co., 103 Kans. 249, 173 Pac. 338, 7 A. L. R. 1671; *Anderson v. Kansas City Ry. Co.* (Mo.), 233 S. W. 203; *Dowdy v. Southern Trac. Co.* (Tex. Civ. App.), 219 S. W. 1092. Compare also *Feldman v. Chicago &c. Ry. Co.*, 289 Ill. 25, 124 N. E. 334, 6 A. L. R. 1291; *White v. Hines* (N. Car.), 109 S. E. 31.

¹⁹ *Southerland v. Texas &c. R. Co.*, (Tex. Civ. App.) 40 S. W. 193.

²⁰ *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

by one of the defendants correctly defining the duty of the other in regard to the care to be exercised in approaching the crossing, and casting upon it liability in case the jury find a breach of duty, since both carriers, it was said, are held to the same degree of care, and the instructions should be applicable to both.²¹ Where a passenger was injured by jumping from a street car to escape a threatened collision with a railroad train, and the petition charged that the street car men took no precaution to ascertain the presence of the railroad train, the court was held to be justified under such allegations in presenting the issue to the jury as to whether the street car men failed to keep a reasonably sufficient lookout for the train.²² But in an action by a passenger for injuries caused by the wrecking of a train, an instruction that if the train was wrecked and the wrecking was the proximate cause of the plaintiff's injuries, he was entitled to recover, was held erroneous as giving conclusive effect to the mere fact that the train was wrecked.²³ As to injuries resulting from the condition of the track or machinery, an instruction that "when the track and machinery are in perfect condition and prudently operated, trains will keep upon the track and run thereon with entire safety to those on the cars, and whenever the car leaves the track and goes down an embankment, it proves that either the track or the machinery, or

²¹ *Kansas City &c. R. Co. v. Stoner*, 49 Fed. 209. But compare *Vincennes Trac. Co. v. Curry*, 59 Ind. App. 683, 109 N. E. 62. As elsewhere shown, the duty of the carrier to its passengers may be different from that of the other company, and a statute or ordinance or ordinance at least where one company is a steam railroad company and the other a street or interurban railway company, may prescribe different precautions.

²² *Galveston &c. R. Co. v. Vollrath*, 40 Tex. Civ. App. 46, 89 S. W. 279. See also *Hamilton v. Metropolitan St. R. Co.*, 114 Mo. App. 504,

89 S. W. 893. Where the court instructed that if the jury find that the street railroad company's employees in charge of the car stopped, looked and listened before crossing the track and were not negligent in not sending a man ahead to see whether a train was approaching, plaintiff could not recover, it was held that the instruction could not be construed as requiring of the street railroad company the absolute duty of having the track clear. *St. Louis &c. R. Co. v. Nance*, 45 Tex. Civ. App. 394, 101 S. W. 294.

²³ *Galveston &c. R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234.

some portion thereof, is not in proper condition, or that the machinery is not properly operated," was held to be erroneous as making the accident conclusive instead of prima facie evidence of the carrier's negligence, and the error was not cured by a subsequent instruction that such conditions amount to presumptive proof of negligence.²⁴ But where it appeared that the train was thrown from the track by a rail having been misplaced at a switch, and that the switch indicator could not be seen by the engineer so as to prevent the accident, and that there was no switch tender at such point, it was held not error to instruct that although the jury find that there was no one in charge of the switch, and that the presence of such person might have prevented accident, the plaintiff could not recover unless they also find that the want of such tender amounted to negligence.²⁵ There being evidence that the carrier improperly made up the train, but none that the derailment of the train resulted from such fact, an instruction that the plaintiff may recover if the train was derailed by reason of negligence in making it up, was held to be prejudicial error.²⁶ And in an action for derailment of a car by reason of a defective switch, it was held that the court was not precluded from instructing that proof of the derailment and of the plaintiff's injury was sufficient to create a presumption of negligence on the part of the defendant.²⁷ Where a mail clerk was injured by the derailment of the train, and his petition in an action for the injuries alleged that the carrier was negligent in failing to exercise proper care as to the safety of its roadbed and in running its trains at a dangerous speed, and two persons who passed over the track before the accident testified that the track was in bad condition, and the conductor testi-

²⁴ *Pattee v. Chicago & N. W. R. Co.*, 5 Dak. 267, 38 N. W. 435.

²⁵ *Baltimore & O. R. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578.

²⁶ *Denver & N. W. R. Co. v. Pilgrim*, 9 Colo. App. 86, 47 Pac. 657.

²⁷ *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582, 82 S. W. 126. An instruction that proof of the derailment raises a presumption of negli-

gence on the part of the defendant, and that if there was negligence and such negligence was the proximate cause of the injury, the verdict should be for the plaintiff, was held to be a proper statement. *Overcash v. Charlotte Elec. R. & Co.*, 144 N. Car. 572, 57 S. E. 377, 12 Ann. Cas. 1040. See also *Midland Val. R. Co. v. Hilliard (Okla.)*, 148 Pac. 1001.

fied that the track was apparently in good condition and that the train was running twenty-five miles an hour, and that it was unusual for a train to jump the track at that rate of speed, it was held to authorize an instruction that if the concurrent negligence of the carrier in failing to provide a safe roadbed and to properly operate its trains caused the plaintiff's injury the carrier was liable, although each negligent act taken separately was not the proximate cause.²⁸ Where a street car was derailed because one of the car wheels became loose, instructions in an action for injury to a passenger resulting therefrom that the carrier is required to exercise reasonable care, commensurate with the danger, to ascertain the fitness of the equipment before using it, and that it is for the jury to determine what tests were reasonably required and what would have revealed the defect, sufficiently stated the law that it was the duty of the carrier before using the equipment to apply every reasonable test to discover whether the equipment was in suitable condition for service.²⁹ An instruction that if the derailment was caused by the breaking of a car wheel by reason of a latent defect when delivered to the carrier, it being conceded that there were no patent defects when the wheel was delivered to the carrier, the carrier is not liable, was held to be erroneous as excluding the issue of the carrier's want of care in properly testing the wheel while it was being used.³⁰ And where a passenger alleged that the derailment was due to neglect to make repairs in the track and roadbed, and to excessive speed, and the court after instructing that if the jury believe that the unrepaired track or excessive speed caused the accident, the verdict should be for the plaintiff, although it should appear that a broken axle contributed to the accident, further charged that if the jury believe the broken axle

²⁸ *Sproule v. St. Louis &c. R. Co.*, (Tex. Civ. App.), 91 S. W. 657. In *McGuire v. Chicago &c. R. Co.*, (Mo.), 178 S. W. 79, L. R. A. 1915F, 188, it is held that passenger has no cause of action for derailment of the train except to the extent of the resulting injury to him

or to some right growing out of his relation.

²⁹ *Marshall v. Boston &c. R. Co.*, 195 Mass. 284, 81 N. E. 195.

³⁰ *Houston &c. R. Co. v. Summers*, (Tex. Civ. App.), 49 S. W. 1106.

was the sole cause of the accident the verdict should be for the defendant, the charge was held to be erroneous as ignoring the derailment and excusing the defendant notwithstanding the broken axle may have been due to the defendant's negligence.⁸¹

§ 2894 (1843). **Burden of proof in actions for injuries to passengers.**—An instruction that the mere fact that the plaintiff sustained an injury while a passenger on the defendant's road does not entitle him to a verdict, but that he must show that the accident was caused by a lack of due care on the part of the defendant, has been held to be proper as a statement that the burden is on the plaintiff to prove negligence on the part of the defendant.⁸² In an action for injury sustained while alighting from a street car, an instruction that the burden of proof is on the plaintiff to show that the car stopped or slowed down, and that as the plaintiff was alighting and before she had reasonable time to alight, the car was started by the defendant's employes with increased motion, and the plaintiff was thereby thrown and injured, which injury could have been prevented if the defendant's servants had exercised a high degree of care, was held not to be open to the objection of casting on the plaintiff the burden of proof that the sudden starting of the car could have been prevented if the defendant had exercised the high degree of care incumbent on it.⁸³ An instruction in an

⁸¹ *Johnson v. Galveston &c. R. Co.*, 27 Tex. Civ. App. 616, 66 S. W. 906.

⁸² *Buck v. Manhattan R. Co.*, 15 Daly 550, 10 N. Y. S. 107; *French v. Pacific Elec. R. Co.*, 1 Cal. App. 401, 82 Pac. 395; *Miller v. Detroit United R.*, 144 Mich. 1, 107 N. W. 714. See also *Huckaby v. St. Louis &c. Ry. Co.*, 119 Ark. 179, 177 S. W. 923; *El Paso Elec. R. Co. v. Alderete*, 36 Tex. Civ. App. 142, 81 S. W. 1246.

⁸³ *Reagan v. St. Louis Transit Co.*, 180 Mo. 117, 79 S. W. 435.

Where the plaintiff sued for injuries received by falling from a street car by the gate opening while he was leaning upon it, an instruction that the defendant must prove that it was free from negligence was held erroneous as shifting the burden of proof from the plaintiff to the defendant. *Greer v. Union R. Co.*, 50 Misc. 560, 99 N. Y. S. 428. See as to instructions as to burden being upon defendant held proper, *Freeman v. Collins Park &c. R. Co.*, 117 Ga. 78, 43 S. E. 410. See also

action by a passenger for personal injuries that if the plaintiff shows a prima facie right to recovery, it then devolves on the defendant to establish by a preponderance of the evidence one of two facts, either that the carrier was not negligent, or that the plaintiff could have avoided the consequences of the negligence by the exercise of ordinary care, was held not to be erroneous because of the failure to instruct in connection therewith as to the law of contributory negligence and apportionment of damages, where the rule bearing on such question were fairly and fully stated by other instructions bearing on the measure of damages.³⁴ An instruction that the burden is on the carrier to show that it did all that human care, vigilance and foresight could reasonably do, consistent with the character and mode of conveyance, in the practical prosecution of its business, to prevent injuries to passengers, was held not to conflict with other instructions requiring the plaintiff to prove that the defendant owned and operated the car in question and holding the defendant to the exercise of such care as human beings are capable of, consistent with the practical operation of the defendant's trains, and that one who charges negligence must prove it.³⁵ An instruction that if the jury find that the failure to stop the car was not the proximate cause of the injury the carrier would not be liable, was held not to place on the defendant the burden of showing that the failure to stop the car was not the proximate cause of the injury.³⁶ And in such an action it was held that the court properly refused to instruct that the jury must find, with a reasonable degree of certainty, that the decedent's death was the

West Chicago &c. R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718, affirming 99 Ill. App. 591. And compare White v. Hines (N. Car.), 109 S. E. 31.

³⁴ Macon Consol. R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756.

³⁵ Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087, affirming 102 Ill. App. 202.

³⁶ Galveston &c. R. Co. v. Voll-

rath, 40 Tex. Civ. App. 46, 89 S. W. 279. And where the complaint alleges other injuries than the one claimed to have resulted in appendicitis it was held not error to refuse to instruct that the burden is on the plaintiff to show that the injuries alleged were the proximate cause of appendicitis. Birmingham R. &c. Co. v. Moore, 148 Ala. 115, 42 So. 1024.

proximate result of an injury received while a passenger on the defendant's road, since it required a higher degree of evidence than the law requires, a preponderance of the evidence being sufficient.³⁷ It was held error to refuse to modify an instruction that the burden of proof is on the plaintiff to show negligence resulting in his injury, by adding that the injury itself is prima facie evidence of negligence on the part of the carrier, if the plaintiff was in the exercise of ordinary care.³⁸ As to contributory negligence, in an action by a passenger for personal injuries, an instruction that to warrant a verdict for the plaintiff the jury must believe, that the carrier's servants in charge of the train failed to stop the train a reasonable time at the station to allow the plaintiff to board it, and that while the plaintiff was on the lower step of the coach in the act of alighting the train was started with a jerk, resulting in the plaintiff's injuries as alleged and that in attempting to board the train the plaintiff exercised reasonable dispatch and haste and such care as a person of ordinary prudence would have exercised under the circumstances to avoid injury, was held to be erroneous as casting on the plaintiff the burden of disproving contributory negligence.³⁹ And an instruction that if the plaintiff has proven the defendant's negligence by a preponderance of the evidence, the burden then shifts to the defendant, and it must show to the satisfaction of the jury that the plaintiff was guilty of negligence, was also held to be erroneous as requiring too high a degree of proof in establishing the defense.⁴⁰

³⁷ *St. Louis S. W. R. Co. v. Burke*, 36 Tex. Civ. App. 222, 81 S. W. 744. But see chapter on Damages.

³⁸ *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. ed. 458, rev'g 5 Mackey, 356. See also *Ohio & M. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774; *Sanders v. Southern R. Co.*, 107 Ga. 49, 32 S. E. 840; *Cronk v. Wabash R. Co.*, 123 Iowa 349, 98 N. W. 884.

³⁹ *St. John v. Gulf &c. R. Co.*, (Tex. Civ App.), 80 S. W. 235.

⁴⁰ *Gulf &c. R. Co. v. Condra*, 36 Tex. Civ App. 556, 82 S. W. 528. See also *Cleveland &c. R. Co. v. Newell*, 104 Ind. 264; *Louisville &c. R. Co. v. Jones*, 108 Ind. 551, 567. As to burden of proof and shifting thereof, especially in cases of collision or derailment, see ante § 2496, also *Kansas City &c. Ry. Co. v. Clinton*, 224 Fed. 896; *Dillahunt v. Chicago &c. R. Co.*,

§ 2895 (1844). **Must be confined to issues.**—It is a general rule that instructions should be pertinent to the issues and to the evidence.⁴¹ In an action by a passenger for injuries alleged to have been sustained by the sudden and violent jerking of the car as a result of the engineer's negligence, an instruction that if the jury find that the defendant through its agents and servants so carelessly and negligently ran and managed its train as to throw the plaintiff off the platform of the car, the plaintiff is entitled to recover, was held to be supported by the petition.⁴² Where the plaintiff's petition alleges that her injuries were sustained by the negligent backing of a train into the car on which she was a passenger, it is error to instruct that the jury may find for the plaintiff if the defendant was negligent in permitting the plaintiff to remain in the car after it had reached its destination, without regard to the negligent handling of the train, although there was evidence that the defendant's employes negli-

119 Ark. 392, 178 S. W. 420; Behen v. Philadelphia &c. R. Co., 28 Del. 389, 93 Atl. 903; Midland Val. R. Co. v. Hilliard, (Okla.), 148 Pac. 1001; Murray v. Philadelphia &c. R. Co., 249 Pa. St. 126, 94 Atl. 558; Niebalski v. Pennsylvania R. Co., 249 Pa. St. 530, 94 Atl. 1097, Ann. Cas. 1917C, 632. See also ante § 2893, n. 18.

⁴¹ 2 Elliott's Gen. Pr. § 899; National &c. Co. v. Pake, 60 Ind. App. 366, 109 N. E. 787; Rawlings v. St. Louis &c. Ry. Co., (Mo.), 175 S. W. 935; Oklahoma Ry. Co. v. Christensen, 47 Okla. 132, 148 Pac. 94; Chesapeake &c. Ry. Co. v. Newton's Admr., 117 Va. 260, 85 S. E. 461.

⁴² Schultze v. Missouri Pac. R. Co., 32 Mo. App. 438. Instructions in the following cases have been held to be erroneous as not being authorized by the pleadings: Wil-

burn v. St. Louis &c. R. Co., 36 Mo. App. 203; Ely v. St. Louis &c. R. Co., 77 Mo. 34; Chicago &c. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. 17n, 44 Ill. App. 124; Cincinnati &c. R. Co. v. Dufraim, 36 Ill. App. 352; Texas &c. R. Co. v. Beckworth, 11 Tex. Civ. App. 153, 32 S. W. 347. In the following case instructions were held to have been properly refused as not being authorized by the pleading: Illinois Cent. R. Co. v. Davenport, 177 Ill. 110, 52 N. E. 266; Harrold v. Winona &c. R. Co., 47 Minn. 17, 49 N. W. 389; Illinois Cent. R. Co. v. Vinson, 25 Ky. L. Rep. 38, 74 S. W. 671, 76 S. W. 167; Danyette v. Nashua St. R., 69 N. H. 625, 44 Atl. 104; Denison &c. R. Co. v. Freeman, 38 Tex. Civ. App. 152, 85 S. W. 55.

gently failed to notify the plaintiff to leave the car after it reached its destination.⁴³ And where the petition, in an action for injuries sustained while alighting from a moving train, alleged negligence of the defendant in failing to direct the plaintiff what train to take, an instruction that if the plaintiff got on the wrong train through failure of the defendant to have some one there to direct him, he having been told by the porter on the train that it was the train he desired to take and on further explanation was told so again, but was afterwards told that it was not the train he wanted, and was then directed by the porter to jump off, the verdict should be for the plaintiff, was held not objectionable on the ground that it authorized recovery on the misdirection of the porter, when the petition charged failure to give any direction.⁴⁴ The declaration having charged in one count the liability of the defendant for failure to make up its train and to sufficiently couple its cars, and in another count that the defendant moved its engine and cars without sufficiently coupling the car, it was held proper to instruct that the plaintiff may recover if he was injured by the negligence of the defendant in making up its trains, and failing to sufficiently couple the cars.⁴⁵ In an action by a passenger for injuries alleged to have been sustained by a sudden lurch of the car, an instruction permitting the plaintiff to recover on the ground of excessive speed, although there was no allegation that the car was running at an excessive speed, was held not to be erroneous, where the petition alleged generally that the injury resulted from the defendant's negligence in the construction, maintenance and operation of its line and car.⁴⁶ Under a general denial to the complaint in an action by a passenger for personal injuries, an instruction is authorized that the plaintiff could not recover if he was a trespasser on the defendant's train.⁴⁷ In an action by a

⁴³ *Chicago &c. R. Co. v. Bell*, 1 Kans. App. 71, 41 Pac. 209.

⁴⁴ *Newcomb v. New York Cent. &c. R. Co.*, 182 Mo. 687, 81 S. W. 1099.

⁴⁵ *Hannibal &c. R. Co. v. Martin*, 111 Ill. 219.

⁴⁶ *Baskett v. Metropolitan St. R. Co.*, 123 Mo. App. 725, 101 S. W. 138.

⁴⁷ *Pfaffenback v. Lake Shore &c. R. Co.*, 142 Ind. 246, 41 N. E. 530. An instruction relating to the duties of carriers of passengers for

passenger for personal injuries the instructions should definitely state the issue presented by the pleadings; hence, an instruction in an action for injuries alleged to have been sustained by the starting of the train before the plaintiff had an opportunity to alight, to find for the defendant if the preponderance of the evidence fails to show that the plaintiff fell because the car was started before she had an opportunity to alight, was held to have been properly refused.⁴⁸ Where the declaration in an action for injuries to a passenger while attempting to alight from a train alleged that the injuries were sustained by the sudden and violent starting of the car, an instruction authorizing a verdict for the plaintiff if the jury believe that the accident and injuries were caused by the carelessness and negligence of the carrier, and that the plaintiff used due care and caution in alighting from the car, or attempted to leave the car after it had stopped, and that the plaintiff was injured by the car from which she was alighting, was held to be erroneous in not confining the jury to consideration of the negligence alleged in the declaration.⁴⁹ An instruction in an action for injuries alleged to have been sustained by the sudden and violent starting of the car while the plaintiff was in the act of alighting which was based on the defendant's negligence on "failing to stop the train a reasonable time to enable plaintiff to alight therefrom," authorized recovery for a different breach of duty from that alleged in the declaration, and it was held to be erroneous.⁵⁰ Where

hire is authorized, although the existence of the relation is denied by the carrier, where the facts alleged in the declaration would if proven establish such relation. *Chicago Union Tract. Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341.

⁴⁸ *West Chicago St. R. Co. v. McCafferty*, 220 Ill. 476, 77 N. E. 153.

⁴⁹ *Chicago Union Tract. Co. v. Gommies*, 110 Ill. 113. See also *El Paso Elect. R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735.

⁵⁰ *Chicago &c. R. Co. v. Wallace*, 85 Ill. App. 606. If a declaration specifically alleges that the plaintiff was injured by being thrown from a car, it is error to charge on the theory that he was compelled to jump from the car. *Pensacola Elec. &c. R. Co. v. Haussmann*, 51 Fla. 286, 40 So. 196. In an action by a passenger for injuries from an insecurely fastened gate on the rear platform of the car, an instruction that the jury may consider all the circumstances

a declaration alleged a combination of concurring acts as constituting the negligence relied on for recovery, an instruction that it was not negligence on the part of the carrier to stop its train before arriving at the station platform, was held to be misleading.⁵¹ And where one count of the complaint alleged injuries resulting from a collision of trains, and another alleged that the injuries were received in attempting to escape a threatened collision, an instruction that the plaintiff could not recover without proof of the collision, was held to have been properly refused, since it confines recovery to one of two causes of injury.⁵²

§ 2896 (1845). Must be confined to the evidence.—It may be stated as a general proposition that instructions should find support in the evidence. Hence it follows that where clear-cut issues are presented, an instruction should not be given unless it is supported by facts in issue.⁵³ Where in an action by a

shown by the evidence, followed by the charge that the actual issue is that the gate was not properly made was held to be erroneous as allowing recovery on negligence not pleaded. *Aston v. St. Louis Co.*, 105 Mo. App. 226, 79 S. W. 999.

⁵¹ *Harvey v. Chicago &c. R. Co.*, 116 Ill. App. 507, affirmed 221 Ill. 242, 77 N. E. 569. See also *New York &c. R. Co. v. Ault*, 56 Ind. App. 293, 102 N. E. 988.

⁵² *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. 747. See also *St. Louis &c. Ry. Co. v. Coke*, 118 Ark. 49, 175 S. W. 1177. In an action for injuries sustained while attempting to alight from a train, in which the petition alleges that the train did not stop long enough to allow plaintiff to alight in safety, and that as he was alighting the

train was suddenly and violently started, throwing plaintiff and causing his injuries, the defendant's negligence is predicated upon both the insufficiency of the stop and the sudden starting of the train, and instructions covering either allegation of negligence are properly based on the pleadings. *Missouri &c. R. Co. v. McElree*, 16 Tex. Civ. App. 182, 41 S. W. 843. See also *Southern Ry. Co. v. Farquhar*, 192 Ala. 415, 68 So. 289; *Watts v. Chicago &c. R. Co.*, 61 Ind. App. 51, 104 N. E. 42; *Vandalia R. Co. v. Holland*, 183 Ind. 438, 108 N. E. 580.

⁵³ *Kelly v. Third Ave. R. Co.*, 25 App. Div. 603, 50 N. Y. S. 426. See also *Little Rock &c. R. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *Smith v. Birmingham R. &c. Co.*,

passenger for personal injuries there is no evidence as to precautions which the carrier might have taken in aiding the plaintiff to alight from the train, it was held not error to refuse an instruction that passengers are not entitled to every precaution to insure safety, which is possible to suggest after the injury has been sustained.⁵⁴ In an action for injuries from having gotten on the wrong train by the direction of the defendant's flagman and conductor, where the flagman testified that he did not give the plaintiff such direction, and the conductor did not

147 Ala. 702, 41 So. 307; Central R. v. Thompson, 76 Ga. 770; Chicago &c. R. Co. v. Bryan, 90 Ill. 126; Indianapolis Trac. &c. Co. v. Hensley, (Ind.), 105 N. E. 474; Lake Erie &c. R. Co. v. Arnold, 8 Ind. App. 297, 34 N. E. 742; Greenfield v. Detroit &c. R. Co., 133 Mich. 557, 95 N. W. 546; Howell v. Lansing City Elec. R. Co., 136 Mich. 432, 99 N. W. 406; Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127; Brod v. St. Louis Transit Co., 115 Mo. App. 202, 91 S. W. 993; Ray v. United Traction Co., 96 App. Div. 48, 89 N. Y. S. 49; Witte v. Atlantic Coast Line &c. Ry. Co., 168 N. Car. 566, 84 S. E. 861; Smitson v. Southern Pac. Co., 37 Ore. 74, 60 Pac. 907; Tyler v. Texas &c. R. Co., (Tex. Civ. App.), 79 S. W. 1075; San Antonio &c. R. Co. v. Turney, 33 Tex. Civ. App. 626, 78 S. W. 256; Shenandoah Valley R. Co. v. Moose, 83 Va. 827, 3 S. E. 796; Beery v. Chicago &c. R. Co., 73 Wis. 197, 40 N. W. 687. An instruction that steam railroads must use the utmost care in carrying passengers, was held to be a correct statement, and was not prejudicial to the carrier which was sued for an injury

to a passenger while boarding its train, even though it had no application to the evidence. Decker v. Manhattan R. Co., 49 Hun 607, 2 N. Y. S. 302. To effect that jury may test truth of testimony by their own general knowledge, etc., see Cincinnati &c. R. Co. v. Creger, 150 Ind. 625, 50 N. E. 760.

⁵⁴ Brodie v. Carolina Midland R. Co., 46 S. Car. 203, 24 S. E. 180. Where the evidence in an action for injuries sustained while alighting from the train, was conflicting as to whether the plaintiff was injured while getting off the train, or was subsequently injured at her home, and the court instructed that if she was so injured in alighting from the train, the jury should find such damages as she sustained, and further instructed that unless she was so injured they should find for the defendant regardless of the other facts, it was held not to be objectionable as laying too much stress on the question whether the plaintiff was in fact injured in alighting from the train, and in suggesting the weight of the evidence on that question. Conwell v. Gulf &c. R. Co., 85 Tex. 96, 19 S. W. 1017.

testify, it was held that an instruction that the plaintiff could not recover unless the defendant's "conductor and flagman" directed the plaintiff to get on the wrong train was erroneous.⁵⁵ The testimony of the plaintiff and another who was with him when looking for his train, that there was no one to direct him, justifies an instruction that the carrier was liable if it failed to make reasonable provisions for directing the plaintiff to his train.⁵⁶ Where it appears that the accident causing the plaintiff's injuries was due to the spreading of rails in the track, the mere fact that some of the ties at the place of the accident were decayed or rotten does not warrant an instruction that the defendant was guilty of gross negligence or wanton disregard of the safety of passengers there being no evidence showing that the rottenness of the ties was the cause of the accident.⁵⁷ Although the evidence shows that it was the duty of railroad employees to assist passengers off trains and that no employee was present to assist the plaintiff's wife, the mere fact that the plaintiff's wife took her child and a grip when leaving the train does not raise the issue of contributory negligence so as to require an instruction on such question.⁵⁸ Where there was a disputed question as to whether the plaintiff was a passenger or a trespasser, the evidence as to which was conflicting, it was held reversible error to instruct that if the jury believe that the plaintiff, through negligence on his part, was injured by the defendant's negligence as charged in the declaration, the verdict should be for the plaintiff since it takes from the jury the question whether the plaintiff was a passenger.⁵⁹ And where the plaintiff was injured by being thrown from a handcar on which he was riding at the invitation of one of defendant's servants, and the evidence was conflicting as to the servant's authority in the matter, it was held error to instruct that he had the right to

⁵⁵ *Robertson v. Louisville &c. R. Co.*, 142 Ala. 216, 37 So. 831.

⁵⁶ *Newcomb v. New York &c. R. Co.*, 182 Mo. 687, 81 S. W. 1069.

⁵⁷ *Illinois Cent. R. Co. v. Lence*, (Ky.), 100 S. W. 215.

⁵⁸ *Missouri &c. R. Co. v. Corse*, 46 Tex. Civ. App. 60, 101 S. W. 522.

⁵⁹ *Chicago &c. R. Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, 19 Am. St. 17n.

give the carrier's consent to plaintiff's riding on the hand-car.⁶⁰ Where one count in an action for injuries caused by the derailment of a car charged that the defendant was negligent in running a train at too great speed, and also in maintaining a defective track at the place of the accident, it was held proper to refuse an instruction to find for the defendant on such count, because there was no evidence of negligence as to the speed of the train.⁶¹

§ 2897 (1846). *Invasion of province of jury.*—An instruction in an action for injuries sustained while attempting to board a moving train, that if the conductor knew the passenger was on the platform, and negligently and without warning started the train without giving him reasonable opportunity to get back on to the train, and the passenger in attempting to get back on the train was injured while exercising reasonable care, by reason of the starting of the train, the carrier would be liable, was held to be erroneous as taking from the jury the question whether the plaintiff's effort to get onto the train was of itself negligence, and in limiting the jury's consideration to due care by the plaintiff while attempting to get onto the train.⁶² And in such an action where the plaintiff alleges that she fell while attempting to board the defendant's train, by reason of the fault of the brakeman, but the brakeman testified that the plaintiff fell without fault or interference on his part, it was held prejudicial error for the court, in charging the jury and in answering questions submitted, to assume that the brakeman pushed or jostled the plaintiff, thereby causing her fall.⁶³ Since the question of negligence is rarely a matter of law, it has often been held error to instruct that certain specified facts constitute negligence on the part of the railroad company, the question usually being for the determination of the jury from all the evidence.⁶⁴ And

⁶⁰ *International &c. R. Co. v. Cock*, 68 Tex. 713, 5 S. W. 635, 2 Am. St. 521.

⁶¹ *Alabama &c. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. 65.

⁶² *Chicago &c. R. Co. v. Gore*, 92 Ill. App. 418.

⁶³ *Philadelphia &c. R. Co. v. Alvord*, 128 Pa. St. 42, 18 Atl. 391.

⁶⁴ *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *In-*

mandatory instructions stating or conditioning only a part of the essential facts or elements have often been held erroneous.⁶⁵ Where the plaintiff sued for the death of a drover while riding on the defendant's freight train, an instruction that the evidence that the drover was killed while a passenger on a train constituted prima facie evidence of the defendant's negligence, was held to be erroneous, since the mere fact that the drover was killed, without regard to how he was killed does not raise the presumption of negligence.⁶⁶ An instruction that the derailment of a train raises no presumption of negligence on the part of the carrier, was held to invade the province of the jury by commenting on the weight of the evidence.⁶⁷ Where the plaintiff's evidence in an action for personal injuries shows the use

diana Union Trac. Co. v. Reynolds, 176 Ind. 263, 95 N. E. 584; Citizens' St. R. Co. v. Hoffbauer, 23 Ind. App. 614, 56 N. E. 54; International &c. R. Co. v. Eckford, 71 Tex. 274, 8 S. W. 679; San Antonio &c. R. Co. v. Robinson, 73 Tex. 277, 11 S. W. 327; Galveston &c. R. Co. v. Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990; Texas &c. R. Co. v. Born, 20 Tex. Civ. App. 351, 50 S. W. 613; International &c. Ry. Co. v. Jones, (Tex. Civ. App.), 175 S. W. 488 (so as to contributory negligence); International &c. R. Co. v. Hubbs, 37 Tex. Civ. App. 77, 82 S. W. 1062.

⁶⁵ Indianapolis Trac. &c. Co. v. Mathews, 177 Ind. 88, 97 N. E. 320; Chicago &c. R. Co. v. Glover, 154 Ind. 584, 57 N. E. 244; Steele v. Michigan &c. Co., 50 Ind. App. 635, 95 N. E. 435, 438; Frank v. Monongahela Val. Trac. Co., 75 W. Va. 364, 83 S. E. 1009. See also McBride v. Des Moines R. Co., 134 Iowa 398, 109 N. W. 618.

⁶⁶ Western Md. R. Co. v. State,

95 Md. 637, 53 Atl. 969. It has been held proper to refuse an instruction that the mere fact of an accident raises no presumption of negligence, since it invades the province of the jury. Missouri &c. R. Co. v. Baker, (Tex. Civ. App.), 58 S. W. 964. But in many jurisdictions such an instruction would not be held erroneous in a proper

⁶⁷ Houston &c. R. Co. v. Richards, 20 Tex. Civ. App. 203, 49 S. W. 687. Where plaintiff was injured by a car window falling on his hand, while the train was passing over a rough place in the track, an instruction to find for the plaintiff if the jury believe from the evidence that while traveling on the train plaintiff was injured by reason of the train passing over a rough place in the defendant's road bed, causing the window to fall on his hand, was held not to be erroneous as bearing on the weight of the evidence and as withdrawing from the jury the ques-

of excessive force, it has been held that the court may properly instruct that if the jury believe the plaintiff's evidence "as a matter of law there was more force used than was necessary to accomplish the result, and the plaintiff is entitled to a verdict," if at the same time the court presents the case as made out by the defendant's evidence.⁶⁸ But an instruction that carriers of passengers are required to furnish suitable and safe depot platforms and that passengers are not required to approach such platforms with suspicion, but may assume that the carrier has not put a death trap in their way, was held to be erroneous as invading the province of the jury, in an action for the death of a passenger by being crushed between a depot platform and a moving train which the deceased was attempting to board.⁶⁹

§ 2898 (1847). Assumption of facts in issue.—An instruction in an action for personal injuries is erroneous which assumes the disputed fact that the plaintiff exercised due care;⁷⁰ and, generally speaking, an instruction is erroneous which assumes as true a matter in issue.⁷¹ Where a passenger sues for injuries alleged to have been sustained by the porter opening and closing

tion of whether the rough place was due to the defendant's negligence, where the court also instructed that the plaintiff must show that the defendant had negligently suffered its road bed to become out of repair and there by caused the injury. *Gulf &c. R. Co. v. Killebrew*, (Tex.), 20 S. W. 182.

⁶⁸ *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. ed. 1049. But see *Chicago &c. R. Co. v. Chisholm*, 79 Ill. 584.

⁶⁹ *Hunter v. Cooperstown &c. R. Co.*, (N. Y.), 24 Wkly. Dig. 21. See also for other instructions held bad as invading province of jury, *Loveman v. Birmingham &c. Co.*,

(Ala.) 43 So. 411; *Karnoop v. Ft. Smith Light &c. Trac. Co.*, 119 Ark. 295, 178 S. W. 302. *Hambright v. Atlanta &c. Ry. Co.*, 102 S. Car. 166, 86 S. E. 375; 2 Elliott's Gen. Pr. §§ 901-903. Instructions may also be erroneous on the other hand, for submitting matters of law rather than fact to the jury. *Southern Ry. Co. v. Hayes*, 194 Ala. 194, 69 So. 641. *Loomis v. Metropolitan St. Ry. Co.*, 188 Mo. App. 203, 175 S. W. 143.

⁷⁰ *DeKalb &c. R. Co. v. Rowell*, 74 Ill. App. 191.

⁷¹ *Michigan So. &c. R. Co. v. Shelton*, 66 Ill. 424; *Lake Shore &c. R. Co. v. W. H. McIntyre Co.*, 60 Ind. App. 191, 108 N. E. 978; *Maloy v. St. Louis &c. Ry. Co.*,

a car door against which the plaintiff was alleged to have been leaning while standing on the platform of the car, an instruction that if the plaintiff was standing on the platform of the car, and the porter in opening a door did not see that the plaintiff was standing against the door, and that the plaintiff began to fall backwards, and in order to prevent his falling the porter shut or attempted to shut the door and thereby injured the plaintiff, the injury was the result of a mere accident, and the defendant is not liable, is erroneous as assuming that plaintiff was leaning against the door.⁷² But where the plaintiff, a street car passenger, was injured by the car colliding with a wagon, and the

(Mo. App.), 178 S. W. 224; *Terre Haute &c. Trac. Co. v. Ellsbury*, (Ind. App.), 123 N. E. 810; 2 Elliott's Gen. Pr. § 900.

⁷² *St. Louis &c. R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879. Where plaintiff sued for injuries received from being thrown from the car platform by a lurch of the car, the court properly refused to instruct that the act of the plaintiff, in getting on to the platform, was the cause of the injury, and that the inquiry should be directed to the ascertainment of the fact whether such act was negligent, since the charge assumed that the getting on to the platform contributed to the plaintiff's injury. *San Antonio &c. R. Co. v. Choate*, 22 Tex. Civ. App. 618, 56 S. W. 214. Where a passenger on arriving at destination, did not leave the train until it had started again and was injured in attempting to get off, an instruction that if she failed to use such diligence as a person of ordinary prudence would have used, "and that the want of such care, if any, on her

part, was the immediate proximate cause of the injury," she cannot recover was held to be erroneous in the use of the quoted words, as presupposing the existence of other causes of the injury which may be attributed to the carrier. *Texas &c. R. Co. v. Mitchell*, (Tex.), 45 S. W. 945. Where plaintiff while a passenger on a street car was injured while the car was turning a corner, by the rear of the car colliding with a truck, thereby causing a truck to fall against the car window, and there was no evidence of negligence on the part of the motorman, an instruction that if the motorman knew that the truck was approaching and about to turn into the avenue and did not use such ordinary care as a man of his position should have exercised, then the plaintiff has established by a "fair preponderance of the evidence" negligence on the part of the defendant, was held to be erroneous as assuming that the mere turning of the truck into the avenue required the motorman to anticipate a collision.

evidence showed that part of the wagon extended over one of the rails of the track, it was held not to be error, in instructing the jury, to use the phrase "broken-down wagon and obstruction which was at said time upon and in close proximity to the tracks," especially where the defendant requested an instruction that there was an obstruction on the track.⁷³ And where a passenger sued for damages for having been wrongfully ejected from the car because of his refusal to pay extra fare for riding in the car, and it appeared from the plaintiff's testimony that the conductor pointed out to him the regulations of the company posted in the car, and that he was required to collect extra fare in that car, and there was nothing to show that the conductor's explanations were not true, it was held not error for the court to assume in its charge that there was a regulation requiring extra fare for riding in the car, and that plaintiff knew thereof and wilfully violated the regulation.⁷⁴ A charge that "if the jury believe from the evidence that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant, as charged in the declaration, or in either of the counts thereof, then you should find the defendant guilty," is not objectionable as assuming that the defendant was negligent.⁷⁵ Where the plaintiff sued for injuries received while riding on a mixed train, by the jolting of the train, an instruction was held not to be prejudicial which assumed that there was more danger in traveling on a mixed train than on a regular passenger train, where in another part of the charge

therewith although there was room for each to pass safely. *Suse v. Metropolitan St. R. Co.*, 80 App. Div. 24, 80 N. Y. S. 513.

⁷³ *Sweeney v. Kansas City R. Co.*, 150 Mo. 385, 51 S. W. 682. See also *Jarneck v. Chicago Consol. Trac. Co.*, 190 Ill. App. 179.

⁷⁴ *Wright v. Central R. Co.*, 78 Cal. 360, 20 Pac. 740. See also for other recent illustrative cases in which there was held to be no error because the fact or evidence

was uncontroverted. *Colsch v. Chicago &c. Ry. Co.*, 171 Iowa 78, 153 N. W. 327; *Cool v. Peterson*, 189 Mo. App. 717, 175 S. W. 244.

Compare also *Razor v. Bloomington &c. Ry. &c. Co.*, 190 Ill. App. 53.

⁷⁵ *Chicago &c. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406. See also *Pennsylvania R. Co. v. McCormick*, 131 Ind. 250, 30 N. E. 27. But compare *American Hominy Co. v. La Forge*, 184 Ind. 600, 111 N. E. 8.

the jury were instructed that to exonerate the defendant they must find that the jolting which caused the injury was unavoidable.⁷⁶ An instruction in an action for the death of a passenger, that if he voluntarily left his seat and assumed the position in which he was injured, and that he would not have been injured if he had remained in his seat, he cannot recover, unless the agent in charge of the car saw him in the dangerous position in time to have prevented the injury, was held to be properly refused as assuming that the position of the passenger was dangerous, as a matter of law, and that the plaintiff could not recover, although the negligent management of the train caused the injury.⁷⁷

§ 2899 (1848). Damages for injuries to passengers.—Instructions on this subject are considered in the chapter on damages, but a few decisions may be noted here. An instruction that “where a passenger is wrongfully compelled to leave the train and suffer insult and abuse, the law does not exactly measure his damage, but it authorizes the jury to consider the wounded feelings of the party, the indignity endured, humiliation and wounded pride, mental suffering and the like, and to allow such a sum as the jury may say is right,” was held to confine the jury to an allowance of compensatory damages only.⁷⁸ An instruction, in an action for ejection of the plaintiff, that he cannot recover for damages caused by his acts intentionally done for the purpose of enhancing the damages, has been held to be erroneous.⁷⁹ It was held error in an action for ejection, to instruct that the jury may find for the plaintiff such sum as he is entitled to, not exceeding the amount claimed in the petition, if they find certain facts which if true entitle the plaintiff to compensa-

⁷⁶ *Runnels v. Houston &c. R. Co.*, (Tex. Civ. App.) 50 S. W. 172.

⁷⁷ *Sweeney v. Kansas City &c. R. Co.*, 150 Mo. 385, 51 S. W. 682. See also *Birmingham Ry. &c. Co. v. Donaldson*, 14 Ala. App. 160, 68 So. 596; *Georgia R. &c. Co. v. Radford*, 144 Ga. 22, 85 S. E. 1006.

⁷⁸ *Shepard v. Chicago &c. R. Co.*,

77 Iowa 54, 41 N. W. 564. See also *St. Louis &c. R. Co. v. Blackburn*, (Ark.), 15 S. W. 469; *Hallman v. Southern R. Co.*, 169 N. Car. 127, 85 S. E. 298.

⁷⁹ *Southern Pac. Co. v. Patterson*, 7 Tex. Civ. App. 451, 27 S. W. 194. But see ante § 2866.

tory damages only, since the jury should have been confined to the assessment of actual damages.⁸⁰ In such an action where the evidence shows that the plaintiff was put off with the use of little force, and that he received no physical injury, and sustained no pecuniary loss, his sense of shame being the only result of the alleged wrongful act, it was held that an instruction that the jury should consider plaintiff's sense of shame "or other disagreeable emotions of the mind, resulting to him from such wrongful acts, if shown to be wrongful," gave the jury too much latitude in assessing damages.⁸¹ But it has been held proper to give an instruction including shame and humiliation as elements of damage, although they were not specially pleaded nor supported by direct testimony.⁸² An instruction in an action by a passenger for personal injuries, relating to epilepsy as an element of damages, which states that the plaintiff may recover therefor if it was the actual or natural and probable consequence, was held to be erroneous as permitting the jury to allow damages for epilepsy, even though they find that it was not the natural consequence of the accident.⁸³ Where a passenger suing for personal injuries testified that he was a laborer and was sometimes engaged in farm work, it was held proper to instruct that if there was no testimony as to the amount which plaintiff had previously earned, the jury may in arriving at such amount use their common knowledge of what men earn at such work as the plaintiff did.⁸⁴ Since punitive damages are not recoverable as a matter of right—an assessment of such damages being in the discretion of the jury—an instruction was properly refused which charged the jury that the plaintiff, in an action for ejection, was, under given circumstances, entitled to punitive damages.⁸⁵ But where a plaintiff's testimony

⁸⁰ *Louisville &c. R. Co. v. Ferrell*, 7 Ky. L. 607.

⁸¹ *Houston &c. R. Co. v. Jageman*, (Tex. Civ. App.), 23 S. W. 628.

⁸² *Berger v. Chicago &c. R. Co.*, 97 Mo. App. 127, 71 S. W. 102.

⁸³ *Cleveland &c. Tract. Co. v. Hammer*, 27 Ohio C. C. 320.

⁸⁴ *Cleveland &c. Tract. Co. v. Ward*, 27 Ohio C. C. 761.

⁸⁵ *Louisville &c. R. Co. v. Bizzell*, 131 Ala. 429, 30 So. 777. See also *Maloy v. St. Louis &c. R. Co.*, (Mo. App.), 178 S. W. 224; *Ferguson v. Missouri &c. Ry. Co.*, (Mo.), 177 S. W. 616.

showed, and her allegations in the petition are, that the defendant's conductor spoke harshly to her and wantonly pushed her off the car platform, it was held that the plaintiff was entitled to an instruction relating to punitive damages.⁸⁶

§ 2900 (1849). **Injuries to trespassers and licensees.**—An instruction, in an action against a railroad company for the death of a person on its track, that "the law presumes that a person found killed by the negligence of another exercised due care himself," to which the court added, "Likewise the law presumes that a person, such as an engineer, does his duty. In fact, as a rule, the law does not presume negligence, and it requires a person who charges negligence or a breach of duty to prove it," was held to have been properly modified by the addition.⁸⁷ Where one was injured while walking along a railroad track, and it was a question for the jury whether he was a trespasser or a licensee, it was held proper to refuse an instruction that he was a trespasser to whom the railroad company owed no duty except to avoid injuring him after discovering his presence and peril.⁸⁸ Where an instruction in an action for injuries to a child presented two theories, one that the child was a licensee, the other that he was a trespasser, and on the latter theory the court instructed that it was not what the defendant's employees could have seen or what they did see of the child, but what they did on seeing him, and that the employees if they did see the child must have known it was too young to help itself, it was held that with regard to the trespass the instruction was not erroneous as eliminating the question of what the employers might have seen by ordinary care, since the railroad company

⁸⁶ *Berger v. Chicago &c. R. Co.*, 97 Mo. App. 127, 71 S. W. 102. See also *Reeves v. Southern R.*, 68 S. Car. 89, 46 S. E. 543; *Attaway v. Southern R.*, 68 S. Car. 89, 46 S. E. 543. An instruction that if the failure to stop a passenger train at a flag station in response to a signal was willful, the jury may award punitive damages, made it incum-

bent on the court to instruct at the defendant's request, that if the engineer did not act maliciously the jury could award only actual damages. *Yazoo &c. R. Co. v. White*, 82 Miss. 120, 33 So. 970.

⁸⁷ *Stewart v. North Carolina R. Co.*, 136 N. Car. 385, 48 S. E. 793.

⁸⁸ *Houston &c. R. Co. v. O'Donnell*, (Tex. Civ. App.), 90 S. W. 886.

owed no duty to trespassers, and the relaxation of the rule in case of children was stated by other instructions.⁸⁹ In an action for injuries to one while trespassing on a railway trestle, it was held that the jury should have been informed that the plaintiff was a trespasser and that the railroad company owed him no lookout duty, but was only required to exercise reasonable diligence after his peril was discovered to avoid injury to him.⁹⁰ And in such an action, an instruction that it was not necessary that the engineer should actually have seen the plaintiff's intestate, but that if he saw others with or near her, it was the engineer's duty to immediately do all he reasonably could to prevent injuring her, was held to have been properly refused, in the absence of evidence that the engineer saw other persons on the trestle before he saw the deceased, and the peril of all was discovered at the same time, it also appearing that the engineer did all in his power to stop the train after discovering the peril of the party.⁹¹ An instruction in an action for injury to one on a railroad track, that if the servants in charge of the train, by the exercise of reasonable care could have seen the plaintiff upon its track, it would be liable for negligently running over him, was held to be erroneous, since, to render the railroad company liable its servants in charge of the train must have actually seen the plaintiff in time to have avoided injury to him.⁹² An instruction that it is the duty of persons operating railroad trains to keep a constant lookout for persons and property upon its track, when unexplained by other instructions, is prejudicial error.⁹³ And where the court instructed that "if you should believe from the evidence that said railway bridge was not commonly used by persons to pass on foot thereover, and that per-

⁸⁹ *Thomas v. Chicago &c. R. Co.*, 114 Iowa 169, 86 N. W. 259. See also *Martin v. Northern Pac. Ry. Co.*, 51 Mont. 31, 149 Pac. 89.

⁹⁰ *Louisville &c. R. Co. v. Woolfork*, 30 Ky. L. 569, 99 S. W. 294. But see *Hines v. Johnson* (Ark.), 224 S. W. 989.

⁹¹ *Smith v. Illinois Cent. R. Co.*, 28 Ky. L. 723, 90 S. W. 254.

⁹² *Crow v. Wabash R. Co.*, 23 Mo. App. 357.

⁹³ *St. Louis &c. R. Co. v. Waren*, 65 Ark. 619, 48 S. W. 222. But see *Carter v. Seaboard Air Line Ry Co.*, 114 S. Car. 517, 104 S. E. 186. Where the engineer admitted that he saw plaintiff on the track several hundred yards away, it was held error to instruct that the train men were

sons were not accustomed to pass over such bridge with the knowledge of defendant company, or if it was so used that such use was not such as to put a reasonably prudent person engaged in operating said bridge on inquiry whether persons might be on said bridge, then, under such circumstances, it could not be the duty of the defendant company to keep a lookout for persons who might be upon the bridge," it was held not objectionable as bearing on the weight of the evidence.⁹⁴ And it was held error, in an action for injuries to a child while trespassing on railroad tracks, to instruct that the railroad company is not required to keep a "constant lookout" to discover children at such place, since the jury might have inferred there from that some lookout was required.⁹⁵ Where plaintiff's decedent was killed at a private crossing it was held error for the court to instruct that if those in charge of the train failed to ring the bell or blow the whistle and such failure was the proximate cause of the injury, plaintiff could not recover as it failed to leave the jury to determine whether the failure to ring the bell or blow the whistle constituted negligence.⁹⁶ Where a trespasser sues for injuries sustained by being knocked off a railroad bridge by a train, an instruction as to the duty of the railroad company's employes to prevent the injury, should be limited to their duty in that regard after discovering the plaintiff's peril, the uncontradicted evi-

under duty to keep a lookout. *Newport News &c. R. Co. v. Deuser*, 97 Ky. 92, 29 S. W. 973.

⁹⁴ *McCowen v. Gulf &c. Co.*, (Tex. Civ. App.), 73 S. W. 46. See also *Galveston &c. R. Co. v. Levy*, 35 Tex. Civ. App. 107, 79 S. W. 879.

⁹⁵ *Thomas v. Chicago &c. R. Co.*, 93 Iowa 248, 61 N. W. 967.

⁹⁶ *St. Louis &c. R. Co. v. Eitel*, (Tex. Civ. App.), 72 S. W. 205. Where plaintiff alleged that the defendant gave no warning of the approach of its train, and that there was no switchman, nor light on its cars, and that the defendant's serv-

ants were guilty of gross negligence in running its train without ringing the bell or blowing the whistle and without lights on the cars, and without having a watchman to warn the deceased of his danger, it was held that an instruction which submitted the issue of negligence in failing to have lights or other signals of danger, was erroneous, since plaintiff's allegation only charged negligence in failing to have lights on the train. *St. Louis &c. R. Co. v. Eitel*, (Tex. Civ. App.), 72 S. W. 205.

dence showing that only one employe saw the plaintiff's peril and signaled the engineer to stop, there being no evidence that the engineer saw the signal or could have stopped the train in time to have avoided the injury if he did see it.⁹⁷ In an action by plaintiff for injuries sustained while attempting to save his child from being run over by a train, an instruction that the fact that those in charge of the train saw his peril in time to have avoided injury to him may be shown by circumstantial evidence was held to be proper.⁹⁸ An instruction "that it only became the engineer's duty to use all the means in his control, consistent with the safety of the train, to prevent injuring the deceased, or to have lessened the injury to him, at such time as it reasonably appeared to him that the deceased was not going to leave the track," was held not objectionable as imposing a higher duty than is required by law, since when read in the light of other instructions its meaning is that the engineer's duty arose upon his realization that the plaintiff would not probably leave the track.⁹⁹ Where plaintiff was a trespasser on defendant's tracks and his peril was discovered by a brakeman who gave signals to the engineer in time to have enabled the engineer to avoid injury to the plaintiff if the signals had been regarded, it was held error to instruct the jury to return a verdict for the plaintiff only in the event they believed the engineer did all he could reasonably do to avoid injuring the plaintiff after he became aware of his peril, since the instruction not only disregarded the engineer's duty to keep a lookout in a town, but also his duty to exercise reasonable diligence to receive signals from brakemen.¹ Where plaintiff's husband while walking on

⁹⁷ *Prince v. Illinois Cent. R. Co.*, (Ky.), 99 S. W. 293.

⁹⁸ *San Antonio &c. R. Co. v. Gray*, 95 Tex. 424, 67 S. W. 763, rev'g 66 S. W. 229. See also *International &c. R. Co. v. Munn*, (Tex. Civ. App.), 102 S. W. 442.

⁹⁹ *International &c. R. Co. v. Munn*, (Tex. Civ. App.), 102 S. W. 442. See also *Houston &c. R. Co.*

v. O'Donnell, (Tex. Civ. App.), 90 S. W. 886, rev'd 92 S. W. 409, where there were two issues. And see further as to issue of discovered peril, *Houston &c. R. Co. v. O'Donnell*, (Tex.), 90 S. W. 886, rev'd 92 S. W. 409.

¹ *Gunn v. Felton*, 108 Ky. 561, 57 S. W. 15.

defendant's tracks stepped aside to allow a train to pass, but because of the noise and a strong wind from the opposite direction, he was not cognizant of the approach of another train although it gave warning by whistle and bell, and he was fatally injured by the other train, an instruction that if the operators of the train saw the deceased and realized that he would not probably leave the track in time to avoid injury, and they could have avoided injury to him after discovering his peril, the verdict should be for the plaintiff, was held not to constitute reversible error as inferring that such means were not used.² In a number of Texas cases instructions as to contributory negligence, discovered peril and the duty of employees thereafter are also considered.³ And an error committed by instructing in an action for injuries to a trespasser on a railroad bridge, that the jury may find for the defendant although the plaintiff's peril was discovered and no effort was made to prevent injury to the plaintiff, was held not to have been cured by a subsequent correct instruction given at the request of the plaintiff.⁴ Where the evidence showed that the engineer discovered a boy on the track in a perilous position, but made no effort to stop the train until after injury to the boy, it was held to authorize the submission to the jury of the question of the failure of those in charge of the train to exercise proper care to avoid injuring the boy after discovering his peril.⁵ An instruction in an action by a trespasser who was made to jump from a moving train by the engineer throwing steam so as to frighten him, was held to require the jury to find that the engineer's act was wilful thereby rendering harmless the additional requirement that it must also have been negligent.⁶ In regard to injuries to persons on the railroad track at a place much used by the public in

² Missouri &c. R. Co. v. Stone, 23 Tex. Civ. App. 106, 56 S. W. 933.

³ Missouri &c. R. Co. v. Haltom, 95 Tex. 112, 65 S. W. 625; Houston &c. R. Co. v. Ramsey, (Tex. Civ. App.), 81 S. W. 825; International &c. R. Co. v. Garcia, 75 Tex. 583, 13 S. W. 223.

⁴ McCowen v. Gulf &c. R. Co., (Tex. Civ. App.), 73 S. W. 46.

⁵ Texas &c. R. Co. v. Ball, (Tex. Civ. App.), 73 S. W. 420, rev'd (Tex.), 75 S. W. 4.

⁶ Galveston &c. R. Co. v. Zantinger, (Tex. Civ. App.), 49 S. W. 677.

crossing or walking along the track, an instruction in an action that if the defendant's train while running at a rapid speed without headlight or other proper signal ran over the plaintiff's deceased, while if there had been a headlight, or the bell had been rung, the deceased would have had notice of the train's approach in time to have avoided the injury, and that if the deceased did not have such notice or warning, and was injured by reason thereof, such failure to have a headlight on the engine or other proper signal amounted to negligence on the part of the defendant and was the proximate cause of the injury, was held to have been a proper statement of the law.⁷ And in a number of other cases, mostly in jurisdictions in which the duty to a licensee, is greater than in other jurisdictions, instructions upon the subject are set out and considered.⁸ Where, in an action for injuries to a child by a car cut loose from the train and allowed to pass over a side-track, the evidence showed that she was nine years old, inexperienced and not aware of the danger, and at the time of the accident she was alarmed by the blowing off of steam from the engine causing her to step onto the side-track, where she was struck by the car, an instruction that the jury in passing on her negligence should take into consideration that by reason of her youth and inexperience she was unaware of the danger, was held to be a proper statement.⁹ So, in a similar case, an instruction that "even though the engineer saw plaintiff on the track, still he cannot recover unless the engineer

⁷ *Heavener v. North Carolina R. Co.*, 141 N. Car. 245, 53 S. E. 513. See also *Alabama & Great So. R. Co. v. Guest*, 144 Ala. 373, 39 So. 654.

⁸ *Norfolk &c. R. Co. v. Carr*, (Va.), 56 S. E. 276; *Texas &c. R. Co. v. Patterson*, (Tex. Civ. App.), 102 S. W. 138; *St. Louis S. W. R. Co. v. Eitel*, (Tex. Civ. App.), 72 S. W. 205.

⁹ *Lange v Missouri Pac. R. Co.*, 115 Mo App. 582, 91 S. W. 989; also

holding that an instruction that the railroad company was under no obligation to the child, except to exercise reasonable care not to injure it after discovering its peril, was held improper, as leaving out of consideration the question of negligence in making the flying switch, and also the act of the engineer in letting off steam at which the child was alarmed and causing her to step onto the side track in front of the moving train.

actually saw and knew he was a child so young as not to be able to get out of danger, or if they find that the engineer saw him in a place of peril and did not know that he was so young as not to be able to take care of himself, then it would be the engineer's duty to keep a lookout to see whether the child did get out of the way, or was of such tender years as to be unable to care for himself, and it would be his duty to have such control of his engine as to be able to stop it in time to be able to prevent the accident," was held not to be erroneous as inconsistent and contradictory.¹⁰ In an action for injuries to a child while trespassing on a railroad track, an instruction that the railroad company was bound to exercise ordinary care to discover children on its tracks, and a further instruction that the degree of care varies in accordance with the known probabilities of danger along different portions of the road, were held not objectionable on the ground that the degree of care required in a given case did not vary, although the degree of diligence might vary with the varying probabilities of danger.¹¹ And in an action for the death of a child, an instruction that the railroad company is liable if it failed to exercise reasonable care to avoid injury to "any person that may go upon its track," was held not to be prejudicial as failing to draw a distinction between the care necessary towards persons rightfully on the track and towards trespassers.¹² An instruction that an engineer may assume that a person on the track will step off before the train reaches him, except when such person is apparently incapable of taking care of himself, such as very young children and persons lying helpless on the track, was held not objectionable on the ground that the plaintiff was a sui juris and capable of avoiding danger, where it appears that the plaintiff was a child towards whom watchful care was due, her actions indicating a helpless condition.¹³ But an instruction that if the defendant's servants failed to discover a boy on

¹⁰ *Thomas v. Chicago &c. R. Co.*,
114 Iowa 169, 86 N. W. 259.

¹¹ *Missouri &c. R. Co. v. Hammer*,
34 Tex. Civ. App. 354, 78 S. W. 708.

¹² *San Antonio &c. R. Co. v.*

Vaughn, 5 Tex. Civ. App. 195, 23 S.
W. 745.

¹³ *Spooner v. Delaware &c. R. Co.*,
115 N. Y. 22, 21 N. E. 696.

the track, because of their recklessness and carelessness, when by ordinary care his peril could have been discovered and the injury avoided, the defendant is liable, was held to be erroneous where the servants were not bound to anticipate his presence on the track.¹⁴ Yet in an action for injuries to a child two years old, the same court held that the railroad company is not entitled to an instruction that it is liable only in case that its servants fail to use ordinary care to prevent the injury after becoming aware of the plaintiff's peril, since the qualification stated in the last clause is proper only in case of an injury to an adult.¹⁵

§ 2901 (1850). *Injuries at railroad crossings.*—An instruction in an action for injury at a railroad crossing that the duty of both parties as to the care required is reciprocal, it being the defendant's duty to exercise such care in regard to signals, speed and look out, as may be expected of ordinarily prudent persons operating a railroad train under like circumstances, and the duty of plaintiff's intestate to use such care as may be expected of an ordinarily prudent person, situated as he was, to learn of the approach of the train; and if the crossing was especially dangerous, it was incumbent on both the parties to use increased care commensurate with the danger, was held to be a proper statement of the law.¹⁶ And an instruction that railway companies must use great care in operating their trains at street and public crossings, and to discover persons and property, was held to impose a greater degree of care than the law requires.¹⁷ But an instruction that the law requires such care and prudence

¹⁴ *Williams v. Kansas City &c. R. Co.*, 96 Mo. 275, 9 S. W. 573.

¹⁵ *Frick v. St. Louis &c. R. Co.*, 75 Mo. 595.

¹⁶ *Chesapeake &c. R. Co. v. Riddle*, 24 Ky. L. 1687, 72 S. W. 22. See also *Lake Shore &c. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476. And after charging that the plaintiff and the railroad company are both bound to the same degree of care to prevent collision at the

crossing, it was held not error to add that one is not bound to anticipate negligence where the law commands diligence for his protection. *Atlanta &c. R. Co. v. Lovelace*, 121 Ga. 487, 49 S. E. 607.

¹⁷ *Gulf &c. R. Co. v. Smith*, 87 Tex. 348, 28 S. W. 520; *Chicago R. Co. v. James*, (Tex. Civ. App.), 75 S. W. 930; *Western &c. R. Co. v. King*, 70 Ga. 261.

on the part of the railroad company as is necessary to protect persons and property and that it is the duty of a person traveling on a highway to exercise reasonable care and caution, and not to approach a railroad crossing recklessly and heedlessly, and that he must use his faculties, keep his eyes and ears open, look in both directions, and take such care as a reasonably prudent person would take under such circumstances, was held not objectionable as imposing a greater degree of care on railroad companies than on travelers using the crossing.¹⁸ Where plaintiff sued for injuries resulting from the fright of his horse while crossing the track, at a backing freight train, and the evidence shows that when the train first came in sight the horse was walking within a few feet of the track and a brakeman first whistled shrilly and called to the plaintiff's deceased, but not succeeding in attracting his attention, then signaled the engineer just before the car struck the team, it was held error to instruct that it was the brakeman's duty to immediately signal the engineer on the appearance of the danger at the crossing.¹⁹ In an action for injury sustained while driving across the track in a wagon, by collision with an engine, where the evidence shows that the crossing was one of the most used crossings in the city and that the collision occurred when it was dark, and when the side tracks at the crossing were so obstructed that the engine could not be seen until it was very close to the crossing, an instruction that it was the railroad company's duty to have someone on the rear end of backing trains to warn travelers of its approach and to display light and give signals at highway crossings, such as will give reasonable warning of the train's approach, was held not prejudicial to the defendant.²⁰ In an action

¹⁸ Delaware &c. R. Co. v. Devore, 122 Fed. 791. See as to instruction where horse was frightened, Inabnett v. St. Louis &c. R. Co., 69 Ark. 130, 61 S. W. 570; San Antonio &c. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607.

¹⁹ Mobile &c. R. Co. v. Coerver, 112 Fed. 489.

²⁰ Illinois Cent. R. Co. v. Coley, 28 Ky. L. 336, 89 S. W. 234. There are usually statutes or ordinances to this effect, otherwise the court could hardly state it as an absolute rule of law. See as to instruction where peril was or ought to have been discovered, Louisville &c. R. Co. v. Dick, 25 Ky. L. 1831, 78 S.

for injuries to a boy, where it appeared that he could have been seen by the engineer for a considerable distance, and that the bell was rung but the whistle was not blown, an instruction that "if the injury could have been prevented by the blowing of the whistle, and the engineer had time to sound it after he saw plaintiff about to pass in front of the engine, and he failed to do so, in consequence of which plaintiff was injured while in the exercise of ordinary care, the plaintiff could not recover; but if after the engineer saw that plaintiff was about to cross he was putting forth other exertions to save plaintiff," and on that account had no time to sound the whistle his failure to do so would not constitute negligence, was held to be a correct statement of the law.²¹ In some jurisdictions it has been held proper to instruct that it was the defendant's duty to exercise ordinary care in operating its cars so as to prevent injury to persons at places used as crossings by the public, the measure of duty being the same whether the place thus used is the crossing of a public highway or a place commonly used by the public in crossing the track.²² And an instruction that it is the duty of the employes of the railroad train to keep a constant lookout for persons and property on its track, and that the railroad company is liable to persons injured, for damages resulting from neglect to keep such lookout, unless the injured person was guilty of contributory negligence, has been held not to be objectionable on the ground that it made it the duty of each member of the train crew to keep a lookout, where the defendant made no specific objection thereto at the time the instruction was given; and did not request an instruction that each member of the train crew was not required to be on constant lookout.²³ Where the statute requires that the bell

W. 914. See also *Louisville &c. R. Co. v. Krey*, 16 Ky. L. 797, 29 S. W. 869; *Texas &c. R. Co. v. Meeks*, (Tex. Civ. App.), 74 S. W. 329; *St. Louis &c. R. Co. v. Matthews*, 34 Tex. Civ. App. 302, 79 S. W. 71.

²¹ *Heddels v. Chicago &c. R. Co.*, 74 Wis. 239, 42 N. W. 237. See also *St. Louis &c. Ry. Co. v. Roddy*, 110 Ark. 161, 161 S. W. 156.

²² *Galveston &c. R. Co. v. Kief*, (Tex. Civ. App.), 58 S. W. 625.

²³ *St. Louis &c. R. Co. v. Pritchett*, 66 Ark. 46, 48 S. W. 809. Where the evidence shows that it was impracticable for those in charge of a train to stop it after coming in sight of the deceased and before reaching the crossing, an instruction that it was the duty of the train-

shall be rung or the whistle blown at least within a prescribed distance from points where highways cross railroads, it is usually proper in an action for injuries alleged to be the proximate result of the failure of the railroad company to give warning of the approach of its train, as prescribed by statute, to submit such question to the jury by proper instructions.²⁴ Where there is evidence in such an action that the plaintiff stopped and listened but the whistle was not sounded or the bell rung, the whistling post being only 1209 feet from the crossing instead of 80 rods as prescribed by law, an instruction that if the jury find that the failure to give signals at the prescribed distance contributed to the plaintiff's injury, and the plaintiff was not guilty of gross negligence, the jury might infer from such facts that the failure to give statutory signals contributed to the injury was held to be a proper statement.²⁵ An instruction is misleading where it authorizes the jury to infer that the whistle must be blown continuously until the crossing has been passed, while the statute

men to keep a lookout to prevent injury to travelers upon highways, and authorizing a finding for plaintiff, although the deceased was negligent in trying to pass over in front of the train if the trainmen knew or could have known of the deceased's peril, in time to have avoided injury to him, was held to be erroneous. *Louisville &c. R. Co. v. Molloy*, 28 Ky. L. 1113, 91 S. W. 685. See also *St. Louis &c. Ry. Co. v. Roddy*, 110 Ark. 161, 161 S. W. 156.

²⁴ *Louisville &c. R. Co. v. Sander*, 29 Ky. L. 212, 92 S. W. 937. See also *St. Louis &c. R. Co. v. Elledge*, (Tex. Civ. App.), 93 S. W. 499; *Wabash &c. R. Co. v. Stewart*, 87 Ill. App. 446; *Baltimore &c. R. Co. v. Young*, 153 Ind. 163, 54 N. E. 791; *Cleveland &c. R. Co. v. Richerson*, 19 Ohio C. C. 385, 10 Ohio C. D. 326; *Hecker v. Oregon R. Co.*, 40

Ore. 6, 66 Pac. 270; *Bowen v. Southern R. Co.*, 58 S. Car. 222, 36 S. E. 590; *Missouri &c. R. Co. v. Melugin*, (Tex. Civ. App.), 63 S. W. 338; *Houston &c. R. Co. v. O'Donnell*, (Tex. Civ. App.), 90 S. W. 886, rev'd in 92 S. W. 409; *Hawkins v. Missouri &c. R. Co.*, 36 Tex. Civ. App. 633, 83 S. W. 52.

²⁵ *Duggan v. New England R. Co.*, 172 Mass. 337, 52 N. E. 519. An instruction that it was the defendant's duty to give statutory signals in approaching highway crossings, and that if it failed to do so and injury resulted therefrom the defendant would be guilty of negligence, and that if the engineer failed to sound the whistle or ring the bell and by reason thereof the accident occurred and plaintiff was injured, without fault on his part, the verdict should be for the plaintiff was held not open to the objection

only requires the bell to be so rung.²⁶ In an action for injuries sustained by the fright of plaintiff's horse by the negligent and unnecessary sounding of the locomotive whistle at the crossing, an instruction that "the law does not require that the whistle shall be blown more than once or blown all the time from where it first sounded until the crossing is past," was held not erroneous as leading the jury to believe that one blast of the whistle was all that the law required and that more than one blast would be excessive and negligent, where the instruction was immediately followed by another that the defendant might have such whistle blown for any purpose in the furtherance of its business, and that it is not negligence to do so, unless it reasonably appears to the engineer that a team would be frightened thereby.²⁷ Where the petition alleges that the plaintiff was injured by being thrown from her buggy by the fright of her horse at an approaching train near a public crossing, and that the defendant did not signal the approach of the train, it is held that the court should direct the attention of the jury to the question whether plaintiff's horse became frightened by reason of the defendant's negligence in failing to give warning of the approach of the train, and not merely to the question whether its agents carelessly and negligently frightened the plaintiff's

that it relieved the plaintiff of the exercise of ordinary care. *Evansville &c. R. Co. v. Clements*, 32 Ind. App. 659, 70 N. E. 554.

²⁶ *Texas &c. R. Co. v. Scrivener*, (Tex. Civ. App.), 49 S. W. 649; *St. Louis &c. R. Co. v. Rawley*, 90 Ill. App. 653. An instruction that it was the duty of the engineer to ring the bell "and" blow the whistle when a train approaches a crossing, was held to be erroneous and not cured by an instruction stating it to be the engineer's duty to ring the bell "or" blow the whistle. *Edwards v. Atlantic &c. R. Co.*, 132 N. Car. 99, 43 S. E. 585. And under a statute requiring the whistle to be blown

or the bell rung when approaching a public crossing, an instruction that it was the engineer's duty to blow the whistle, without stating the alternative "or ring the bell," was held to be erroneous. *East Tennessee &c. R. Co. v. Deaver*, 79 Ala. 216.

²⁷ *Houston &c. R. Co. v. Blan*, (Tex. Civ. App.), 62 S. W. 552. See also as to instructions in regard to statutory signals, *Nashville &c. Co. v. Higgins*, 29 Ky. L. 89, 92 S. W. 549; *Chicago &c. R. Co. v. Smith*, 77 Ill. App. 492; and see as to customary signals at private crossing, *Fletcher v. South Carolina &c. R. Co.*, 57 S. Car. 205, 35 S. E. 513.

horse.²⁸ Where the plaintiff sued for injuries to a traction engine at a crossing, an instruction that if the railroad company complied with the statute as to blowing the whistle or ringing the bell a mile from the limits of the city in which the accident occurred, and continued to blow the whistle or ring the bell until it reached the station, and had someone on the lookout ahead, and that an employe on the train saw the engine approaching the track and put on the brakes, blew the whistle and reversed the engine and did all he could to stop the train, the plaintiff could not recover if guilty of contributory negligence, was held to be erroneous as authorizing the jury to inquire, after finding that the railroad company has done everything required of it by the statute, whether plaintiff was guilty of negligence before exonerating the defendant from liability.²⁹ Where in such action the declaration states the cause of action on the theory that the company failed to comply with the precautions required by statute, the better practice is said to be to give instructions based on the statute, without undertaking to instruct as to the common-law duties of the railroad company, so as to avoid confusion.³⁰ Where a declaration alleged that the plaintiff's deceased was killed at or near a street crossing it was held error to charge the jury that it is unnecessary that it appear that the deceased when killed was exactly and technically on the crossing, if he was substantially using it, and it was his purpose to cross the track in the usual and ordinary way at the crossing.³¹ In regard to construction and repair of railroad crossings, where there was evidence, in an action for injuries at a crossing reasonably constructed, that it was defective, it was held not error to submit in instructions, as an element of negligence, the proper construction of crossings and the duty to keep them in repair.³² In another case it was held not error for the court to refuse an instruction, requested by the defendant, that if the jury

²⁸ *Chesapeake &c. R. Co. v. Cunter*, 108 Ky. 362, 56 S. W. 527.

²⁹ *Chesapeake &c. R. Co. v. Crews*, 118 Tenn. 52, 99 S. W. 368.

³⁰ *Chesapeake &c. R. Co. v. Crews*, 118 Tenn. 52, 99 S. W. 368.

³¹ *Cowen v. Merriman*, 17 App. (D. C.) 186.

³² *Taylor &c. Co. v. Warner*, (Tex. Civ. App.), 60 S. W. 442, An instruction in an action for a crossing accident that if the crossing was

find that the crossing was constructed in the usual way of constructing such crossings, and that such construction has been in general use for several years prior to the accident, and that to the knowledge of the defendant no accident had occurred prior thereto by reason of such construction, and that a reasonably prudent person would not have anticipated an accident from such construction, then the jury should find for the defendant.³³

And in such action an instruction that it is the duty of the defendant to maintain its crossing in a reasonably safe condition and to exercise ordinary care to keep them in a state of repair so as to be reasonably safe for the use of the public, was held to be a correct statement and sufficiently specific.³⁴ But it has been held error in such an action to instruct that the plaintiff must establish that the defendant had no knowledge that the crossing was out of repair, and that such absence of knowledge if any was not due to the defendant's negligence in examining the crossing.³⁵ As to leaving cars close to a crossing, it was held to be misleading to instruct, in an action where the negligence complained of was the leaving of the cars upon the track close to the crossing and starting a locomotive from behind them without warning, that it was negligence per se to leave cars close to the track.³⁶ In regard to speed of trains at or near crossings, an instruction submitting to the jury the question whether the speed of the train was so high as to amount to negligence on the part of the railroad company and wholly failing to submit other attending circumstances disclosed by the evidence, relating to the safety of persons using the crossing, was held to be erroneous as giving the jury unrestrained license to

maintained in such a manner as not to "unnecessarily" impair the usefulness of the highway or interfere with its safe enjoyment, the railroad company is not liable, was held to be misleading in the use of the word "unnecessarily" instead of the word "immaterially." *Louisville & C. R. Co. v. Hubbard*, 148 Ala. 45, 41 So. 814.

³³ *McDermott v. Severe*, 25 App. (D. C.) 276, affirmed 202 U. S. 600; 26 Supt. Ct. 709, 50 L. ed. 1162.

³⁴ *Hughes v. Chicago & C. R. Co.*, 122 Wis. 258, 99 N. W. 897.

³⁵ *Heckle v. Southern Pac. Co.*, 123 Cal. 441, 56 Pac. 56.

³⁶ *Cleveland & C. R. Co. v. Richerson*, 19 Ohio C. C. 385, 10 Ohio C. D. 326.

find any speed which they might regard as dangerous to be negligent.⁸⁷ And an instruction that plaintiff in approaching the crossing had the right to presume that the defendant would obey the speed ordinance, and if the jury believe that the train was running at a greater rate of speed than allowed by ordinance they may consider the fact together with other circumstances of the case in determining whether plaintiff was guilty of contributory negligence, was held not in conflict with another instruction that the running of the train at a higher rate of speed than allowed by ordinance was not of itself negligence, so as to render the defendant liable.⁸⁸ An instruction that the railroad company has the right to run its trains or engines at such times as it may choose "and the running of a train or an engine out of schedule time, or as a wild engine, is not of itself an act of negligence," has been held to be indefinite and misleading.⁸⁹ As to the care required by plaintiff, the defendant in a railroad accident case is entitled to have the jury specifically instructed as to the plaintiff's duty to exercise reasonable care in approaching the crossing and in such a case the court should instruct that it is the duty of one approaching the railroad crossing to use his senses of hearing and seeing before going upon the track.⁴⁰ In some jurisdictions the court should instruct that in the absence of eye witnesses the presumption arises in the absence of other evidence, that the deceased was exercising due care, but such presumption may be rebutted by evidence, and that if the jury finds that the plaintiff's deceased did not exercise reasonable care, and that by the exercise of his senses he could have discovered the train in time to have avoided injury,

⁸⁷ *Wabash R. Co. v. Stewart*, 87 Ill. App. 446. See also *Chicago & C. R. Co. v. Appell*, 103 Ill. App. 185; *Long Island R. Co. v. Darnell*, 221 Fed. 191. But see *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449, 71 Pac. 371.

⁸⁸ *Southern R. v. Stockdon*, 106 Va. 693, 56 S. E. 713.

⁸⁹ *Central Texas & C. R. Co. v.*

Bush, 12 Tex. Civ. App. 291, 34 S. W. 133.

⁴⁰ *Chicago & C. R. Co. v. Turner*, 33 Ind. App. 264, 69 N. E. 484. An instruction that "greater care" is required in approaching a dangerous public crossing, was held to be erroneous, where the quoted words were not defined. *Louisville & C. R. Co. v. Clark*, 105 Ky. 571, 49 S. W. 323.

the presumption as to due care should not be given weight, unless there is other evidence from which the jury can find that the plaintiff's deceased did not contribute to his injury.⁴¹ An instruction that if the plaintiff was killed while acting as a person of ordinary prudence placed in such a position might reasonably act, it is immaterial that he might have escaped injury if he had followed some other course, should have been given instead of the charge that the deceased was not guilty of contributory negligence if he was injured while exercising such means as appeared to him to be reasonably necessary to avoid danger.⁴² But the court properly refused an instruction that if the plaintiff's decedent knew, or, by the exercise of ordinary care could have known, that the train was approaching, it was want of ordinary care on his part to go upon the crossing, since it improperly assumed that there was evidence showing certain facts, and required that all the care should have been exercised by the deceased.⁴³ It was held proper to instruct in an action for injuries to a thirteen year old boy that the plaintiff is required to exercise the same degree of care that a prudent boy of similar age, intelligence and experience would exercise under the same circumstances, in view of the allegation that he was in the exercise of due care, and the proof as to his age, experience and manner of driving having been submitted to the jury.⁴⁴ Where there was evidence that the habits of the deceased were cautious and prudent, and there was testimony by the engineer of the train who saw the plaintiff's deceased drive onto the track, and no motion was made to strike out the evidence as to his habits, it was held error to instruct that if the jury believe that

⁴¹ *Rietveld v. Wabash R. Co.*, 129 Iowa 249, 105 N. W. 515. An instruction in an action for a crossing accident, that the presumption is that plaintiff used the required care, but that such presumption might be rebutted by evidence, the burden being on the defendant to remove the presumption, it was held not erroneous on the theory that it conveyed the impression that evidence of con-

tributory negligence could be established only by the defendant's witnesses. *Cleveland &c. R. Co. v. Schneider*, 40 Ind. App. 38, 80 N. E. 985.

⁴² *Louisville &c. R. Co. v. Molloy*, 28 Ky. L. 1113, 91 S. W. 685.

⁴³ *Louisville &c. R. Co. v. Clarke*, 105 Ky. 571, 49 S. W. 323.

⁴⁴ *Grenell v. Michigan Cent. R. Co.*, 124 Mich. 141, 82 N. W. 843.

the deceased was a cautious man at the time of his injury they may take such evidence into consideration, since the evidence of an eye-witness of the accident renders the evidence of the deceased's habits incompetent.⁴⁵ Where the plaintiff, in an action for injuries at a railroad crossing, was deaf, and the court instructed that the plaintiff is held to the exercise of that degree of care which an ordinarily prudent person whose hearing was so defective should have exercised under the circumstances, but refused to instruct that he was required to exercise that degree of care which an ordinarily prudent person would have exercised, and that a defect in hearing not only did not excuse him from the exercise of care, but required the greater use of his other senses, it was held to be erroneous as tending to mislead the jury into believing that to the extent of the plaintiff's deafness the degree of care required of him was lessened.⁴⁶ Where the question of the defendant's negligence and whether it was the proximate cause of the plaintiff's injuries was a sharply contested issue, it was held reversible error to give a separate and independent instruction complete in itself and based upon the plaintiff's right to recover, if he was free from contributory negligence, without reference to negligence on the part of the defendant.⁴⁷ But an instruction that if the jury find from the evidence that the plaintiff and the defendant were both negligent, and that the negligence of both directly contributed to the injury complained of the verdict should be for the defendant was held to be a correct statement, since the word "directly" is used synonymously with the word "proximately."⁴⁸ It has been held the court properly refused to instruct that it is negligence to

⁴⁵ *Cleveland &c. R. Co. v. Moss*, 89 Ill. App. 1.

⁴⁶ *Toledo &c. R. Co. v. Hammett*, 220 Ill. 9, 77 N. E. 72, rev'g 115 Ill. App. 268.

⁴⁷ *Houston &c. R. Co. v. Dillard*, (Tex. Civ. App.), 94 S. W. 426.

⁴⁸ *Cincinnati St. R. Co. v. Jenkins*, 20 Ohio C. C. 256, 11 Ohio C. D. 130. See also *Midland R. Co. v. Tidwell*, (Tex. Civ. App.), 49 S. W.

641. As to proximate cause where vehicle runs into train at crossing see *Sublett v. Mobile &c. R. Co.*, 145 Ky. 707, 141 S. W. 50, 38 L. R. A. (N. S.) 1153; *Louisville &c. R. Co. v. Eckman*, 137 Ky. 331, 125 S. W. 729; *Gage v. Boston &c. R. Co.*, 77 N. H. 289, 90 Atl. 855, L. R. A. 1915A, 363. Defendant can not counterclaim damages to car. *Hoover v. Meyer* (Ind.), 128 N. E. 614.

drive upon a railroad crossing until the train on another track of the crossing has moved far enough from the crossing so that its noise will not interfere with the traveler's hearing a train approaching from another direction, since it gives too much importance to the sense of hearing.⁴⁹ In an action for the death of the plaintiff's decedent at a railroad crossing, where there was no evidence that his condition was not self-imposed, it was held not error to instruct that if the deceased was asleep when driving over the crossing, he was guilty of contributory negligence and could not recover, although the instruction made no distinction between voluntary and involuntary slumber.⁵⁰ Where the safety of a traveler at a railroad crossing could have been assured by stopping, looking and listening, the court should not refuse an instruction submitting to the jury the question of his obligation to do so.⁵¹ But an instruction that the plaintiff was guilty of contributory negligence if he did not look in each direction before going upon the crossing, so as to enable him to avoid an approaching train, was held to have been properly refused.⁵² And it has been held in some jurisdictions that the

⁴⁹ *Boyden v. Fitchburg R. Co.*, 72 Vt. 89, 47 Atl. 409.

⁵⁰ *Dalton v. Chicago &c. R. Co.*, 114 Iowa 257, 86 N. W. 272.

⁵¹ *St. Louis &c. R. Co. v. Brock*, 64 Kans. 90, 67 Pac. 538. Where an instruction given was erroneous in that it relieved the traveler from any obligation to look and listen, although there was a failure on the part of the railroad company to give the usual and ordinary signals, it was not cured by qualifying words exempting the plaintiff from the obligation to look and listen, that "though he exercised that prudence and care which a prudent man would use under the same circumstances," nor by the further fact that the instruction required the jury to find that the deceased's failure to look

was not the proximate cause of his injury. *Cooper v. North Carolina R. Co.*, 140 N. Car. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391. See also *St. Louis &c. Ry. Co. v. Roddy*, 110 Ark. 161, 161 S. W. 156; *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150, 33 N. W. 161. Same rule as to looking and listening and stopping if required, applies to one crossing an interurban railway track on its own right of way in the country applies as in case of steam railroad crossing. *Cable v. Spokane &c. R. Co.*, 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224 and note citing *Robinson v. Rockland &c. Co.*, 99 Maine 47, 58 Atl. 57; *Phillips v. Washington &c. R. Co.*, 104 Md. 455, 65 Atl. 122, and other cases.

⁵² *Hecker v. Oregon R. Co.*, 40

court is not required to instruct that it is the plaintiff's duty to look and listen for approaching trains, but that he is only required to exercise ordinary care to avoid danger.⁵³ But where there is an entire absence of facts explaining or excusing the plaintiff's failure to look and listen, it was held proper to instruct that the failure to do so constituted contributory negligence, as a matter of law, precluding the plaintiff's recovery.⁵⁴ An instruction in such an action that a bicyclist must, under ordinary circumstances, be held to the same rules as a pedestrian, and that he must stop, look and listen, was held to be erroneous, since the term "ordinary circumstances" may have been understood as the giving of the signals to cross the tracks, which in the absence of apparent danger might absolve both pedestrians and bicyclists from looking and listening.⁵⁵ And an instruction that it was the duty of the deceased before going upon the crossing to look and listen for approaching trains, and that if he failed to do so the verdict should be for the defendant, was held to have been properly modified by substituting for "look and listen," the words "take such precautions to learn of the approach of trains as men of ordinary prudence would take under like circumstances," as it can not be held as a matter of law that looking and listening are the only precautions to be taken in such cases.⁵⁶

§ 2902 (1851). Injuries to persons near railroad tracks.—As to damages resulting from fright of horses at railroad trains, an

Ore. 6, 66 Pac. 270. See also *International &c. R. Co. v. Neff*, 87 Tex. 303, 28 S. W. 283; *Texas &c. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup.Ct. 1104, 41 L. ed. 186. Ordinarily, however, an instruction that it is his duty to look and listen would be proper in some jurisdictions.

⁵³ *Gulf &c. R. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129. But such a specific instruction, when properly requested, should be given in many jurisdictions.

⁵⁴ *Gahagan v. Boston &c. R. Co.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426n. See also *Missouri &c. R. Co. v. Ferris*, 23 Tex. Civ. App. 215, 55 S. W. 1119.

⁵⁵ *Louisville &c. R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562. Nor is one always required to stop as matter of law.

⁵⁶ *Smith v. Boston &c. R. Co.*, 70 N. H. 53, 47 Atl. 290, 85 Am. St. 596.

instruction that the sounding of the whistle at any point required by law would not make the defendant liable for any injury resulting therefrom, unless the engine operatives knew or by reasonable diligence could have known that by so doing injury would reasonably and proximately result, was held to be erroneous, and it was held that the court should have charged that the defendant was not negligent in blowing the whistle unless it knew or had reason to know that the blowing of the whistle would frighten plaintiff's horse.⁵⁷ And it was held error to instruct the jury to determine whether the engineer saw the plaintiff or by the exercise of ordinary care could have seen him and his team on the highway within a short distance of the track, without explanation as to the duty of the engineer under the circumstances.⁵⁸ Where the plaintiff's minor son was injured by being struck by a horse which collided with a train, and the court instructed that if the defendant failed to use ordinary care in approaching the place where the injury to the boy occurred, and such want of ordinary care was the proximate cause of his injury, the verdict should be for the defendant, it was held that the court should also have given an instruction defining the term "proximate cause" and applying the law to the facts of the case.⁵⁹ Where a railroad had been constructed in a public highway and the plaintiff was injured while passing along the highway, by a stick thrown or falling from a train, a requested instruction applying merely to licensees or trespassers on the defendant's right of way was held to have been properly modified so as to advise the jury that the rule stated does not apply to a railroad track situated in a public highway.⁶⁰ Evidence that at the time of the plaintiff's injury he was walking

⁵⁷ *Choctaw &c. R. Co. v. Coker*, 77 Ark. 174, 90 S. W. 999; see also *Texas &c. R. Co. v. Hamilton*, (Tex. Civ. App.), 66 S. W. 797; *Chalkley v. Central Ga. R. Co.*, 120 Ga. 683, 48 S. E. 194; *Crenshaw v. Asheville &c. Co.*, 144 N. Car. 314, 56 S. E. 945.

⁵⁸ *Chicago &c. R. Co. v. Stickman*, 95 Ill. App. 4. And see as to

duty of plaintiff, *Johnson v. Texas &c. R. Co.*, (Tex. Civ. App.), 100 S. W. 206.

⁵⁹ *Texas &c. R. Co. v. Short*, (Tex. Civ. App.), 58 S. W. 56.

⁶⁰ *Turney v. Southern Pac. R. Co.*, 44 Ore. 280, 75 Pac. 144, 76 Pac. 1080. See as to duty to persons on right of way, *Southern R. Co. v. Hill*, 125 Ga. 354, 54 S. E. 113.

• along the track at the end of the ties and was seen in such position by the defendant's trainmen when the train was six-hundred feet away, and they could have known that plaintiff would be struck by the train if he did not change his position and that the plaintiff walked a portion of the way on the track, was held to sufficiently raise the issue of discovered peril.⁶¹ Where the plaintiff was injured by reason of his horse becoming frightened at a hand car and there was evidence warranting the inference that both the plaintiff and defendant were negligent, it was held error to refuse to instruct that if the defendant was guilty of negligence causing the injury and the plaintiff was guilty of negligence proximately causing or contributing to his injury, the verdict should be for the defendant.⁶² But in such case a requested instruction that contributory negligence is such an act of omission as an ordinarily prudent man would not do under similar circumstances, which concurring with the negligent act of the defendant becomes a proximate cause of the injury, and that if the plaintiff in driving among the tracks of the railroad company with a team such as he was driving did what an ordinarily prudent man would not have done, or if such act was necessary, then he was guilty of contributory negligence, was held not a strictly correct statement, in that it erroneously made the test of contributory negligence, as to whether it was necessary for plaintiff to drive over the tracks, and in ignoring the issue of discovered peril, but it was sufficient to

⁶¹ *Houston &c. R. Co. v. O'Donnell*, (Tex.), 90 S. W. 886, rev'd 92 S. W. 409. See also *Pennsylvania Co. v. Reesor*, 60 Ind. App. 636, 108 N. E. 983. In an action for personal injuries against a railroad company, an instruction that if plaintiff was seated at the end of the cross ties as the train approached him, and those in charge of the train saw, or could have seen, him in time to have stopped the train before reaching him, but failed to do so, the verdict should

be for the plaintiff, but if the plaintiff was injured while attempting to jump on or off the train while in motion, the verdict should be for the defendant, was held not to be improper or prejudicial to the plaintiff, although inaptly expressed. *Givens v. Louisville &c. R. Co.*, 24 Ky. L. 1796, 72 S. W. 320.

⁶² *St. Louis S. W. R. Co. v. Everett*, 40 Tex. Civ. App. 285, 89 S. W. 457.

call the court's attention to the failure of the main charge to define contributory negligence.⁶³ An instruction in an action against a railroad company for injury sustained by plaintiff while attempting to dismount from his vehicle, on the frightening of his mule by defendant's train, that if the plaintiff in attempting to get out of the vehicle did what others in a similar situation would have done he was not guilty of contributory negligence, was held to be erroneous in not testing the propriety of the plaintiff's conduct by what men of ordinary prudence would have done under the circumstances.⁶⁴ And where plaintiff was injured while unloading machinery from a car, it was held error to instruct that if he was out of the car just prior to his injury and saw the train backing to couple onto the car, he was guilty of negligence in getting into the car, since the question whether the plaintiff was guilty of negligence was for the jury.⁶⁵ And in an action for injuries sustained by being thrown from the car door in loading hogs, by the violent collision of an engine with the car, a requested instruction that if plaintiff saw the approach of the engine he was not justified in remaining in the car door in an effort to close it to prevent the escape of his hogs, was held to have been properly refused, since it excluded from the consideration of the jury the question whether the rate of speed of the engine in approaching the car was such as to raise apprehension of peril, and also whether the plaintiff was justified in believing that the speed would be slackened before the engine reached the car.⁶⁶ So, a requested instruction that if the jury believe that the plaintiff was aware that an engine was backing towards the car in time to have gotten out of its way, it was his duty to have done so, and if he neglected to do so, he cannot recover for injuries resulting from collision, was held to be properly refused as withdrawing from the jury the circumstances surrounding plaintiff at the time

⁶³ *St. Louis S. W. R. Co. v. Everett*, 40 Tex. Civ. App. 285, 89 S. W. 457.

⁶⁴ *Alabama &c. R. Co. v. Fulton*, 144 Ala. 332, 39 So. 282.

⁶⁵ *St. Louis R. Co. v. Holmes*, (Tex. Civ. App.), 49 S. W. 658.

⁶⁶ *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, 56 N. E. 331, affirming 81 Ill. App. 137.

of the accident.⁶⁷ But where plaintiff was injured by being thrown from a wagon in passing an engine on a sidetrack from which steam was escaping, at which his horses became frightened, and there was evidence that as the plaintiff passed the engine he was not holding tight reins, and for that reason the wagon was dashed against the curbing, injuring plaintiff, it was held error to refuse to instruct that if plaintiff had reason to believe that his horses were afraid of the engine it was his duty to keep tight rein on them and if when passing the engine he was holding the reins so loosely that he could not control the team, in case of sudden fright, he was guilty of contributory negligence.⁶⁸ An instruction in an action for injuries to plaintiff by jumping from his wagon to turn his horses into a cross street to avoid danger from an approaching train, which he would have been able to do if the train had not been running at an excessive speed, that if the plaintiff used bad judgment in the excitement of a moment of danger, that alone does not amount to negligence, and in such a case the plaintiff is required to use ordinary care to avoid injury, was held not objectionable as being inapplicable to the case.⁶⁹ In an action for injuries to a minor while attempting to cross a railroad track, by a train suddenly backing, where the defendant contends that the plaintiff was injured in attempting to get on a car while it passed him, it was held error to refuse an instruction that if the plaintiff knew that it was imprudent to approach the side of a moving train and was thereby injured by coming in contact with it, he could not recover.⁷⁰ Evidence showing that plaintiff when his team became frightened at defendant's engine was within fifteen or twenty feet of the track and that the engine was not attached to cars and was backing towards plaintiff's team, and the engineer saw plaintiff and his team in their peril and caused unusual and unnecessary noises to be made by the engine, thereby frightened

⁶⁷ *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, 56 N. E. 331, affirming 81 Ill. App. 137.

⁶⁸ *Dunn v. Wilmington &c. R. Co.*, 126 N. Car. 343, 35 S. E. 606.

⁶⁹ *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449, 71 Pac. 371.

⁷⁰ *Pittsburgh &c. R. Co. v. Geltmaker*, 16 Ky. L. 861, 30 S. W. 394.

plaintiff's horses, has been held to authorize an instruction relating to punitive damages.⁷¹ But where the complaint in an action alleged that the defendant wilfully, wantonly and recklessly and with intent to injure plaintiff, let off steam from its engine and blew the whistle, whereby the plaintiff's team was frightened and plaintiff's injury inflicted, an instruction that the jury may award damages arising from negligence alone, was held to be erroneous, because, as the court held, the theory of the complaint was wilful misconduct and not mere negligence.⁷²

⁷¹ Southern R. Co. v. Hill, 125 Ga. 354, 54 S. E. 113.

⁷² Proctor v. Southern R. Co., 61 S. Car. 170, 39 S. E. 351. And although the general rule is that contributory negligence is no defence in an action for personal injury, it is held that one who

wilfully contributes, as approximate cause, to her own injury can not recover although the defendant was also wilful. Spillers v. Griffin, 109 S. Car. 78, 95 S. E. 133, L. R. A. 1918D, 1193n; Contra Central of Ga. Ry. Co. v. Partridge, 126 Ala. 587, 34 So. 927.



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